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 ON THE MERITS FOR RESPONDENT JENA GRISWOLD, SECRETARY OF STATE OF COLORADO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Other Authorities

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

U.S. Const. art. I, § 4, cl. 1:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.

U.S. Const. art. II, § 1, cl. 2:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

COLO. REV. STAT. § 1-1-113:

> (1) When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this

code has committed or is about to commit a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

(2) Repealed.

(3) The proceedings may be reviewed and finally adjudicated by the supreme court of this state, if either party makes application to the supreme court within three days after the district court proceedings are terminated, unless the supreme court, in its discretion, declines jurisdiction of the case. If the supreme court declines to review the proceedings, the decision of the district court shall be final and not subject to further appellate review.

(4) Except as otherwise provided in this part 1, the procedure specified in this section shall be the exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election.

INTRODUCTION

Respondent Jena Griswold, Colorado's Secretary of State, is Colorado's chief election officer. As such, she is responsible for supervising all primary and general elections in the state, including presidential primary elections. She is charged with certifying candidates to the presidential primary ballot, as well as interpreting and enforcing Colorado's Election Code.

Colorado's election system is the "gold standard" for the nation. *Experts: Colorado's Elections System Is the 'Gold Standard' Nationally*, LEAGUE OF WOMEN VOTERS (Oct. 4, 2022), http://tinyurl.com/s898p3mw. Its elections are safe and secure. Voters in Colorado express the highest confidence in the country that their elections are free and fair. *Colorado Earns Top Marks for Voting and Election Confidence*, COLO. NEWSLINE (Apr. 18, 2022), http://tinyurl.com/5ysptphn. This confidence translates to voting—Colorado is consistently among the highest turnout states in the nation, with approximately 86.5% of active Colorado voters voting in the 2020 general election. *2020 General Election Voting Statistics*, COLO. SEC'Y OF STATE, https://historicalelectiondata.coloradosos.gov/eng/voter_stats/view/25358.

One important aspect of Colorado's Election Code is that it enables the Secretary and state courts to determine ballot access qualifications before an election. This ensures that voters cast votes for only those candidates who are qualified to hold the offices that they seek. This, in turn, guarantees maximum enfranchisement because votes are not wasted on ineligible candidates.

Colorado has successfully used this same state court procedure to resolve ballot access challenges for over 130 years. And, in 2017, after Coloradans voted to reinstate presidential primaries, the state legislature mandated that this same procedure apply to those elections as well.

Using this well-established procedure, a group of Colorado Republican and unaffiliated voters challenged the qualifications of Petitioner Donald J. Trump as a candidate for the 2024 Republican presidential primary. The state district court held a five-day hearing at which the parties presented extensive documentary, video, and testimonial evidence. The court issued a 102-page order, with 154 findings of fact, resolving all the factual and legal issues in the case. The Colorado Supreme Court exercised its statutory right of discretionary review, and after briefing and oral argument, issued its decision on December 19, 2023, well in advance of the January 5 ballot content certification deadline. Petitioner Trump makes no claim now that this state court procedure was insufficient to address the issues in this case; indeed, he urges this Court to resolve the case on its merits.

While the facts and historical significance of this case are extraordinary, Colorado's process for addressing Petitioner Trump's qualifications was routine. Over the decades, Colorado has repeatedly relied on this state court procedure to resolve ballot access and other election disputes presenting novel and complex issues of both fact and law, including issues of constitutional magnitude.

Petitioner Trump challenges Colorado's constitutional prerogative to exclude ineligible candidates

from its ballots. But just as Colorado cannot be forced to place on its presidential primary ballot a naturalized citizen, a minor, or someone twice elected to the presidency,[1] it also should not be forced to include a candidate found by its courts to have violated his oath to support the Constitution by engaging in insurrection.

As required by Colorado's voters, state legislature, and courts, the Secretary is committed to following the rule of law and excluding ineligible candidates from the ballot. She requests that this Court affirm the Colorado Supreme Court's decision that Petitioner Trump is disqualified under Section 3 of the Fourteenth Amendment and affirm Colorado's constitutional right to ensure that its ballots are free from such disqualified candidates.

STATEMENT OF THE CASE

A. History of Colorado's Election Laws

For more than 130 years, Colorado's legislature has empowered its state courts to resolve election challenges, including challenges over access to the ballot. This process, now codified at COLO. REV. STAT. § 1-1-113, arose from the legislature's desire to ensure the orderly administration of elections and avoid voter confusion.

In 1892, rival factions of the Democratic Party presented competing slates of presidential electors—one supporting the Populist Party candidate, James B. Weaver, and the other supporting former and future

[1] *See* U.S. Const. art. II, § 2, cl. 5.

President Grover Cleveland—with each faction claiming to represent the Democratic Party. *See People ex rel. Eaton v. Dist. Ct. of Arapahoe Cnty.*, 31 P. 339 (Colo. 1892). The Colorado Supreme Court determined that Colorado's then-existing election law, referred to as the "Australian Ballot Law," gave authority to resolve the conflict to neither the Secretary nor the courts. *Id.* at 342. The court therefore ordered both sets of electors to be placed on the ballot, "[u]ntil some statute clothes some tribunal with such power." *Id.* at 342-43.

In response, Colorado's legislature granted Colorado courts broad powers to resolve election disputes that arise before the date of an election. *See* Act in Relation to Elections: Defining Offenses Against the Same, and Prescribing Punishments Therefor, ch. 7, sec. 5, § 26, 1894 Colo. Sess. Laws 59, 65.[2] Rather than

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[2] The 1894 Act provided that:

> Whenever any controversy shall arise between any official charged with any duty to function under this act, and any candidate, or the officers or representatives of any political party, or persons who have made nominations, upon the filing of a petition by any such official or persons, setting forth in concise form the nature of such controversy and the relief sought, which petition shall be under oath, it shall be the duty of such court, or the judge thereof in vacation, to issue an order commanding the respondent in such petition to be and appear before the court or judge and answer under oath to such petition; and it shall be the duty of the court or judge to summarily hear and dispose of any

narrowly addressing how to handle competing slates of candidates, the legislature authorized the courts to resolve "*any* controversy" arising between an election official and any candidate, party, or person making nominations, and declared "it shall be the duty of the court or judge to summarily hear and dispose of any such issues, with a view of obtaining a substantial compliance with the provisions of this act." *Id.* (emphasis added). "The intent of the legislature, expressed in the amendment, in giving the district court jurisdiction, was for the purpose of enforcing by the courts a 'substantial compliance with the provisions of this act[.]'" *People ex rel. McGaffey v. Dist. Ct. of Arapahoe Cnty.*, 46 P. 681, 683 (Colo. 1896).

Nearly 100 years later, Colorado's legislature enacted the Uniform Election Code of 1992, ch. 118, sec. 1, § 1-1-101, 1992 Colo. Sess. Laws 624 ("Election Code"), which contained substantially the same dispute resolution procedure codified at section 1-1-113. And the current version of section 1-1-113 remains the same as the 1992 version in all material respects. Thus, section 1-1-113 has served as a bedrock of Colorado's Election Code, and Colorado's legislature has never removed the authority of its state courts to expeditiously resolve ballot access and other election disputes before the date of an election.

> such issues, with a view: of obtaining a substantial compliance with the provisions of this act by the parties to such controversy, and to make and enter orders and judgments, and issue the writ or process of such court to enforce all such orders and judgments.

Cf. § 1-1-113.

