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 FOR REPUBLICAN NATIONAL COMMITTEE AND NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE*

Amici Republican National Committee and National Republican Congressional Committee—collectively, National Republican Amici—are political organizations that help their members achieve electoral victories at the local, state, and national level, and who work to ensure a fair and equal electoral process. National Republican Amici have an interest in controlling their primaries and nominating the candidates of their choice. They also have an interest in ensuring that the rules governing elections are lawful and fairly applied. And they have an interest in promoting any of their potential nominees' ballot eligibility and electoral success.

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* Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amici, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This case arises from a historically unprecedented decision removing a presidential candidate from the ballot based on a new theory of Section Three of the Fourteenth Amendment. On the Colorado Supreme Court's theory, the Reconstruction Congress gave States—including former Confederate States—the power to unilaterally displace candidates for national office, before they are elected, based on their own determinations about legitimacy and illegitimacy. The Reconstruction Congress did not do that.

The Colorado Supreme Court made a series of legal errors. First, state courts are the wrong forum for this dispute. The Colorado Supreme Court rewrote the text of Section Three to prohibit not just "*hold[ing]* office" but *running for* it. It then ignored history and common sense to give Section Three enforcement power to state officials. And it ignored this Court's precedents enforcing the limited role of state courts in our national democracy. Second, the court's relief would interfere with political-party primaries, violating National Republican Amici's First Amendment rights. Finally, the court misread the text and history to apply Section Three to former Presidents, even though the text, history, and tradition make clear Section Three references the Article VI oath of office that Presidents do not take.

Before the Colorado Supreme Court's decision, many state courts had rejected challenges based on the same theory. *E.g.*, *Growe v. Simon*, 2023 WL 7392541 (Minn. Nov. 8); *Davis v. Wayne Cnty. Election Comm'n*, 2023 WL 8656163 (Mich. Ct. App. Dec. 14).

But now Maine's Secretary of State has adopted the Colorado Supreme Court's erroneous reading of Section Three. *In re Challenges of Rosen to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States* (Dec. 28, 2023), perma.cc/KDL6-WFWZ. These States should have taken the other path. Given the obvious risk of political escalation, even President Trump's most public critics hope that cooler heads prevail. *See, e.g.*, Lessig, *The Supreme Court Must Unanimously Strike Down Trump's Ballot Removal*, Slate (Dec. 20, 2023), perma.cc/Y4LP-PANK; Moyn, *The Supreme Court Should Overturn the Colorado Ruling Unanimously*, N.Y. Times (Dec. 22, 2023), perma.cc/N6GQ-HW48; Feldman, *Alas, Trump Is Still Eligible to Run for Office*, Wash. Post (Aug. 20, 2023), perma.cc/T5DT-V7BV.

National Republican Amici do not take sides in presidential primary battles or endorse particular presidential primary candidates in open elections. But the Colorado Supreme Court's decision threatens massive upheaval to the political process and future national candidates of all parties. As Justice Samour's dissent observes, the Colorado Supreme Court unleashes "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." App.160a ¶348.

This Court should reject the Colorado Supreme Court's reimagination of Section Three, restore the proper balance of powers between the States and the federal government, and vindicate political parties'

First Amendment right to select the candidate of their choosing.

ARGUMENT

I. Courts are not the appropriate forum for this dispute.

A. Section Three does not apply until after an election.

1. Section Three cannot be enforced at the ballot stage. By its plain text, Section Three governs only who can "*hold*" office. U.S. Const. amend. XIV, §3 (emphasis added); *see id.* ("No person shall *be* a Senator or Representative in Congress, or elector of President and Vice President, *or hold* any office …." (emphases added)). It does not govern who can "run for" office or "be elected to" anything. To "hold" office means to presently possess it. *See Hold*, Black's Law Dictionary (2d ed. 1910) ("[T]o possess; to occupy; to be in possession and administration of; as to hold office."); *accord Hold*, Webster's American Dictionary of the English Language (1828) ("To have; as, to *hold* a place, office or title."). Former President Trump does not "hold" office by running for or being elected as President, so Section Three does not forbid him from either. A State's application of Section Three at the ballot stage contradicts Section Three's text and is akin to adding a new qualification for presidential candidates, which States cannot do. *See Chiafalo v. Washington*, 140 S.Ct. 2316, 2324 n.4 (2020) ("[I]f a State adopts a condition on its appointments that effectively imposes new requirements on presidential candidates, the condition may conflict with the Presidential Qualifications Clause."). And importantly, even if Section

Three's prohibition on holding office is self-executing, any "'prophylactic'" extension to the ballot stage would of course have to come from Congress. *Allen v. Cooper*, 140 S.Ct. 994, 1004 (2020).

The rest of the Constitution confirms that "hold" has its ordinary meaning. The Constitution always uses "hold" to refer to present occupation of the office, not to candidacy or election. *See, e.g.*, U.S. Const. art. II, §1 ("He shall hold his Office during the Term of four Years...."); *id.* art. I, §6 ("[N]o Person holding any Office under the United States, shall be a Member of either House...."). And the last clause of Section Three gives Congress the power to "remove" the disability, a power that would become ineffective if the disability took force before the election. *Id.* amend. XIV, §3.

