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 KANSAS REPUBLICAN PARTY AND 32 OTHER STATE AND TERRITORIAL REPUBLICAN PARTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amicus curiae, the Kansas Republican Party ("KRP"), is an incorporated nonprofit association and political party committee in Kansas, duly formed and operating under the laws of the State of Kansas. As stated in its bylaws, its purpose is to promote the principles and objectives of the Republican Party and elect Republican candidates to office to the maximum extent provided for under Kansas law. Specifically, its purpose is: "to coordinate and unite the activities of Republicans in Kansas through recognized . . . committees under a central, statewide organization and serve as the official state affiliate of the Republican National Committee. The [KRP] is dedicated to the advancement of Republican candidates, policies and principles and shall aid in every way possible the Republican nominees selected in each partisan primary. The [KRP] seeks to advance Republican principles and beliefs by seeing them enacted as sound public policy."

Its interests are to elect Republicans at the federal, state, and local levels and to protect its members' access to those candidates who wish to represent the party. Nominating and designating candidates are core functions, without regard to a particular candidate. The KRP, along with the other *Amici* named below, all of whom are state Republican parties, seeks to be heard in this action to protect its stated interests and the voter access of its members

[1] No counsel for any party authored this brief in whole or in part. Only *amici curiae* funded its preparation and submission.

and any citizen who might choose to vote for a Republican candidate. Each of the *Amici* have faced, or will face, similar litigation over the scope and meaning of the Fourteenth Amendment to the United States Constitution and its application to contemporary events.

Amici the KRP, the Alabama Republican Party, Republican Party of American Samoa, California Republican Party, Colorado Republican Party, Connecticut Republican Party, Delaware Republican Party, District of Columbia Republican Party, Georgia Republican Party, Republican Party of Guam, Idaho Republican Party, Illinois Republican Party, Maine Republican Party, Maryland Republican Party, Mississippi Republican Party, Missouri Republican Party, Nebraska GOP, New Jersey Republican Party, North Carolina Republican Party, North Dakota Republican Party, Ohio Republican Party, Oklahoma Republican Party, Oregon Republican Party, Rhode Island Republican Party, South Dakota Republican Party, South Carolina GOP, Tennessee Republican Party, Republican Party of Texas, Utah Republican Party, Republican Party of Virgina, West Virgina Republican Party, Wisconsin Republican Party, and Wyoming Republican Party join this Brief and seek to be heard here, as a ruling in favor of Respondents would injure these other state parties because, if a candidate is barred from the ballot in Colorado, then that candidate's viability is unquestionably lessened and the votes of these state parties' members diminished. This injury highlights the importance of jurisprudence requiring that states may not make their own independent qualifications or otherwise

interfere with qualifications for national office. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 810 (1995) ("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."); *Heitmanis v. Austin*, 899 F.2d 521, 529 (6th Cir. 1990) ("a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a state's delegation to the party's national convention is protected by the Constitution.") (quoting *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 123-24, 101 S. Ct. 1010, 1020 (1981)). All these state parties share a commitment to their First Amendment rights and the establishment of clear jurisprudence protecting those rights.

SUMMARY OF ARGUMENT

This case arises from the Supreme Court of Colorado's novel and untested interpretation of the Fourteenth Amendment to the United States Constitution in order to remove a presidential candidate from a political party's primary ballot. While this was not the first action to attempt such an action, it was the first such action to be successful. Rather than utilize principles of judicial restraint and caution, the Colorado Supreme engaged in "judicial lawmaking" which has, and will continue to, invite a slew of politically motived actions designed to pander to public perception to the determent of well-established principles of law. *See*, *e.g.*, *Vote.Org v. Callanen*, No. 22-50536, 2023 WL 8664636, at *5 (5th

Cir. Dec. 15, 2023) (finding judicial self-restraint warranted to avoid making "unnecessary pronouncement[s] on constitutional issues" and "premature interpretations of statutes"); *see also Trump v. Bellows*, Case No. AP-24-01 (Me. Super. Ct. filed Jan. 2, 2024).