With exceptions not relevant here, section 1-1-113 is the "exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election." § 1-1-113(4). After the filing of a "verified petition" by a registered elector and "notice to the official which includes an opportunity to be heard," if the trial court finds good cause to believe that the election official "has committed or is about to commit a breach or neglect of duty or other wrongful act," it "shall issue an order requiring substantial compliance with the provisions of [the Election Code]." § 1-1-113(1). Such proceedings "contemplate[] the taking of evidence where the issues require it." *Leighton v. Bates*, 50 P. 856, 858 (Colo. 1897). Parties may appeal directly to the Colorado Supreme Court, which may review the trial court's decision in its discretion. § 1-1-113(3).

Similar to the procedure for adjudicating a motion for preliminary injunction under Federal Rule of Civil Procedure 65, section 1-1-113 provides all interested parties an opportunity to be heard and present argument and evidence to a court of law, which then expeditiously resolves any factual and legal disputes before the election occurs. Proceedings under section 1-1-113 give voters, candidates, and election officials the certainty necessary to carry out Colorado's elections in a fair and orderly manner.

This flexible statutory procedure is used effectively every election cycle and is well known to Colorado's courts. *See* Pet. App. 27a. The statute establishes a mechanism to resolve a broad range of election-related disputes for both state and federal candidates. For example, in 2016, upon learning that

the presidential electors did not intend to cast their votes for president in accordance with state law, the prior Secretary of State filed a section 1-1-113 proceeding to declare that the Secretary had authority to remove and replace those electors. Two electors later challenged the constitutionality of Colorado's presidential elector statute, which this Court ultimately upheld. *See Colo. Dep't of State v. Baca*, 140 S. Ct. 2316 (2020) (mem.). In 2018, state courts resolved a section 1-1-113 challenge to whether a congressional candidate obtained enough valid signatures to appear on the ballot. *See Kuhn v. Williams*, 418 P.3d 478 (Colo. 2018). That case proceeded from a factually intensive dispute in the state trial court to a published decision by the Colorado Supreme Court in less than two weeks. *See id*. at 480.

Section 1-1-113 is also frequently used to resolve disputes over who qualifies to appear on the ballot and how. For example, in 2020, Colorado's state courts addressed, through section 1-1-113, whether the COVID-19 pandemic altered how many signatures congressional candidates needed to obtain to appear on the ballot. *See Griswold v. Ferrigno Warren*, 462 P.3d 1081, 1084 (Colo. 2020). And in 2022, a congressional candidate brought a section 1-1-113 case seeking to appear on the ballot using a politically charged slogan as a nickname. *See* Jonathan Edwards, *Congressional Candidate Loses Bid to Go by "Let's Go Brandon" on Ballot*, WASH. POST, Apr. 28, 2022, http://tinyurl.com/4p42nv56.[3]

[3] Because discretionary review in the Colorado Supreme Court is sometimes either not sought or not granted, section 1-1-113 proceedings do not always produce published decisions.

Colorado's process for expeditious pre-election judicial determination of ballot access and other election disputes is an important pillar in Colorado's gold standard election process. And other states provide similar statutory causes of action for pre-election judicial review. *See, e.g.*, MICH. COMP. LAWS § 168.552(12) ("A person who filed a nominating petition with the secretary of state and who feels aggrieved by a determination made by the board of state canvassers may have the determination reviewed . . . in the supreme court."); MINN. STAT. § 204B.44(a)(4) (authorizing judicial review of "any wrongful act . . . [by] any other individual charged with any duty concerning an election"); NEB. REV. STAT. § 32-624 (authorizing summary orders by state courts to decide objections to sufficiency of candidate forms); N.C. GEN. STAT. § 163-22(*l*) (authorizing "judicial review of any decision of the State Board [of Elections]"); UTAH CODE ANN. § 20A-1-403(2)(a)(i) ("If an error or omission has occurred in the publication of the names or description of the candidates . . . a petition for ballot correction [may be filed] with the district court."); VT. STAT. ANN. TIT. 17, § 2617 ("In all cases for which no other provision has been made, the Superior Court shall have general jurisdiction to hear and determine matters relating to elections and to fashion appropriate relief."); WASH. REV. CODE § 29A.68.011 (allowing judicial review of any "wrongful act" related to the placement of a candidate on a ballot).

B. Colorado's Presidential Primary Process

1. Current presidential primary process

Colorado's current presidential primary process was enacted by citizen initiative in 2016. Colorado's voters had previously adopted a referred measure establishing presidential primary elections in 1990, *see* Act Concerning the Establishment of a Binding Preference Presidential Primary Election, ch. 42, sec. 1, §§ 1-4-1101 to -1104, 1990 Colo. Sess. Laws 311, but the legislature eliminated primaries in 2003 and reestablished a caucus system, *see* Act Concerning the Elimination of the Presidential Primary Election, ch. 24, sec. 6, 2003 Colo. Sess. Laws 495. The 2016 presidential candidate selection process was fraught for both major political parties, with the Republican Party canceling its presidential vote in the caucus and the state Democratic Party experiencing logistical problems due to record turnout. Christopher Jackson, *Colorado Election Law Update*, 46 COLO. LAW. 52 (2017). In response to these issues, Proposition 107—a citizen ballot initiative—passed with 64% of voters approving a return to presidential primaries. *See id.*

Among other things, Proposition 107 directed Colorado's legislature to "adopt all necessary conforming amendments to ensure the proper operation of a presidential primary election in Colorado." COLO. REV. STAT. § 1-4-1201. The legislature did just that, making several changes to the presidential primary process in 2017. *See* S.B. 17-305, 71st Gen. Assemb., 1st Reg.

Sess. (Colo. 2017), Act Concerning Effective Implementation of the State's Election Laws, ch. 216, sec. 1-6, 2017 Colo. Sess. Laws 841, 841-45.

Most relevant here, the legislature amended the initiative, moving the authority to decide voter challenges to a candidate's qualifications from the Secretary to the courts, and expressly incorporating the well-established section 1-1-113 process. Under this process, all challenges to the Secretary's decision to place a candidate on the presidential primary ballot must be filed in the district court under section 1-1-113, with discretionary review available in the Colorado Supreme Court. COLO. REV. STAT. § 1-4-1204(4).

While political parties play some role in Colorado's presidential primary election process, primary elections are paid for by the state and run by state and local officials, not by the parties. *See* COLO. REV. STAT. § 1-4-1203(3) ("presidential primary election[s] must be conducted in the same manner as any other primary election," with the "election officers and county clerk and recorders hav[ing] the same powers and . . . perform[ing] the same duties . . . as they provide by law for other primary elections and general elections").

2. Certification to Colorado's presidential primary ballot

This year, Colorado's presidential primary will be held on March 5, 2024. This election is separate from the state's other primary elections, and the ballot contains only presidential candidates. § 1-4-1203(4)(a).

The Secretary, as Colorado's "chief state election official," COLO. REV. STAT. § 1-1-107(1)(e), generally

"enforce[s] the provisions" and "make[s] uniform interpretations of" the Election Code, § 1-1-107(1)(a), (c). She is specifically charged with "supervis[ing] the conduct of primary . . . elections in this state," including "certify[ing] the names and party affiliations of the candidates to be placed on any presidential primary election ballots." §§ 1-4-1204(1); 1-1-107(1)(a).