The Twentieth Amendment reinforces this reading. It sets the rules for what happens when a disqualified presidential candidate has been elected. The elected Vice President will serve unless and until the President elect becomes qualified: "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified." *Id.* amend. XX; *see* Harrison & Prakash, *If Trump Is Disqualified, He Can Still Run*, Wall Street J. (Dec. 20, 2023), perma.cc/8EQ9-9VVP. If state officials decided qualification at the ballot stage, then the Twentieth Amendment's contingency provision is meaningless in many cases. *See Myers v. United States*, 272 U.S. 52, 229 (1926) ("'It cannot be presumed that any clause in the Constitution is intended to be without effect.'").

Historical practice confirms that Section Three does not prohibit running for a position but only holding it. *See Chiafalo*, 140 S.Ct. at 2326 ("'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'"). After Section Three's ratification, several candidates' qualifications were challenged. 1 Hinds' Precedents of the House of Representatives 474-86 (1907) [hereinafter Hinds']. In each case, the challenges were not decided by election officials or judges, and they were not decided before the relevant elections. Instead, Congress resolved each challenge *after* the candidate won his election, but before he was sworn into office. *See, e.g.*, 41 Cong. Globe 948-49, 2135, 5443-46, 5195-96 (1870).

Even when the challenged candidate was obviously disqualified—such as when the candidate led Confederate troops into battle—Section Three was enforced by Congress after the election. *See* Hinds' 478-86. At that time, a formal complaint would be lodged, Congress would hear evidence, and Congress would determine whether the candidate was disqualified before he was sworn in. *See, e.g.*, Hinds' 474-86; 41 Cong. Globe 948-49, 2135, 5443-46, 5195-96 (1869-70). Courts never decided qualification pre-election.

2. The Colorado Supreme Court misconstrued the text, history, and other available evidence.

a. The court found "no textual evidence" against enforcement of Section Three at the ballot stage. App.45a-55a ¶¶88-107. But it never looked. It simply ignored the word "hold" and treated Section Three as

if it said "run for" instead, without any explanation. "Courts cannot go very far against the literal meaning and plain intent of a constitutional text." *Forbes Pioneer Boat Line v. Bd. of Comm'rs*, 258 U.S. 338, 340 (1922).

The court also never acknowledged that the Fourteenth Amendment provides a mechanism for Congress to remove the Section Three disability. And the court said that the Twentieth Amendment was irrelevant because it "applies post-election" and "says nothing about who determines in the first instance whether the President and Vice President are qualified to hold office." App.58a-59a ¶119. But that cursory interpretation fails to explain why the Twentieth Amendment presupposes that qualification will not be resolved before election. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (courts must give "a fair construction of the whole instrument").

b. The court glossed over the "historical evidence" too. App.50a ¶97. It never acknowledged the historical practice of Congress deciding disqualification after elections. *See supra* 8. It never explained why plainly disqualified candidates still ran and were elected without pre-election interference. *See* Hinds' 478-86. And it never acknowledged Congress's belief that it must enact implementing legislation for anyone else to enforce Section Three. *See, e.g.*, App.143a-45a ¶¶314-18 (Samour, J., dissenting) (explaining Congress's practice of enacting implementing legislation, including the Enforcement Act of 1870).

c. Instead, the court concluded that the Constitution's natural-born-citizen, age, residency, and term-limit requirements mean that Section Three can be enforced at the ballot stage. App.57a ¶116; *see* U.S. Const. art. II., §1, cl. 5 (citizenship, age, and residency); *id.* amend. XXII, §1 (term limits).

But the history is unclear on whether those requirements could be properly enforced by state courts at the ballot stage. *See* Blackman & Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. 350 (forthcoming 2024) (manuscript at 372), perma.cc/2XLZ-X2RF. When those requirements were ratified, state and local governments did not control who was on the ballot at all, so it is a stretch to assume that pre-election enforcement was proper. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 226 (2010) (Scalia, J., concurring in the judgment). The Colorado Supreme Court cited no original historical evidence to suggest that they could. *See* App.49a n.12 (conclusorily stating otherwise with no historical support).

More importantly, this Court need not decide whether these other requirements can be enforced pre-election because they critically differ from Section Three. None of these requirements is followed by an appropriate-legislation modifier. App.148a-49a ¶324 (Samour, J., dissenting); *but see* U.S. Const. amend. XIV, §5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). None involve qualifications that can be cured by congressional action before the candidate takes office. *But see id.* amend. XIV, §3 ("Congress may by a vote of

two-thirds of each House, remove such disability."). And none limit themselves to candidates who "hold" office, instead applying to the ability to be "elected" or "eligib[le]" in the first place. *Id.* amend. XXII, §1; *id.* art. II., §1, cl. 5.

The Colorado Supreme Court cited three modern lower-court opinions in support of its position that it could decide Section Three qualification at the ballot stage. App.30a-31a ¶¶53-55. But all three cases involved requirements that cannot be cured by congressional action before holding office and provisions that refer only to "eligibility," not "holding" the position. *See Hassan v. Colorado*, 495 F. App'x 947, 948-49 (10th Cir. 2012) (natural-born citizen who could not become one); *Lindsay v. Bowen*, 750 F.3d 1061, 1062-66 (9th Cir. 2014) (27-year-old who could not become 35 in time); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (similar). Here, the requirement can be cured and is limited to serving in the position post-election. *See* U.S. Const. amend. XIV, §3.