The Colorado Supreme Court's decision is rooted in impossible assumptions and ignores well established principles of constitutional and statutory law. The Colorado Supreme Court is attempting to impose an impermissible new federal constitutional requirement on the qualifications for President, eviscerating both Section Five of the Fourteenth Amendment and Article II, Section 1, Clause 5 of the United States Constitution, while making factual and legal assumptions that run contrary to bedrock state and federal constitutional law. This imprudent decision making resulted in a rash, purely political decision, rather than the well-reasoned legal analysis we normally require of our courts. The political nature of this "per curium" decision is belied by its three dissenting opinions. *See* App. 224a-360a.

The Colorado case was a cause of action brought "under sections 1-4-1204(4), 1-1-113(1), 13-51-105, C.R.S. (2023), and C.R.C.P. 57(a). In their Verified Petition, the Electors challenged the [Colorado Secretary of State]'s authority to list President Trump 'as a candidate on the 2024 Republican presidential primary election ballot and any future election ballot, based on his disqualification from public office under Section [Three].'" App. 10a-11a at ¶ 14. The Colorado court's factual background focused solely on the

actions of the candidate when he was President on January 6, 2021. The Colorado Supreme Court found that the Colorado General Assembly gave Colorado courts the authority to assess, and add, presidential qualifications—a finding of questionable historic and legal validity, which created the absurd result of allowing partisan state actors to simply disqualify candidates they deem unfit to serve. This result runs contrary to the fundamental Constitutional principles of the nation. "Constitutional provisions should be construed so as to avoid absurd, unjust, or unreasonable consequence." *In re Chapman*, 166 U.S. 661, 667, 17 S. Ct. 677, 680, 41 L. Ed. 1154 (1897). "But nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *United States v. Wainer*, 49 F.2d 789, 791 (W.D. Pa. 1931).

Although this case is already being attacked in the press for predicted political results, this case is the type that demonstrates the need for this Court. This matter is not about President Trump, but about the proper interpretation of the Constitution and the unprecedented interpretation the Colorado Supreme Court invoked to achieve it desired political ends. Failing to close this Pandora's box will result in tit-for-tat litigation to determine federal elections.[2]

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[2] For example, Missouri Secretary of State, Jay Ashcroft, recently raised the idea of disqualifying President Biden because his border policies and for Vice President Harris's support to the protests in the wake of George Floyd's murder. *See* https://www.nbcnews.com/politics/2024-election/missouri-republican-secretary-of-state-biden-trump-ballot-rcna132600.

ARGUMENT

I. The Present Controversy is not Ripe for Adjudication.

As this Court has made clear: "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 1259, 140 L. Ed. 2d 406 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81, 105 S. Ct. 3325, 3333, 87 L. Ed. 2d 409 (1985)). This matter had not reached the stage where judicial intervention is necessary when the Colorado Supreme Court took it upon itself to put its thumb on the scale of the upcoming elections.

A. Political Parties' Choices of Their Candidates for National Offices Implicate the Right to Free Association Under the First Amendment.

Political parties, which are wholly private, stem from "freedom of association protected by the First and Fourteenth Amendments, and '[a]s a result, political parties' government, structure, and activities enjoy constitutional protection.'" App. 65a-66a at ¶ 75 (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1985); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)); *see also* U.S. CONST. Amends. 1, 14. In Colorado, nominees for President must go through a primary process. *See* COLO. REV. STAT. § 1-4-101(1). At this point, there is no conflict with the Fourteenth Amendment because,

even if a candidate wins the Colorado Republican primary, he will not yet be President-elect. Winning that vote only provides him delegates at the convention, where winning would put him on the ballot for the nation vote. The Colorado Supreme Court's decision, however, has ramifications far beyond its borders because removing a national candidate from a single state's primary ballot unquestionably weakens that candidate's viability and impedes a political party's ability to field a strong national candidate.

It is well established that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a state's delegation to the party's national convention is protected by the Constitution." *Heitmanis*, 899 F.2d at 529 (*quoting Democratic Party*, 450 U.S. at 123-24); *see also Thornto*n, 514 U.S. at 810 ("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."). This Court regularly recognizes the right of a political party to make associational decisions:

> In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is

> the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.