To be certified to the presidential primary ballot, a political party candidate must:

- Be a "bona fide candidate for president of the United States pursuant to political party rules" and be affiliated with a major political party, § 1-4-1204(1)(b);
- Submit a notarized statement of intent, along with a filing fee or petition signed by 5,000 eligible electors, § 1-4-1204(1)(c); and
- Be a "qualified candidate entitled to participate in the presidential primary election," § 1-4-1203(2)(a).

C. Procedural History

On September 6, 2023, four Republican and two unaffiliated[4] voters ("the Electors") brought this lawsuit against the Secretary in state district court under sections 1-1-113 and 1-4-1204 of Colorado's Election Code. *See* Pet. App. 185a, 208a. The Electors sought an order prohibiting the Secretary from committing a "wrongful act" by certifying Petitioner Trump to the

[4] The Election Code defines "unaffiliated" as "mean[ing] that a person is registered but not affiliated with a political party in accordance with the provisions of section 1-2-204(2)(j)." COLO. REV. STAT. § 1-1-104(49.5).

Colorado Republican presidential primary ballot because, they argue, he is ineligible under Section 3 of the Fourteenth Amendment. Pet. App. 10a-11a.

Both Petitioner Trump and the Colorado Republican State Central Committee ("CRSCC") intervened. Pet. App. 8a. Petitioner Trump filed a notice of removal to federal district court, but the case was remanded to state court because he failed to seek or obtain the Secretary's consent. *See* Order, *Anderson v. Griswold*, No. 1:23-cv-02291-PAB (D. Colo. Sept. 12, 2023), ECF No. 29. The state district court reopened the case on September 14, 2023. Pet. App. 12a.

After the case was filed, the Secretary's office received (1) a Major Party Candidate Statement of Intent for Presidential Primary, signed by Petitioner Trump; (2) a State Party Presidential Primary Approval signed by the chair of the Colorado Republican Party, stating that the "Colorado Republican Party has determined [Petitioner Trump] is bona fide and affiliated with the party," Pet. App. 242a; and (3) a $500 filing fee from Trump for President 2024, Inc. *See* Sec'y of State's Notice Regarding Receipt of Candidacy Materials for Donald J. Trump ("Secretary's Notice"), *Anderson v. Griswold*, No. 2023CV032577 (Denver Dist. Ct. Oct. 11, 2023). The Major Party Candidate Statement of Intent for Presidential Primary contains the following affirmation: "I intend to run for the office stated above and solemnly affirm that I meet all qualifications for the office prescribed by law." Pet. App. 242a; *see* Secretary's Notice. Petitioner Trump signed the affirmation. Pet. App. 242a.

In response to the section 1-1-113 challenge, the Secretary held Petitioner Trump's application "pending further direction from the Court." *See* Secretary's Notice; JA 190-91 (stating that the Secretary "welcomes the Court's direction on whether [Petitioner Trump's] actions . . . disqualify him from appearing on the presidential primary ballot in Colorado" and that "she will, of course, follow the Court's judgment"); *accord* JA 625, 639-40.

1. District court proceedings

In adjudicating the challenge under section 1-1-113, the district court provided Petitioner Trump with notice and an opportunity to be heard.[5] On September 22, 2023, after consulting with the parties, the district court issued expedited case-management deadlines for disclosures of expert reports, witness lists and exhibits, and briefing and argument on multiple motions. JA 70-117. The district court also considered and re-

[5] This Court has repeatedly recognized that due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place[,] and circumstances." *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (quotation and citation omitted). Rather, it is flexible and "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), *quoted with approval in Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). The "fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), *quoted with approval in Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). This, in turn, simply requires "timely and adequate notice detailing the reasons for [the] proposed [action], and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Goldberg*, 397 U.S. at 267-68.

solved numerous prehearing issues, Pet. App. 43a, including confirming that if Petitioner Trump were found to be ineligible to hold the office of President, it would be a "wrongful act" under the Election Code for the Secretary to certify him to the primary ballot, Pet. App. 13a.

Beginning October 30, 2023, the district court held a five-day trial, which included opening and closing statements, the direct- and cross-examination of fifteen witnesses, and the presentation of ninety-six exhibits, totaling thousands of pages and including hours of video evidence. *See* Pet. App. 43a; 199a-208a. All witnesses were subject to cross-examination, and the district court "offered to hear additional witness testimony outside the 5-day hearing" if necessary. Pet. App. 198a-199a n.6. Hilary Rudy, Colorado's Deputy Elections Director, testified extensively about how the Secretary's office has historically handled ballot qualification questions. JA 169; Pet. App. 203a.

The trial court allocated eighteen hours each to the Electors and to Petitioner Trump to present their respective cases. JA 151. Petitioner Trump chose not to use all of his allotted time, using only twelve hours and fifteen minutes. Pet. App. 198a n.6. He "made no specific offer of proof regarding other discovery he would have conducted or other evidence he would have tendered" if the court had afforded more time. Pet. App. 42a. Petitioner Trump chose not to appear or testify, and he opposed the Electors' request for an out-of-state preservation deposition. Pet'rs' Mot. for Permission to Conduct a Trial Preservation Dep., *Anderson v. Griswold*, No. 2023CV032577 (Denver Dist. Ct. Oct. 17, 2023).

In resolving this case, the district court adhered to the deadlines prescribed by Colorado's Election Code, except where Petitioner Trump sought and was granted additional time or where the parties expressly waived the presumptive time limits. For instance, section 1-4-1204(4) provides that a hearing must be held "[n]o later than five days after the challenge is filed." Petitioner Trump, however, initially requested that the hearing take place "towards the end of November." JA 55. The court set the hearing for October 30, and Petitioner Trump expressly approved this timeline. JA 63.

Section 1-4-1204(4) also requires that the court "issue findings of fact and conclusions of law no later than forty-eight hours after the hearing." After the close of evidence on November 3, 2023, the trial court continued the hearing while the parties submitted proposed findings of fact and conclusions of law. Pet. App. 14a. The court held lengthy closing arguments on November 15, 2023, and issued its decision on November 17, 2023, less than 48 hours later. Pet. App. 14a.

Petitioner Trump raised no objection to this procedure in the district court; instead, he took the position that the 48-hour time limit did not apply to the proceedings. JA 135. Regardless, the parties expressly agreed to waive the time limit to the extent it was applicable. *See* Agreed Resp. to Court's Oct. 2, 2023 Order, *Anderson v. Griswold*, No. 2023CV032577 (Denver Dist. Ct. Oct. 10, 2023) ("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.").[6] At no point did Petitioner Trump argue to the district court that he was not receiving due process.[7] Pet. App. 198a n.6.

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[6] The Election Code's time limits to hold a hearing and to issue a decision after the hearing are waivable, non-jurisdictional requirements. *See In re A.W.*, 637 P.2d 366, 373-74 (Colo. 1981) ("While jurisdiction may be limited by the legislature, no statute will be held to so limit court power unless the limitation is explicit."); *cf. Mahaffey v. Barnhill*, 855 P.2d 847 (Colo. 1993) (holding that another time limit in Colorado's Election Code is not a jurisdictional requirement because the governing provision lacks express jurisdictional language); *Nicholls v. Barrick*, 62 P. 202 (Colo. 1900) (concluding that another time limit in Colorado's Election Code was waivable by the parties through stipulation). Colorado's means of determining whether a procedural deadline is jurisdictional mirrors the standard adopted by this Court. *See Boechler, P.C. v. Comm'r of Int'l Rev.*, 596 U.S. 199, 203 (2022) ("[W]e treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is.") (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006)).