B. Section Three did not give state officials power to frustrate the federal government or national will.

1. Even if Section Three applied to running for office, it would not give enforcement power to *States*. The Colorado Supreme Court's view that state courts and officials can decide Section Three qualification is historically implausible because it makes Section Three a states'-rights superpower.

On the court's account, the Reconstruction Congress handed state judges and election officials a grave power to undermine the federal government. It gave these state officials, including in the former Confederate States, the power to decide national-office eligibility based on independent judgments about loyalty and legitimacy. And as the court's supporters explain, the question which national officers or candidates are insurrectionists under Section Three can be decided not just by state supreme courts, but by "*anybody who possesses legal authority*" at the state level. Baude & Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev., at 22-29 (forthcoming 2024), perma.cc/7GQV-9853 (emphasis added). This authority extends even beyond eliminating candidates for federal office, allowing state officials to nullify the acts of current officeholders because "[t]hose who cannot constitutionally hold office cannot constitutionally exercise government power, so the subjects of that power can challenge their acts as *ultra vires*." *Id.* at 29. In other words, the Reconstruction Congress crafted a secessionists' dream: a new constitutional basis to not only eliminate pro-Union candidates from the ballot, but also nullify acts of such officials, including their enactment or enforcement of federal legislation.

That is the last thing the Reconstruction Congress would have done. The Reconstruction Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179 (1980). They were enacted by the Reconstruction Congress as it fought to reassert its authority over States that warred against it and viewed the federal government

and its officials as illegitimate. *See* Paschal, Lecture Delivered to the American Union Academy of Literature, Science, and Art, *in* The Constitution of the United States Defined and Carefully Annotated, xxiv (1868), bit.ly/49dXWM3 (explaining that the Reconstruction-era amendments' purpose and effect were to "enlarge[] the powers of the nation, [and] abridge[] those of the States"). Many during Reconstruction still believed that the Union was illegitimate. *See generally* Nicoletti, Secession on Trial: The Treason Prosecution of Jefferson Davis (2017). If Section Three gave state officials the power to disqualify any candidates whom—in the state officials' views—engaged in insurrection, then it would have been a self-sabotaging laughingstock. The Colorado Supreme Court erred in endorsing this "highly counterintuitive result." *Yellen v. Confederated Tribes*, 141 S.Ct. 2434, 2448 (2021).

2. The perils of giving enforcement power to States are no less obvious today. If state officials can independently enforce Section Three—and decide for themselves who has really "engag[ed] in insurrection or rebellion"—it would court anarchy.

Under the Colorado Supreme Court's approach, state officials can and will remove other candidates from the ballot or from office, often along partisan lines. A handful of examples illustrate this point:

- During the summer of 2020, Vice President Harris, President Biden, and their staffs advocated for, marched with, and provided material support (in the form of bail money) to rioters in

the wake of George Floyd's death.[1] These rioters stormed the White House, injuring police officers and forcing the President, his family, and his staff to shelter in a bunker.[2] They killed people, took over government buildings, burned down buildings, and sought to establish alternative "governments" in the form of so-called "autonomous zones."[3] If a state official believes that President Biden or Vice President Harris aided these efforts, he may eliminate President Biden and Vice President Harris from the ballot. And all their past actions can be nullified as

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[1] *E.g.*, Marcus, *Meet the Rioting Criminals Kamala Harris Helped Bail Out of Jail*, The Federalist (Aug. 31, 2020), perma.cc/9S6A-NBBG; Lange & Honeycutt, *Biden Staff Donate to Group That Pays Bail in Riot-Torn Minneapolis*, Reuters (May 30, 2020), perma.cc/5FBJ-MTST; @JoeBiden, X (Aug. 28, 2020), perma.cc/GSH6-W9EP.

[2] *E.g.*, Hoffman, *More Than 60 Secret Service Officers and Agents Were Injured Near the White House This Weekend*, CNN (May 31, 2020), perma.cc/5H3J-Q2BD; Leonnig, *Protesters' Breach of Temporary Fences Near White House Complex Prompted Secret Service to Move Trump to Secure Bunker*, Wash. Post (June 3, 2020), perma.cc/E75G-XTJL.

[3] *E.g.*, Holcombe & Boyette, *Seattle Police to Remove Concrete Barriers Around Precinct That Was Temporarily Vacated During George Floyd Protests*, CNN (Apr. 3, 2021), perma.cc/KMJ8-VU5U; *Retired St. Louis Police Captain Killed During Unrest Sparked by George Floyd Death*, CBS News (June 3, 2020), perma.cc/69RN-EYAM; Deese, *Vandalism, Looting Following Floyd Death Sparks at Least $1B in Damages Nationwide: Report*, The Hill (Sept. 16, 2020), perma.cc/T2N4-KC67; Boyd, *Death Toll Rises to an Estimated 30 Victims Since 'Mostly Peaceful Protests' Began*, The Federalist (Aug. 19, 2020), perma.cc/2V7V-NTFP.

"*ultra vires*" by state officials. Baude & Paulsen, *supra*, at 29.