[7] Due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The five-day trial with equal time allotted for the Electors and Petitioner Trump, and allowing for the introduction of exhibits, testimony, and cross-examination of witnesses, amply satisfied this standard, and Petitioner Trump has not asserted otherwise. Indeed, while the CRSCC suggests that due process forecloses "the automatic disqualification from office without a trial," CRSCC Br. in Support of Reversal 19 (citing *Griffin's Case*, 11 F. Cas. 7, 26 (Va. Cir. Ct. 1869)), Petitioner Trump received a comprehensive trial safeguarding notice, an opportunity to be heard, and the ability to confront evidence and witnesses against him in adjudicating his eligibility for office. Moreover, section 1-1-113, and its predecessor statutes, have effectively resolved ballot disputes since the late 1800s, without

The district court ultimately issued a 102-page order. Pet. App. 184a-284a. It found by clear and convincing evidence that Petitioner Trump had engaged in insurrection but that Section 3 of the Fourteenth Amendment does not apply to the president because he is not an "officer." *See* Pet. App. 276a, 279a, 283a.

In concluding that Petitioner "Trump engaged in an insurrection on January 6, 2021 through incitement, and that the First Amendment does not protect Trump's speech," Pet. App. 276a-277a, the court examined many of Petitioner Trump's statements—both before and after the 2020 election—asserting that the election was "stolen," *e.g.*, Pet. App. 216a; *see* Pet. App. 214a-222a. It determined that "prior to the January 6, 2021 rally, Trump knew that his supporters were angry and prepared to use violence to 'stop the steal,' including physically preventing Vice President Pence from certifying the election." Pet. App. 222a. The court found that Petitioner "Trump did everything in his power to fuel that anger with claims that he knew were false . . . ." Pet. App. 222a. The court also examined Petitioner Trump's January 6 speech at the Ellipse and found that, given the context of Petitioner Trump's speech and his broader efforts to rally his supporters, his invitation to "'fight' and 'fight like hell' was intended as, and was understood by a portion of the crowd as, a call to arms" such that Petitioner "Trump's conduct and words were a factual cause of, and a substantial contributing factor to, the January

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any notable due process concerns raised. *Cf. Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 244 (1944) ("The fact that a procedure is so old as to have become customary and well known in the community is of great weight in" ensuring due process.).

6, 2021 attack on the United States Capitol." Pet. App. 229a-230a.

The court also considered the events of the January 6 attack on the Capitol, including the violence deployed by his supporters. Pet. App. 230a-235a. It concluded "that the attack was meant to disturb Congress's electoral vote count." Pet. App. 235a (quotation and citation omitted). Finally, the court examined Petitioner Trump's reaction to the attack, including his initial tweet following the attack—"Mike Pence didn't have the courage to do what should have been done," which it concluded "further encouraged imminent lawless violence." Pet. App. 235a. The court found that Petitioner "Trump ignored pleas to intervene and instead called Senators urging them to help delay the electoral count." Pet. App. 236a-237a. The court noted that Petitioner Trump rebuffed House Minority Leader McCarthy's pleas to ask his supporters to leave the Capitol. Pet. App. 237a. The court found that even after the attack, Petitioner Trump's statements made clear that he "endorsed and intended the actions of the mob on January 6, 2021." Pet. App. 240a.

The court nevertheless ruled that Section 3 of the Fourteenth Amendment does not apply to Petitioner Trump because it "explicitly lists all federal elected positions except the President and Vice President" and an earlier version of the amendment explicitly mentioned the president and vice president. Pet. App. 278a. The court also concluded that the president is not an "officer of the United States" within the meaning of Section 3. Pet. App. 282a. Accordingly, the court ordered the Secretary to place Petitioner Trump on the presidential primary ballot. Pet. App. 283a.

2. Colorado Supreme Court review

Petitioner Trump and the Electors cross-appealed, and the Colorado Supreme Court accepted discretionary review. After "extensive briefing from the parties and over a dozen amici," Pet. App. 15a, the Colorado Supreme Court held oral argument and issued a 106-page majority opinion, with three justices authoring dissents, Pet. App. 8a-114a.

The court first considered whether Colorado's Election Code authorized the court to direct the Secretary not to certify a candidate to the presidential primary ballot who is ineligible to hold office. Pet. App. 114a. It explained that section 1-1-113 authorizes courts to remedy both "a breach or neglect of duty" and "other wrongful act[s]" under the Election Code. § 1-1-113(1). The court then held "that certifying an unqualified candidate to the presidential primary ballot constitutes a 'wrongful act' that runs afoul of section 1-4-1203(2)(a) and undermines the purposes of the Election Code." Pet. App. 33a.

The court next interpreted federal law to conclude that Petitioner Trump is ineligible to hold the office of the presidency under Section 3 of the Fourteenth Amendment. Pet. App. 9a-10a. In doing so, the court held that the presidency is an "office . . . under the United States" and that the president is an "officer of the United States" within the meaning of Section 3. Pet. App. 62a-73a. It further determined that the presidential oath is an oath to support the Constitution. Pet. App. 74a-76a.

The Colorado Supreme Court held that "the district court did not clearly err in concluding that the events of January 6 constituted an insurrection and

that President Trump engaged in that insurrection." Pet. App. 83a. In arriving at this conclusion, it examined the facts at issue and the meaning of the word "insurrection" before finding that "the record amply established that the events of January 6 constituted 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 actions necessary to accomplish the peaceful transfer of power in this country. Under any viable definition, this constituted an insurrection." Pet. App. 89a. The court also recounted Petitioner Trump's speech and conduct surrounding those events and concluded that "the record fully supports the district court's finding that President Trump engaged in insurrection within the meaning of Section Three." Pet. App. 100a.

The Colorado Supreme Court emphasized that it did "not reach these conclusions lightly" and that it was "mindful of the magnitude and weight of the questions" at issue, as well as "mindful of [its] solemn duty to apply the law, without fear or favor." Pet. App. 10a. Recognizing the potential impact of the issues it decided, the Colorado Supreme Court stayed its ruling until January 4, 2024, subject to further appellate proceedings. Pet. App. 114a. The court instructed that "[i]f review is sought in the Supreme Court before the stay expires, [the stay] shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot until the receipt of any order or mandate from the Supreme Court." Pet. App. 114a. Accordingly, on January 5, 2024, the Secretary certified Petitioner

Trump as a candidate on the presidential primary ballot, along with six other Republican candidates and two Republican write-in candidates.

SUMMARY OF THE ARGUMENT

The United States Constitution empowers states to conduct presidential primary elections at the direction of their state legislatures. For over a century, the Colorado legislature has used these far-reaching powers to instruct state courts to resolve ballot-access challenges. Here, Colorado's courts followed the legislature's direction in order to implement the promise of the Fourteenth Amendment—that officers who have engaged in insurrection against the very Constitution they swore to support may not hold future office. In doing so, the Colorado legislature and courts acted well within their constitutional powers.

The Electors Clause provides far-reaching powers to state legislatures to determine how the state's presidential electors will be chosen. In Colorado, the legislature specifically directs that any challenges to the qualifications of candidates in the presidential primaries be resolved under Colorado Revised Statute section 1-1-113 *before* Coloradans cast their votes.

Colorado's courts did exactly as authorized by the state legislature, using this time-tested process to adjudicate whether Petitioner Trump was ineligible for the office of president under Section 3 of the Fourteenth Amendment. The parties were granted extensive process to allow for the fair resolution of this challenge, and all parties to this proceeding agree that the factual and legal record is complete and that the issues are properly presented for this Court's review.

This Court should reject Petitioner's Trump's attempts to limit state electoral authority to avoid resolution of this case. *First*, Petitioner Trump asserts that evaluating whether he is ineligible to "hold" office under the Fourteenth Amendment before he may appear on the ballot somehow imposes a "new" qualification for office. It does not. Petitioner Trump confuses a qualification for office with the procedures used to enforce those qualifications. As it does for other qualifications, Colorado may assess this qualification at the time of balloting; it need not indefinitely await a speculative and hypothetical possibility that Congress might remove the disability.

Second, in resolving this challenge, the Colorado Supreme Court did not arrogate the power of the state legislature under the Electors Clause to itself. Colorado's legislature specifically directed Colorado courts to resolve ballot access challenges, under a procedure that has been in place for over a century. And the process of statutory interpretation that the Colorado Supreme Court used to resolve disputes regarding Colorado's Election Code was well within the boundaries of ordinary judicial review.

Third, the CRSCC has no First Amendment right to place candidates that are ineligible for office on the ballot. On the other hand, Colorado law directly advances its important interest in running orderly elections and promoting the enfranchisement of its voters.

The facts of this case are unprecedented, but the legal mechanism is routine. The dispute was capably and constitutionally handled by the procedures directed by Colorado's legislature to resolve these precise issues. This Court should affirm and uphold

Colorado's right to exclude from its presidential ballots ineligible insurrectionists.

ARGUMENT

I. Colorado May Exclude Ineligible Insurrectionists from Its Presidential Primary Ballots.

States have the authority to exclude from their presidential primary ballots candidates who are ineligible for the office, including those who are ineligible pursuant to Section 3 of the Fourteenth Amendment. Petitioner Trump's arguments to the contrary are unavailing.

A. States may exclude ineligible candidates from the ballot.

States must appoint presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2. This power is "far-reaching," limited only by other constitutional constraints. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020).

Pursuant to this power, Colorado's legislature enacted an Election Code that governs both state and federal elections. This comprehensive set of laws, which has served Coloradans for more than 100 years, ensures fair and accurate elections. Among other universally applicable and evenhanded procedural safeguards, Colorado requires that a presidential candidate be qualified for that office in order to appear on a primary ballot. § 1-4-1203(2)(a). While states can fashion their electoral procedures in different ways, Colorado has opted to impose a foundational ballot-access requirement: to appear on the ballot, candidates must be qualified for the offices they seek. *See, e.g.*, *id.*;

see also Bullock v. Carter, 405 U.S. 134, 145 (1972) ("[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.").

This Court has recognized that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974); *cf. Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (the term "manner" includes matters such as the "supervision of voting, protection of voters, [and] prevention of fraud and corrupt practices"). Colorado's ballot-access requirement promotes these precise goals. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986)) (recognizing states' interests in avoiding voter confusion, ballot overcrowding, or the presence of frivolous candidacies). It ensures voters are not disenfranchised by voting for candidates who are ineligible for office. This, in turn, allows voters to accurately weigh their choices before casting a vote. And, perhaps most importantly, it avoids the turmoil of an ineligible candidate winning an election for an office that the candidate is constitutionally barred from holding.[8]

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[8] To be sure, states are not required to exclude ineligible candidates from their ballots. But as explained above, the Constitution authorizes states to regulate the manner in which they appoint their presidential electors. *See Thornton*, 514 U.S. at 834; U.S. Const. art. II, § 1. Notably, the Constitution is silent as to how states may do so; that choice is properly left to the states and the

Colorado's ballot-access requirement is both unremarkable and consistent with other states that exclude ineligible candidates. For example, in 2012 Colorado excluded an ineligible naturalized citizen from the presential ballot. The Tenth Circuit determined that Colorado's exclusion was lawful. *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) ("[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."). In parallel litigation involving the same putative candidate, Iowa, Montana, and New Hampshire all reached the same result.[9] Courts have consistently recognized that states have the authority, if not the duty, to exclude ineligible candidates from the ballot. *See, e.g.*, *Lindsay v. Bowen*, 750 F.3d 1061, 1063 (9th Cir. 2014) (affirming California's exclusion of a twenty-seven-year-old candidate on the presidential ballot); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972). No party has cited, and the Secretary is not aware of, any case to the contrary.

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people. *Cf. Thornton*, 514 U.S. at 845 ("And where the Constitution is silent, it raises no bar to action by the States or the people.") (Thomas, J., dissenting). In this instance, Colorado has made the choice to protect its ballots from ineligible and frivolous candidates. Nothing about this procedural restriction is contrary to the Constitution.

[9] *Hassan v. Montana*, 520 F. App'x. 553 (9th Cir. 2013); *Hassan v. New Hampshire*, No. 11-cv-552-JD, 2012 WL 405620 (D.N.H. Feb. 8, 2012), *aff'd* (Aug. 30, 2012); *Hassan v. Iowa*, No. 4-11-CV-00574, 2012 WL 12974068 (S.D. Iowa Apr. 26, 2012), *aff'd,* 493 F. App'x 813 (8th Cir. 2012).

B. Colorado may exclude from its ballot a candidate who is ineligible under the Fourteenth Amendment.

Petitioner Trump argues that Section 3 prohibits insurrectionists only from *holding* office, but not from *running* for that same office. Thus, he contends, by prohibiting an ineligible insurrectionist from appearing on a primary ballot, Colorado has imposed an extra-constitutional qualification for the office of the presidency. Pet. Br. 41-42.

It is beyond dispute that states cannot add or modify qualifications for the presidency. In *Thornton*, Arkansas attempted to impose—on otherwise eligible candidates—a three-term limit for the House of Representatives or a two-term limit for the Senate. 514 U.S. at 784. This Court held that those limits impermissibly imposed additional qualifications for the respective offices. *Id.* at 818, 837.

This Court reasoned that Arkansas imposed its ballot-access restriction with "the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clauses." *Id.* at 835. The same cannot be said of Colorado's requirement that a candidate be eligible in the first instance. This Court's analysis in *Thornton* was expressly couched in terms of "otherwise-eligible candidate[s]." *Id.* at 783. Colorado's Election Code does not disadvantage particular classes of *otherwise-eligible* candidates—it simply distinguishes between those eligible for office and those currently barred from office by the Constitution. Nor does Colorado's Election Code evade the qualifications for office as set out in the Constitution.

To the contrary, Colorado's Election Code enforces those requirements.

Nevertheless, Petitioner Trump contends that Colorado's Election Code imposes a new qualification because it requires candidates to be eligible when they run for office, not just when they hold the office. This argument simply confuses a qualification for office with the procedures used to enforce those qualifications and ignores that a "state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F. App'x at 948.

Petitioner Trump further tries to distinguish ineligibility under Section 3 because Congress can "remove" that disability by a two-thirds vote of each house. He argues that this amnesty provision "shows that it is ultimately for Congress to decide whether Section 3 should prevent someone from holding office," Pet. Br. 41, and that Colorado must wait to see what Congress does before enforcing its own election laws. But nothing in the amnesty provision precludes Colorado from making its determination of eligibility for the ballot in the first instance.

Nor must Colorado entertain hypotheticals. Petitioner Trump is ineligible from holding office *now*, and whether Congress will ever remove this disqualification is, at best, speculative. States face the very real challenge of administering elections today, and they

must do so based on present circumstances, not hypothetical future contingencies.[10] Nothing in the Constitution's text requires a state to forgo its own election process while an ineligible candidate injects confusion and uncertainty into its elections.