- During the last Administration, prominent Democrats publicly directed their supporters to confront Administration officials. As Congresswoman Maxine Waters said, "If you see anybody from that Cabinet in a restaurant, in a department store, at a gasoline station, you get out and you create a crowd and you push back on them…."[4] Around the same time, many Democrat supporters did confront Administration officials.[5] A Democrat supporter tried to murder Republican officeholders when he attacked a Republican baseball practice before the Congressional Baseball Game, shooting at several sitting Republican members and staff and seriously wounding Representative Steve Scalise.[6] Under the lower court's theory, state officials may disqualify these Democrats or nullify their acts if they determine that they aided an insurrection or rebellion.

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[4] *E.g.*, Warmbrodt, *Waters Scares Democrats with Call for All-Out War on Trump*, Politico (June 25, 2018), perma.cc/E7XR-JAV4; Boyd, *10 Times Democrats Urged Violence Against Trump and His Supporters*, The Federalist (Jan. 8, 2021), perma.cc/CQ37-F29E.

[5] *E.g.*, Lurie, *Trump Officials Can No Longer Eat Out in Peace*, Mother Jones (June 23, 2018), perma.cc/JJL3-YP3D.

[6] *E.g.*, Keeley, *Rep. Steve Scalise, Shot by Sanders Supporter, Replies to Request for Evidence of 'Bernie Bros' Being Bad: 'I Can Think of an Example'*, Newsweek (Feb. 20, 2020), perma.cc/3D4C-6SPX.

- Recently, left-wing pro-Palestine protesters, after receiving vocal support from elected Democrats, violently stormed the White House complex.[7] Just before that, another coalition of left-wing pro-Palestine protesters invaded the Capitol complex.[8] State officials could, on the lower court's theory, remove all the previous oath-takers who supported these rioters—including through their public speeches—from ballots and void their official acts.

Just like the events underlying the Colorado Supreme Court's theory, state officials and Americans in general are divided in how to view each of these events. But that is the point: If state officials can unilaterally decide the facts and make the relevant legal judgments, then those disagreements will produce a fractured government and a dysfunctional democracy.

The Colorado Supreme Court's construction of "engag[ing] in insurrection or rebellion" exacerbates these concerns. Although that phrase was originally understood to cover only constitutional treason, *see United States v. Greathouse*, 26 F. Cas. 18 (C.C.N.D.

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[7] *Pro-Palestine Protestors Climb Up White House Fence, Attack Secret Service*, Times Now (Nov. 4, 2023), perma.cc/4GCF-H2HM; *Anti-Israel Protesters Vandalize White House Gates, Try to Scale Fence*, Jerusalem Post (Nov. 5, 2023), perma.cc/67GR-UFVP; Vazquez, *Democratic House Member Accuses Biden of Supporting Palestinian 'Genocide'*, Wash. Post (Nov. 3, 2023), perma.cc/RZW3-3QJG.

[8] Smith, *Hundreds Arrested After Pro-Palestinian Demonstrators Flood Cannon Rotunda, Capitol Complex*, Fox 5 D.C. (Oct. 18, 2023), perma.cc/R6AF-XQA2.

Cal. 1863) (Field, J.) (insurrection or rebellion are no less than treason); *accord, e.g.*, 37 Cong. Globe 2173 (1862) (Sen. Howard) (insurrection or rebellion "nothing more nor less than treason"), the Colorado Supreme Court said that an insurrection or rebellion "need not involve bloodshed," need not "be so substantial as to ensure probable success," and need not even be "highly organized at [its] inception." App.86a-87a ¶184. And of course, other state officials could interpret the phrase differently. Baude & Paulsen, *supra*, at 29.

None of this is hypothetical anymore. In the wake of the lower court's decision, officials in other States have announced plans to remove other candidates from the ballot. *See, e.g.*, Wilson, *Texas Leader Wants Biden Kicked Off State's 2024 Ballot Over Immigration*, Wash. Times (Dec. 20, 2023), perma.cc/V8Y7-TUX6; Dobkin, *Republicans Pull Trigger on Plan to Remove Joe Biden from Ballots*, Newsweek (Dec. 22, 2023), perma.cc/JA8A-WR6D ("Republican lawmakers in three swing states," Arizona, Georgia, and Pennsylvania, "have announced their plan to remove President Joe Biden from their state ballots."); Stanton, *Democrats Want Over 130 Republicans Banned From Holding Office*, Newsweek (Jan. 5, 2024), perma.cc/88CS-PVZD; *DeSantis Suggests Biden Could Be Removed from Florida Ballot*, CNN (Jan. 6, 2024), perma.cc/AK6F-X9R4; Keck, *Illinois Voters Assert Biden 'Ineligible' to Run for Office, Move to Strike Him from Ballot*, The State Journal-Register (Jan. 15, 2024), perma.cc/QY46-HMZQ.

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Allowing political opponents to pick each other off ballots based on their political disagreements would destroy that confidence, threaten this Nation's system of representative democracy, and unravel the Reconstruction Congress's design.

C. This Court has cautioned against state control over similar election issues.

Even outside the context of the Reconstruction Amendments, this Court has long warned against state control over national election qualifications.