Petitioner Trump's reliance on pre-election residency requirements for congressional and senatorial candidates is also unavailing. The Constitution's text specifies *when* a person must be an inhabitant to be qualified. *See* U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative . . . who shall not, *when elected*, be an Inhabitant of that State in which he shall be chosen" (emphasis added)).[11] By contrast, a person who has taken an oath to support the Constitution becomes ineligible for office once he engages in an insurrection.

The Twentieth Amendment does not require a different result. It directs Congress how to proceed if the president-elect or vice president-elect is unqualified for office; it does not deprive the states of their ability to exclude unqualified candidates from their ballots. The Amendment was adopted because a president-

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[10] By the same logic, at any point, the qualifications in Article II, Section 1 could be amended. *See* U.S. Const. art. V. For example, a constitutional amendment could permit a naturalized citizen to hold the office of the presidency. But that ever-present remote possibility does not require states to include naturalized citizens on their presidential ballots just in case. *Hassan*, 495 F. App'x at 948.

[11] As the Fifth Circuit observed, the Framers deliberately chose to use "when elected" after considering and rejecting alternative proposals of seven-year, three-year, and one-year requirements. *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 589 (5th Cir. 2006).

elect may "become ineligible to serve after they are elected (but before they start their service) due to illness or other misfortune. Or, a previously unknown ineligibility may be discerned after the election." *Lindsay,* 750 F.3d at 1065. None of these concerns is implicated here. And, of course, a state may choose a different path than Colorado and permit ineligible candidates to appear on its ballots. Should such a candidate win an election, the Twentieth Amendment may provide guidance to Congress. But it does not deprive Colorado of the right to exclude an ineligible candidate from the ballot in the first instance.

C. The Colorado Supreme Court properly ordered Petitioner Trump excluded from the ballot under the Fourteenth Amendment.

The Constitution grants each state the authority and duty to conduct state and federal elections. And each state may direct the manner of those elections. The people of Colorado, through their elected representatives, developed an Election Code that empowers Colorado's district courts and supreme court to determine a candidate's qualification for office and his right to appear on the ballot.

Here, the Colorado district court received voluminous testimonial and documentary evidence that persuaded the court by clear and convincing evidence that Petitioner Trump engaged in insurrection: "[He] knew that his supporters were angry and prepared to use violence to 'stop the steal,'" and he "did everything in his power to fuel that anger with claims he knew were false . . . ." Pet. App. 222a. He exhorted them to fight and attack the Capitol for the purpose of "disturb[ing]

Congress's electoral vote count." Pet. App. 235a (quotation and citation omitted). And then he stood by, ignoring pleas to intervene and stop the attack. Pet. App. 240a.

The Fourteenth Amendment prohibits any officer of the United States who has taken an oath to support the Constitution, and who thereafter engages in insurrection, from holding any office under the United States. U.S. Const. amend. XIV, § 3. The Colorado Supreme Court carefully considered the legal arguments presented and concluded that this provision: applies to a former president; precludes an insurrectionist from holding the office of the president; and applies without further enabling legislation from Congress. *See* Pet. App. 9a-10a. Based on these determinations, the Colorado Supreme Court properly concluded that Petitioner Trump should be excluded from the ballot. *Id.*

Colorado's courts fulfilled their designated role under Colorado's Election Code and, subject to this Court's review on the federal constitutional questions, this Court should uphold the Colorado Supreme Court's decision that it would be a wrongful act for the Secretary to certify Petitioner Trump to the ballot.

II. The Colorado Supreme Court Did Not Violate the Electors Clause.

Relying on *Moore v. Harper*, 600 U.S. 1 (2023), Petitioner Trump asks this Court to second-guess the Colorado Supreme Court's conclusion that Colorado's Election Code authorizes it to order the Secretary not to certify a candidate who is ineligible to hold office to the presidential primary ballot. Nothing in this Court's jurisprudence authorizes such extraordinary action.

A. Petitioner Trump forfeited this issue.

Throughout these proceedings, the parties litigated the meaning of the relevant provisions of Colorado's Election Code, including whether the Code authorized the courts to order the Secretary not to certify Petitioner Trump to the ballot. At no time, however—in either the district court or the Colorado Supreme Court—did Petitioner Trump contend that such authorization would violate the Electors Clause; nor did he ever cite *Moore v. Harper*. Thus, the Colorado courts never addressed this contention, and this Court should decline to address it now. *See Hemphill v. New York*, 595 U.S. 140, 148 (2022) (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'" (citation omitted)); *see also* Electors' Resp. Br. 57.[12]

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[12] In his Petition, Petitioner Trump asserted that the Colorado courts violated the Electors Clause in two ways—first, by wrongly interpreting Colorado's Election Code to allow the courts to order the Secretary not to list ineligible candidates on the ballot; and second, by not rigidly adhering to the statutory timelines. As described in the Electors' brief in opposition, Electors' Br. in Resp. to Pet. 17-21 (Jan. 4, 2024), the second argument was not only waived, but invited by Petitioner Trump, who requested the deviations from the statutory timeline. *See United States v. Wells*, 519 U.S. 482, 488 (1997) (a "party may not complain on appeal of errors that he himself invited or provoked the [district] court . . . to commit") (citation omitted). *See* District court proceedings C.1, *supra*, pp. 16-18. Regardless, Petitioner Trump does not advance this argument in his opening brief, and it is now decidedly waived. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

B. *Moore v. Harper* confirms that the Colorado Supreme Court did not violate the Electors Clause.

"[S]tate courts are the ultimate expositors of state law," *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and have the right to "utter the last word" on the meaning of state law, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quotation and citation omitted).[13] Just last term, this Court considered whether "the Elections Clause carves out an exception to this basic principle." *Moore*, 600 U.S. at 22. It does not—"[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review." *Id.*

The interpretation of Colorado's duly enacted election code is solely a question of state law. The Constitution's Elections Clauses "expressly vest[] power to carry out its provisions in 'the Legislature' of each State, a deliberate choice that this Court must respect." *Moore*, 600 U.S. at 34; *see also id.* at 27 (Electors Clause "similar to the Elections Clause"); *accord* U.S. Const. art. II, § 2 (authorizing action "in such manner as the legislature thereof may direct"). Colorado's legislature, in turn, has delegated authority to

[13] This Court has repeatedly recognized this principle since at least 1874. *See Murdock v. City of Memphis*, 87 U.S. 590, 626 (1874) ("State courts are the appropriate tribunals, as this [C]ourt has repeatedly held, for the decision of questions arising under their local law."), *quoted with approval in Moore*, 600 U.S. at 34; *see also West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) (same).

Colorado's courts to resolve certain controversies under the Code.[14] *See* § 1-1-113.

Petitioner Trump nevertheless asks this Court to second-guess the Colorado Supreme Court's interpretation of Colorado law. He argues that the court violated the Electors Clause by "arrogat[ing] to [itself] the power vested in state legislatures to regulate federal elections." Pet. Br. 47 (citation and quotation omitted). Not so. Colorado's legislature expressly authorized its courts to hear "[*a*]*ny* challenge to the listing of *any* candidate on the presidential primary election ballot" under the well-established procedures of section 1-1-113. § 1-4-1204(4) (emphasis added). Carrying out the legislature's directive is hardly an "arrogation" of its authority. *See, e.g.*, *Colo. Gen. Assemb. v. Lamm*, 704 P.2d 1371, 1378 (Colo. 1985) ("[I]t is peculiarly the province of the judiciary to interpret the constitution and say what the law is.") (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")).

In *Moore*, this Court acknowledged a narrow exception—that "where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law." 600 U.S. at 34. But here, the state statute

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[14] State court review of federal election procedure is a practical necessity given the "extraordinarily complicated and difficult" administration of running state-wide elections. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of application for stay).

authorized—indeed, specifically directed—the Colorado Supreme Court to review the inclusion of Petitioner Trump on the ballot. *See* § 1-4-1204(4). The Colorado Supreme Court's review did not attempt to evade federal law or federal rights—if anything, the court's interpretation of Colorado's Election Code resulted in the *enforcement* of Section 3 of the Fourteenth Amendment, not its evasion.[15]

The Colorado Supreme Court's statutory interpretation was well within the bounds of "ordinary judicial review." *See Moore*, 600 U.S. at 37. Here, in deciding whether placing an ineligible candidate on the ballot constituted a "wrongful act" under section 1-1-113, the Colorado Supreme Court applied the standard tools of statutory interpretation to the relevant statutes in Colorado's Election Code that bear on this question. It considered that section 1-4-1204 authorizes "any"

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[15] The CRSCC suggests that the Colorado Supreme Court's statutory interpretation was "based on politically suspect and tendentious theories." CRSCC Br. in Support of Reversal 30. But the court narrowly and faithfully applied Colorado's elections laws by using fundamental tools of statutory interpretation, as is the role of the judiciary. That this case has political ramifications and originates from unprecedented facts and circumstances does not mean that any judicial opinion displeasing to a party is, ipso facto, politically motivated. Further, Colorado rejects the unfounded insinuation that its judges and justices, who are appointed through a merit selection process conducted by a bipartisan nominating commission, allow partisan politics to influence their rulings. *See* Colo. Const. art VI, § 24 (providing for judicial nominating commissions); *see also Judicial Nominating Commissions*, COLORADO JUDICIAL BRANCH (detailing bipartisan membership, commission requirements, and selection process), https://www.courts.state.co.us/Courts/Supreme_Court/Nominating.cfm.

challenge to the listing of a candidate on the ballot; that both party candidates and write-in candidates must be "qualified"; and that the Colorado Constitution specifies that the purpose of Colorado's Election Code is to "secure the purity of elections." Pet. App. 20a, 35a. The court considered and rejected Petitioner Trump's arguments to the contrary. Finally, the court considered whether Section 3 of the Fourteenth Amendment reflected a qualification for office. All of this constitutes ordinary statutory interpretation of the kind courts regularly do. *See generally Marbury*, 5 U.S. at 177 ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule."); *see also Patchak v. Zinke*, 583 U.S. 244, 250 (2018) (noting courts' "power to interpret and apply the law"); *Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 661 (Colo. 2011) (court's primary duty when interpreting statutes to ascertain and effectuate legislature's intent). Nothing in this analysis arrogated any legislative power to the courts.[16]

Petitioner Trump maintains there is "nothing wrong" with this Court telling the Colorado Supreme Court that its interpretation of state election statutes was incorrect. Pet. Br. 49. On the contrary, "it is difficult to think of a *greater* intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106

[16] Petitioner Trump notes that one Colorado justice disagreed with this reasoning. Pet. Br. 47. But the existence of a dissenting opinion is entirely consistent with ordinary judicial review and no indication that the courts are arrogating legislative authority to themselves.

(1984) (emphasis added). In support of his argument, Petitioner Trump relies on *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). But in *Patterson*, this Court granted certiorari to safeguard federal constitutional rights, the "vindication" of which had first been sought in state courts. 357 U.S. at 457-58. And at issue in *Martin* was the construction of a treaty and whether the state could legally seize land before the treaty was enacted, particularly where title to the land had not timely passed to the state—i.e., not solely a question of state law. 14 U.S. at 355-56, 358; *see also Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 621-28 (1812). As this Court recognized in *Moore*, these cases concerned the narrow question of whether state law was "circumvent[ing] federal constitutional provisions." 600 U.S. at 35-36. Petitioner Trump's proposed review would widen this exception into wholesale federal oversight of the states' judiciary.

Finally, Petitioner Trump argues that 28 U.S.C. § 1257 does not bar this Court's review. Pet. Br. 49. This argument would turn *Moore*'s holding on its head by authorizing federal courts to routinely revisit state court interpretation of state law. Section 1257 does no such thing. It authorizes certiorari only where "the validity of a treaty or statute of the United States is drawn in question" or where a state statute is challenged as "repugnant to the Constitution" or other federal laws. 28 U.S.C. § 1257(a). It does not authorize wholesale challenges to state court interpretation of state laws.

C. Expanding federal review of state supreme court interpretations of state election law would create chaos.

Although the mechanisms may vary, state judicial review of state election laws governing federal elections is universal. Any departure from this practice would wreak havoc on this longstanding, reliable system and place insuperable challenges on this Court's docket. In *Moore*, this Court was presented with a litany of consequences that would have occurred had the Court adopted the petitioner's theory. *See* Br. by State Respondents 55-58, *Moore v. Harper*, 21-1271 (U.S. Oct. 19, 2022); Br. for American Civil Liberties Union et al. as Amici Curiae Supporting Respondents 27-31, *Moore v. Harper*, 21-1271 (U.S. Oct. 26, 2022); Br. for the United States as Amicus Curiae Supporting Respondents 30-32, *Moore v. Harper*, 21-1271 (U.S. Oct. 26, 2022); Br. for the Brennan Center as Amicus Curiae Supporting Respondents 26-31, *Moore v. Harper*, 21-1271 (U.S. Oct. 26, 2022); Br. for Secretaries of State of Colorado et al. as Amicus Curiae Supporting Respondents 15-20, *Moore v. Harper*, 21-1271 (U.S. Oct. 26, 2022). In holding that state courts are the appropriate tribunals to review state laws, this Court wisely avoided such adverse results. *Moore*, 600 U.S. at 34.

Petitioner Trump's argument here would put these potential outcomes back on the table. *See* Br. for the Brennan Center as Amicus Curiae in Support of Neither Party 19-25, *Trump v. Anderson*, No. 23-719 (U.S. Jan. 18, 2024). At a minimum, it would create significant confusion for voters and state election administrators, who would have to comply with state law

for elections involving state candidates but not necessarily for federal candidates running in the same election. If federal courts are allowed to review the Colorado Supreme Court's determination of state law here—where the legislature expressly authorized such review and the court employed ordinary tools of statutory interpretation—it is difficult to imagine any federal election law ruling by a state court that would not ultimately be reviewable by a federal court. Such paternalistic review by the federal courts would be repugnant to our system of federalism, never mind undermine confidence in election integrity.

For all these reasons, this Court should not accept Petitioner Trump's invitation to second-guess the Colorado Supreme Court's interpretation of Colorado's own election laws.

III. Colorado Law Does Not Violate the CRSCC's First Amendment Rights.

The CRSCC seemingly asserts an absolute First Amendment right to control who appears on the ballot. *See* CRSCC Br. in Support of Reversal 28. The First Amendment, however, does not absolutely entitle a party to have its nominee appear on the ballot because, among other things, that party's "particular candidate might be ineligible for office." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997); *see also 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.").