"In light of the Framers' evident concern that States would try to undermine the National Government, they could not have intended States to have the power to set qualifications." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 810 (1995). States cannot even enforce state law to disqualify someone from federal office; those qualifications are set and enforced by the federal government, usually Congress. *Id.* at 810-11. Indeed, in the aftermath of the Civil War, Congress itself judged whether candidates for federal office were disqualified even under state law, just like they did for federal law. *See* Hinds' 471.

The notion of state control over who can run for federal office would have been unfamiliar to the ratifiers of the Fourteenth Amendment. At the time, state and local governments did not control who was on the ballot at all. *See John Doe No. 1*, 561 U.S. at 226

(Scalia, J., concurring in the judgment). Parties distributed ballots; state and local governments accepted and counted them. *Id.* An argument that Section Three empowers state and local officials to enforce their views of federal qualifications at the ballot stage would have surprised the ratifiers.

Our system of government gives the power to elect candidates not to state courts, but to the people. "The people are the best judges [of] who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." *Thornton*, 514 U.S. at 794-95 (quoting 2 Debates on the Federal Constitution 292-93 (Elliot ed. 1876) (Livingston)). "'The true principle of a republic,'" in Alexander Hamilton's famous words, "'is[] that the people should choose whom they please to govern them.'" *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) (brackets omitted) (quoting 2 Debates on the Federal Constitution 257 (Elliot ed. 1876) (A. Hamilton)). Allowing state courts to subvert that principle would render our government no longer one "'by the people.'" *Thornton*, 514 U.S. at 821 (quoting Lincoln, Gettysburg Address (1863)).

D. Congress has not authorized pre-election enforcement of Section Three in state courts.

The Fourteenth Amendment contemplates a mechanism by which Congress can authorize others to enforce Section Three, but Congress has not done so. Section Five gives Congress the "power to enforce, by appropriate legislation, the provisions of this article," including Section Three. U.S. Const. amend. XIV, §5.

That Congress has not exercised that power to authorize private plaintiffs to sue or state officials to adjudicate Section Three means that this determination still belongs exclusively to Congress.

The drafters of Section Three believed that it would require implementing legislation. "[I]f this amendment prevails," its principal proponent explained, "*[i]t will not execute itself*." 39 Cong. Globe 2544 (1866) (Rep. Stevens) (emphasis added). Even when Congress wanted Section Three enforced with respect to state offices, it believed that implementing legislation was required. So it authorized federal law-enforcement actions to remove such officers. *See* Enforcement Act of 1870, ch. 114, §§14, 15, 16 Stat. 140, 143-44 (May 31, 1870).

Soon after Section Three was ratified, Chief Justice Chase dismissed a Section Three lawsuit because "legislation by Congress is necessary to give effect to" Section Three. *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869). He said that the removal of disqualified officeholders "can only be provided for by [C]ongress." *Id.* That remains the law today. *See* App.131a-43a ¶¶285-313 (Samour, J., dissenting) (defending *Griffin* at length); Blackman & Tillman, *supra*, at 404-504 (same); *Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978) (explaining that *Griffin* held "that the third section of the Fourteenth Amendment, concerning disqualifications to hold office, was not self-executing absent congressional action" and concluding that "the Congress and Supreme Court of the time were in agreement that affirmative relief under the [Fourteenth] [A]mendment should come from Congress");

Rothermel v. Meyerle, 136 Pa. 250, 254 (1890) ("[I]t has also been held that the Fourteenth Amendment, as indeed is shown by the provision made in its fifth section, did not execute itself." (citing *Griffin*)); *State v. Buckley*, 54 Ala. 599, 616 (1875) (same).

Congress has enacted Section Three enforcement legislation, and it does not include pre-election lawsuits by private plaintiffs in state courts. "One year after *Griffin*'s Case was decided, and perhaps in response to it, Congress enacted the Enforcement Act of 1870." App.143a-44a ¶314 (Samour, J., dissenting). The Act "contained two provisions for the specific purpose of *enforcing Section Three*." App.143a-44a ¶314 (Samour, J., dissenting). The first provision authorized "a quo warranto mechanism" in which a federal district attorney could bring "a civil suit in federal court to remove from office a person who was disqualified by Section Three." App.143a-44a ¶314 (Samour, J., dissenting) (citing Enforcement Act of 1870, ch. 114, 16 Stat. 140, 143). The second provision authorized "a criminal prosecution for knowingly accepting or holding office in violation of Section Three, and included punishment by imprisonment of not more than a year, a fine of not more than $1,000, or both." App.143a-44a ¶314 (Samour, J., dissenting) (citing 16 Stat. at 143-44).

Congress later repealed the civil-suit provision (*i.e.*, the quo warranto provision) in 1948, but the descendant of the criminal provision remains: 18 U.S.C. §2383. App.144a-45a ¶316 (Samour, J., dissenting). This provision "specifically criminalizes insurrection and requires that anyone convicted of engaging in

such conduct be fined or imprisoned *and be disqualified from holding public office*." App.127a-28a ¶276; *see* 18 U.S.C. §2383 ("Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."). "If any federal legislation arguably enables the enforcement of Section Three, it's section 2383." App.127a-28a ¶276 (Samour, J., dissenting). But "President Trump has never been charged with, let alone convicted of, violating it. The instant litigation [is] an end run around section 2383." App.145a-46a ¶319 (Samour, J., dissenting).

II. Primary ballot cleansing violates National Republican Amici's First Amendment rights.

Enforcing Section Three at the primary stage would violate the First Amendment rights of National Republican Amici and their members and supporters. "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). National Republican Amici help carry out this function.

A party's right to select candidates is protected by the First Amendment. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572-73 (2000). "It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489

U.S. 214, 224 (1989). "The ability of the members of the Republican Party to select their own candidate unquestionably implicates an associational freedom." *Jones*, 530 U.S. at 575 (cleaned up). It is "central to the exercise of the right of association." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986).

When a State intrudes "upon the selection of the party's nominee," it violates that First Amendment right. *Jones*, 530 U.S. at 577 n.7; *accord Cousins v. Wigoda*, 419 U.S. 477, 487-88 (1975). Among other things, that means "ballot access must be genuinely open to all, subject to reasonable requirements," like objective popular-support metrics. *Lubin v. Panish*, 415 U.S. 709, 719 (1974). States must leave it up to a party and its members "to select a 'standard bearer who best represents the party's ideologies and preferences.'" *Eu*, 489 U.S. at 224; *see Tashjian*, 479 U.S. at 216 (primary is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community").

Removing former President Trump from the ballot violates this right. It denies ballot access to one of the Party's potential candidates. It ruptures the "process[] by which [Republicans] select their nominees" and denies them their "'ability … to select their own candidate.'" *Jones*, 530 U.S. at 572, 575. And it unconstitutionally puts in the hands of the State—rather than the party (and the people)—the right to select a "'standard bearer who best represents the party's ideologies and preferences.'" *Eu*, 489 U.S. at 224. If Republicans cannot nominate the candidate of their

choice, then the primary system will no longer be theirs, violating the First Amendment.

Nor can Section Three supersede this First Amendment right. "[T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012). Since Section Three's phrase "hold office" and the First Amendment right of political parties can easily be interpreted harmoniously by not applying Section Three at the primary stage, that interpretation must prevail. *See* Cooley, *A Treatise on the Constitutional Limitations Which Rest the Legislative Power of the States of the American Union* 58 (1868) ("[O]ne part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together."); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) ("[I]t is our role to make sense rather than nonsense out of the *corpus juris*.").

Even if they did conflict, the conflict would be governed by the general-specific canon, and the First Amendment would win. "[W]hen conflicting provisions simply cannot be reconciled," "the specific provision is treated as an exception to the general rule." Scalia & Garner, *supra*, at 183. The First Amendment carves out a specific protected right—the right of political parties to select their own candidates at the primary stage—from the lower court's vast construction of Section Three's prohibitions. That specific protection must prevail.

III. Section Three does not apply to former Presidents.

Section Three applies only to people who have previously taken the Article VI Oath to support the Constitution. A prerequisite to Section Three disqualification is "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. But that is not the oath that Presidents take. They take the Article II oath to "preserve, protect and defend the Constitution." U.S. Const. art. II. And they are not and never have been considered "executive … Officers … of the United States" under the Article VI Oath Clause. This exclusion of the presidency makes sense because the drafters had no former Presidents on their minds.

A. Presidents do not take an oath "to support" the Constitution.

Section Three applies only to people who previously took a specified "oath": the Article VI oath. U.S. Const. amend. XIV, §3. It refers to not just any oath, but the oath to "support the Constitution." *Id.* Article VI, which was part of the original Constitution, requires an "Oath" of "Senators and Representatives," "Members of the several State Legislatures," and "all executive and judicial Officers, both of the United States and of the several States." U.S. Const. art. VI. They must take an oath to "support this Constitution." *Id.*; *see Illinois v. Krull*, 480 U.S. 340, 351 (1987). Congress has always required this oath by law. *See* 5 U.S.C. §3331 (to "support" the Constitution).

When "'a word [or phrase] is obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall v. Hall*, 138 S.Ct. 1118, 1128 (2018). The drafters of Section Three referred to the same oath "to support" the Constitution everybody already knew. *See* Paschal, *supra*, at xxxviii, bit.ly/3vzTTuW (Article VI and Section Three cover "precisely the same class of officers"). Thus, it incorporates the same categories of people who take that oath: "a member of Congress," "a member of any State legislature," "an officer of the United States," or "an executive or judicial officer of any State." *Id.*

But Presidents have never taken the Article VI oath. The statute carrying into effect the Article VI Oath Clause confirms that it applies to a wide range of government officials "*except the President*." 5 U.S.C. §3331 (emphasis added). There is "no historical evidence that the President has ever taken a separate oath pursuant to the Article VI Oath or Affirmation Clause." Tillman & Blackman, *Offices and Officers of the Constitution Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. Tex. L. Rev. 349, 423 (2023).

Presidents take a different oath prescribed by Article II. *See* U.S. Const. art. II, §1; *see also Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 415 (1950) ("For the President, a specific oath was set forth in the Constitution itself. Art. II, §1."). In that oath, they do not swear to "support" the Constitution, as Section Three requires. They swear to "preserve, protect and defend the Constitution." *See* U.S. Const. art. II, §1 ("I do solemnly swear (or affirm) that I will

faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."). Former President Trump has never taken the Article VI oath "to support" the Constitution as used in Section Three, but only the Article II oath. He thus falls outside Section Three's coverage.