When deciding whether a state's election regulation violates a political party's First Amendment associational rights, this Court "weigh[s] the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider[s] the extent to which the State's concerns make the burden necessary." *Timmons* at 358 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Regulations that impose "severe burdens" on associational rights must be "narrowly tailored and advance a compelling state interest." *Id.* "Lesser burdens," on the other hand, "trigger less exacting review," where a state's important regulatory interests generally justify its "reasonable, nondiscriminatory restrictions." *Id.* (quotation and citation omitted).

By limiting presidential primary ballots to candidates qualified to hold office, Colorado law advances the State's interest in ballot integrity in a reasonable and nondiscriminatory manner, and it does so without severely burdening the CRSCC's associational rights. For these reasons, Colorado law comports with the First Amendment.

A. Limiting presidential primary ballots to candidates eligible to hold office does not severely burden the CRSCC's associational rights.

"Ballots serve primarily to elect candidates, not as forums for political expression." *Timmons,* 520 U.S. at 363. "That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights." *Id.* at 359. This principle holds true in primary as well as

general elections, because "a State may impose restrictions that promote the integrity of primary elections." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Limiting the presidential primary ballot to qualified candidates does not burden the CRSCC's First Amendment right to engage in a wide variety of expressive and associational choices, and it "remains free to endorse whom it likes, to ally itself with others, to nominate [eligible] candidates for office, and to spread its message to all who will listen." *Timmons*, 520 U.S. at 361.

Unlike Colorado's Election Code, a state law severely burdens a political party's First Amendment rights when it regulates those who may vote in a party's primary, when it prohibits parties from endorsing candidates in primaries, or when it regulates parties' internal structure and leadership. For example, this Court has held that a state law requiring a party to open its primary election process to voters who potentially belonged to competing parties severely burdened the party's First Amendment rights. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582-83 (2000). Similarly, this Court has concluded that a state law severely burdened First Amendment rights when it prohibited political parties from endorsing candidates in primaries and regulated parties' internal structure by imposing term limits and geographic requirements on party chairs. *Eu*, 489 U.S. at 224-25, 230-31. And this Court determined that a state law severely burdened political parties' associational rights when it prohibited them from opening their primary systems to unaffiliated voters. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215-16 (1986). In contrast here, limiting the presidential primary ballot to

qualified candidates imposes none of these severe burdens on the CRSCC's associational rights.

B. Limiting the presidential primary ballot to candidates eligible to hold office advances the state's important interest in ballot integrity in a reasonable and nondiscriminatory manner.

"States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons*, 520 U.S. at 358. Limiting the presidential primary ballot to candidates qualified to hold office is both reasonable and nondiscriminatory in advancing the state's important interest in ballot integrity.

First, Colorado law reasonably and directly advances this important interest by limiting the ballot to candidates who are qualified to hold the office they seek. This Court has consistently upheld state laws that restrict ballot access to protect the integrity of the ballot—in other words, to protect the effectiveness of a ballot as the tool for enabling voters to select those who will govern.

In *Timmons*, for example, this Court upheld a state law prohibiting an individual from appearing on the ballot as the candidate for multiple parties as justified by the state's "weighty" interest in ballot integrity and avoiding voter confusion. 520 U.S. at 369-70. Likewise, this Court has upheld a state law restricting ballot access to candidates who could make a preliminary showing of substantial support because it furthered the state's interest in protecting the integrity of the ballot by avoiding voter confusion and ballot overcrowding. *Munro*, 479 U.S. at 196-97. Similarly,

this Court has upheld a state law restricting ballot access to political parties that could demonstrate a significant measure of community support because it furthered the state's "compelling" interest in preserving the integrity of the electoral process by regulating the number of candidates on the ballot to avoid voter confusion. *Am. Party of Texas v. White*, 415 U.S. 767, 782-83 & n.14 (1974).

Excluding candidates who are not qualified to hold office from primary as well as general election ballots helps prevent voter confusion and deception and ensures that voters cast meaningful ballots. *See Storer*, 415 U.S. at 735 (emphasizing that a primary election is "not merely an exercise or warm-up for the general election but an integral part of the entire election process").

Second, limiting the presidential primary ballot to candidates qualified to hold office is not discriminatory because the qualifications for holding office apply equally to all candidates and all parties. No candidate can be on the ballot if they are determined ineligible. Colorado's law is thus markedly different from a state's early filing deadline for independent candidates, as this Court has found that that burden "falls unequally on new or small political parties or on independent candidates" and thus discriminates against candidates and voters "whose political preferences lie outside the existing political parties." *Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983).[17] That concern

[17] The *Celebrezze* Court went on to hold that Ohio's statutorily created early filing deadline not only imposed a discriminatory burden on independent voters and candidates, but also failed to

does not arise under Colorado's Election Code. So too does Colorado's law differ from laws excluding from absentee ballots the candidates of minor parties who had sufficient community support to qualify for the general ballot, *Am. Party of Texas*, 415 U.S. at 795, and laws conditioning ballot access on a candidate's ability to pay a filing fee, *Lubin v. Panish*, 415 U.S. 709, 718 (1974).

The laws at issue in each of those cases discriminated against independent, minor-party, or low-income candidates despite those candidates' undisputed eligibility to hold office. Colorado's law on presidential primaries does no such thing. Limiting the ballot to candidates qualified to hold office, as Colorado's law does, is not discriminatory because the qualifications for holding office apply equally to all candidates and all parties.

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advance the state's asserted interests in voter education, equal treatment of candidates, and political stability. 460 U.S. at 799-805. Applying its balancing analysis to conclude that the law's discriminatory burden thus outweighed the state's "minimal" interests, *id.* at 806, the Court also suggested that "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries" and because its regulation "has an impact beyond its own borders," *id.* at 795.

Here, by contrast, Colorado's presidential primary law does not create any new or additional ballot access qualification, much less one that imposes a discriminatory burden or "places a significant state-imposed restriction on a nationwide electoral process." *Id.* Rather, it merely gives legal effect to the qualifications imposed by the Constitution, which apply equally to every candidate for federal office in every state. *See* U.S. Const. art. II, § 1, cl. 2.

C. The CRSCC's argument would lead to unacceptable consequences.

As the Colorado Supreme Court correctly observed, to accept the CRSCC's argument that it has a First Amendment right to control who appears on a ballot "would permit political parties to disregard the requirements of the law and the Constitution whenever they decide, as a matter of 'political expression' or 'political choice,' that those requirements do not apply. That cannot be. The Constitution—not any political party rule—is the supreme law of the land." Pet. App. 40a (citation omitted).

To accept the CRSCC's First Amendment argument would, for example, permit parties to insist on placing *any* person on the ballot—regardless of age, residence, citizenship, or any other disqualifying factor. Because the ballot is a tool that enables voters to select those who will govern rather than a forum for expression, *see Timmons,* 520 U.S. at 363, states may appropriately limit it to those who are qualified to govern, *id.* at 359. Moreover, to include a candidate who is ineligible to hold office effectively disenfranchises those who vote for that candidate when they could have voted for a different, qualified candidate.

Put simply, the CRSCC has a First Amendment right to identify the candidates with whom it chooses to affiliate. But it does not have a First Amendment right to place candidates on Colorado's presidential primary ballot who are ineligible to hold office. None of the cases cited in the CRSCC's brief involve the removal of an ineligible candidate from the ballot. The CRSCC's argument, at its core, is really an argument that it believes that Petitioner Trump is eligible to

hold office, and thus that the Colorado Supreme Court was wrong to decide otherwise. That issue is now teed up for this Court's consideration.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests this Court affirm the holding of the Colorado Supreme Court.

Respectfully submitted,

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