The Colorado Supreme Court disagreed because in its view, the presidential oath to "'preserve, protect, and defend the Constitution' … is consistent with the plain meaning of the word 'support.'" App.75a ¶156. But that argument answers the wrong question. The question is not whether the President's commitments can broadly be characterized as "support"; the question is whether the President takes the oath that Section Three references. He does not; Section Three points to the Article VI oath, not the Article II oath.

B. The President is not an "officer of the United States" because that phrase never includes the President in the Constitution.

The presidency is also not among those positions whose past oath would subject them to Section Three. Section Three applies only to a "member of Congress," "officer of the United States," "member of any State legislature," or "executive or judicial officer of any State." U.S. Const. amend. XIV, §3. The Colorado Supreme Court determined that the President must be an "officer of the United States." He is not.

When Section Three was ratified, the President was not understood to be an "officer of the United

States" for constitutional purposes. Joseph Story wrote that because the Constitution's Impeachment Clause lists the President, Vice President, "and *all civil officers* (not all *other* civil officers)," that means that the President and Vice President were "contra-distinguished from, rather than ... included in the description of civil officers of the United States." 1 Joseph Story, Commentaries on the Constitution of the United States 578 (1891).

Less than a decade after the Fourteenth Amendment's ratification, at least two Senators said the same thing. Senator Newton Booth said that "the President is not an officer of the United States." Congressional Record Containing the Proceedings of the Senate Sitting for the Trial of William Belknap 454 (1876). Senator Boutwell said that "according to the Constitution, as well as upon the judgment of eminent commentators, the President and Vice-President are not civil officers." *Id.* at 409. A contemporaneous treatise confirmed what Justice Story wrote: "[I]t is obvious that ... the President is not regarded as 'an officer of, or under, the United States.'" McKnight, The Electoral System of the United States 346 (1878).

More recently, two future Justices came to similar conclusions. Future-Justice Scalia wrote that "when the word 'officer' is used in the Constitution, it invariably refers to someone *other than* the President or Vice President." Memorandum from Antonin Scalia, Re: Applicability of 3 C.F.R. Part 100, OLC, at 2 (Dec. 19, 1974), perma.cc/GQA4-PJNN. And future-Chief Justice Rehnquist wrote that "statutes which refer to

'officers' or 'officials' of the United States are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive." Memorandum from William H. Rehnquist, Re: Closing of Government Offices, OLC, at 3 (Apr. 1, 1969), perma.cc/P229-BAKL. One scholar who was initially hopeful about Section Three disqualification concluded that it would not work because the President is not an "officer of the United States." *See* Calabresi, *Donald Trump Should Be on the Ballot and Should Lose*, Volokh Conspiracy (Sept. 16, 2023), perma.cc/LP5Y-MJ97.

Each of the four other constitutional uses of the phrase "officer of the United States" confirm the President's exclusion:

- ***Article VI Oath Clause.*** Article VI requires an oath of "all executive and judicial Officers … of the United States." U.S. Const. art. VI. Presidents do not take the Article VI Oath. *See* Tillman & Blackman, *supra*, at 423. Indeed, the statute carrying into effect the Article VI Oath Clause confirms that it applies to a wide range of government officials "except the President." 5 U.S.C. §3331.
- ***Commissions Clause.*** Article II assigns the President the duty to "Commission all the Officers of the United States." U.S. Const. art. II, §3. But "[t]he President has never commissioned himself." Tillman & Blackman, *supra*, at 412. Nor have Presidents received commissions from their predecessors. *See id.* That unbroken

practice would be unconstitutional if "all the officers of the United States" included the President.

- ***Appointments Clause.*** Article II assigns the President the power to "appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all* other *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, §2 (emphases added). Because the President does not appoint himself, the phrase "all other Officers of the United States" does not include him. And his "[a]ppointment[]" is not otherwise provided for because the President is not "[a]ppoint[ed]" at all—he is elected. *See id.* amend. XII; *id.* art. II.
- ***Impeachments Clause.*** Last, Article II describes the impeachment process for the "President, Vice President and *all civil officers of the United States*," U.S. Const. art. II, §4. (emphasis added). The first two items are superfluous if "all" of the "officers of the United States" included the President. *But see* Scalia & Garner, *supra*, at 174 ("If possible, every word ... is to be given effect."). And because the last category does not contain the word "other," it is not a catch-all clause that also comprehends the first two categories, but a distinct third category. Again, that's because the President is never a constitutional "officer of the United States."

Drafting history confirms what the text suggests. When the Impeachments Clause was drafted, it initially referred to the President, Vice President, and "other civil officers of the U.S." 2 The Records of the Federal Convention of 1787, at 545, 552 (Farrand ed., 1911). But upon further deliberation, the drafters changed the Impeachments Clause to remove the word "other." *Id.* at 600. That change makes no sense if the President is an "officer of the United States."

Precedent supports this conclusion. The President is commonly called a "department" or "branch," not an "Officer of the United States." *See, e.g.*, *Mississippi v. Johnson*, 71 U.S. 475, 500 (1866) ("the President is the executive department"); *Trump v. Mazars USA, LLP*, 140 S.Ct. 2019, 2034 (2020) ("The President is the only person who alone composes a branch of government."). This Court's precedent has long assumed that the President is not an "Officer of the United States." *See, e.g.*, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 497-98 (2010) ("The people do not vote for the 'Officers of the United States.'"); *accord United States v. Mouat*, 124 U.S. 303, 307 (1888) ("Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."); *Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2199 (2020) ("Article II distinguishes between two kinds of officers—principal officers (who must be *appointed by* the President with the advice and consent of the Senate) and inferior officers (whose *appointment* Congress may vest in the

President, courts, or heads of Departments)." (emphases added)).

The Colorado Supreme Court ignored this evidence. First, the court thought excluding the President was "absurd." App.54a ¶106. But the Fourteenth Amendment's ratifiers had no reason to include Presidents. At the time, all former Presidents had previously taken the Article VI oath. And only one former President had joined the Confederacy, but he was dead. *See* John Tyler, White House Historical Ass'n, perma.cc/23RJ-AWWJ.

Second, the court focused almost entirely on the word "officer," not the phrase "officer of the United States." *See* App.70a-72a ¶¶145-50. But phrases often have meanings that are not captured by the definitions of their individual words. *See, e.g.*, *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1826-27 (2020) (Kavanaugh, J., dissenting) ("This Court has often emphasized the importance of sticking to the ordinary meaning *of a phrase*, rather than the meaning of words in the phrase."); *FCC v. AT&T Inc.*, 562 U.S. 397, 406 (2011) ("two words together may assume a more particular meaning than those words in isolation"). The phrase "officer of the United States" is used four times in the Constitution, and all four times it does not cover the President. "When seeking to discern the meaning of a word [or phrase] in the Constitution, there is no better dictionary than the rest of the Constitution itself." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting).

IV. Section Three does not cover holding the presidency.

Even if former President Trump had taken the Article VI Oath, Section Three does not disqualify anyone from becoming President. By its terms, Section Three disqualifies people only from holding these positions: "Senator or Representative in Congress," "elector of President and Vice President," or "any office, civil or military, under the United States, or under any State." U.S. Const. amend. XIV, §3.

The first draft of what became Section Three provided that nobody could "hold the office of President or Vice President of the United States, Senator or Representative in the national Congress, or any office now held under appointment from the President of the United States, and requiring the confirmation of the Senate…." 39 Cong. Globe 919 (1866). Congress then eliminated "the office of President or Vice President of the United States" and enacted Section Three without it. Of course, courts "presume differences in language like this convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017); *see Thornton*, 514 U.S. at 810 n.20 (deciding election-qualifications questions based in part on "[t]he Framers' decision to reject a proposal allowing for States to recall their own representatives"). It is not for this Court to second-guess the drafters' decision.

If the drafters wanted to use Section Three to block presidential candidates, they would not have been so subtle. Although the drafters identified specifically "member[s] of Congress," "member[s] of any

State legislature," and even "elector[s] of President and Vice President," the Colorado Supreme Court contends that they also covered duly elected Presidents—the most important position in America—in the same catch-all class as entry-level bureaucrats. It is far more likely that "office under the United States" referred only to subordinate offices and that the highest offices were identified by name. This follows from the "commonsense principle[] of communication" that drafters communicate major decisions—like whether they are proposing to disqualify duly elected Presidents—with clarity. *Biden v. Nebraska*, 143 S.Ct. 2355, 2380 (2023) (Barrett, J., concurring).

This understanding also makes sense in historical context. "[T]he President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). The drafters of the Fourteenth Amendment were not trying to subvert the national will, but a regional will. Their concerns were with things like "prevent[ing] the intrusion of arch traitor Jefferson Davis into the Senate." 39 Cong. Globe 2537 (1866). Section Two, which restricted representatives from the former Confederate States, ensured that no Confederate would soon become President as a matter of math, and nobody mentioned such a concern in the ratification debates. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment* 46-48, 54 (last updated Dec. 29, 2023), perma.cc/2WKV-CZYU.

The Colorado Supreme Court came to the contrary conclusion, but it repeated the same mistake it made

for "officer of the United States." It focused on the meaning of "office," not the meaning of the phrase "office … under the United States." App.116a-20a ¶¶130-33. But this phrase cannot be understood by looking just to the "hyperliteral meaning of each word in the text.… The full body of a text contains implications that can alter the literal meaning of individual words." Scalia & Garner, *supra*, at 356; *cf. Helvering v. Gregory*, 69 F.2d 809, 810-11 (2d Cir. 1934) (L. Hand, J.) ("[T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes.").

* * *

Finally, if this Court has any doubt concerning Section Three's application, it should resolve such doubt against disqualification. As the Attorney General wrote in 1867, "[t]hose who are expressly brought within [Section Three's] operation cannot be saved from its operation." The Reconstruction Acts, 12 Op. Att'y Gen. 141, 160 (1867). But "[w]here, from the generality of terms of description, or for any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the law." *Id.*

CONCLUSION

This Court should reverse the Supreme Court of Colorado.

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