Cal. Democratic Party v. Jones, 530 U.S. 567, 575 (2000); *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 629 (1996) ("Political parties have a unique role in serving this principle; they exist to advance their members' shared political beliefs."); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (holding unconstitutional statute's requirement that voters in a primary be members of that party). At the primary stage, if Republican voters want to vote to nominate a candidate who they know will not hold the office, including because they are not qualified, it is their right to do so. In every election, people vote for candidates who do not go on to hold the office in question, for whatever reason.[3]

As this Court has indicated, States may not enact "unreasonably exclusionary restrictions." *Timmons*, 520 U.S. at 369. Laws regarding even general ballot access must still be "reasonable, politically neutral regulations." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). "[T]he State's asserted regulatory interests need be 'sufficiently weighty to justify the limitation' imposed on the Party's rights." *Timmons*, 520 U.S. at 364 (citing *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). Moreover, the basis for the purported disqualification is crucial to determining

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[3] For example, in the most recent Iowa Republican caucuses, 35 votes were cast for Chris Christie, even though he had suspended his campaign the previous week. See https://www.politico.com/2024-election/results/iowa/.

whether First Amendment rights are violated. *See Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002) (restrictions are not severe when they are "generally applicable, even-handed, [and] politically neutral"). The heavily political, extra-statutory, non-neutral, and not-generally-applicable requirement Respondents seek to impose here is not available to them in this matter under the Fourteenth Amendment, partly because it would infringe on the Party's right to associate. As the Supreme Court of Michigan has emphasized:

> [b]oth the rights of individuals to associate for the advancement of political beliefs and of qualified voters to cast their votes effectively are basic to effective political expression and merit strong constitutional protection. Restrictions on access to the ballot burden those fundamental rights directly, and the effect is heightened where the restrictions work to eliminate political and ideological alternatives at the primary election when the candidates for the major parties are selected and before campaigning has identified and sharpened the issues facing the voters.

Socialist Workers Party v. Secretary of State, 412 Mich. 571, 579 (1982). The Colorado Republican Party, not the Secretary of State, sets the rules and requirements for Republican nominees. Election law reflects the Party's constitutional right to freely associate and

exercise its political decisions. One way the law does so is by withholding from individuals the right to interfere with a party's political decisions.

"All candidates for nominations to be made at any primary election shall be placed on the primary election ballot either by certificate of designation by assembly or by petition." COLO. REV. STAT. § 1-4-102 (West). For Presidential access to the primary ballot:

> Not later than sixty days before the presidential primary election, the secretary of state shall certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots. The only candidates whose names shall be placed on ballots for the election shall be those candidates who: Are seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and are affiliated with a major political party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election.

COLO. REV. STAT. § 1-4-1204(1)(b).

Private political parties nominate candidates for primary elections. *See, e.g.*, COLO. REV. STAT. § 1-4-1204(b). Political parties have complete control over all aspects of their operations, as provided for in the

First Amendment. *See*, *e.g.*, COLO. REV. STAT. § 1-3-105; § 1-3-106; § 1-4-302. If Donald Trump were to be disqualified under party rules, then the Secretary of State could refuse to certify. If Mr. Trump is successful in securing his party's nomination, at that point, at the earliest, could the Colorado Secretary of State and the Colorado Courts entertain a challenge under state statute. *See* COLO. REV. STAT. § 1-1-113. Thus, even if the Colorado Supreme Court were allowed to craft an additional qualification for President other than those specified in Article II, Section 1 of the Constitution, the question of a particular candidate's qualification for national office would not be relevant until—at the earliest—a candidate wins the primary.

B. At This Stage, This Question is Not Ripe.

The question of whether Donal Trump is "qualified to hold office" will not arise until, at the earliest, Donald Trump becomes his party's nominee. One could even argue the issue will not be ripe unless and until Mr. Trump wins a general election and becomes the presumptive President-elect. In other words, if Mr. Trump were to lose either the Republican primary election or the general election, then there would be nothing for the courts to decide.

"Prudential ripeness is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial." *Simmonds v. I.N.S.,* 326 F.3d 351, 357

(2d Cir. 2003) (citing Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues,* 75 HARV. L. REV. 40, 58–64 (1961)). Indeed, even Colorado has recognized that courts should "refuse to consider uncertain or contingent future matters that suppose a speculative injury that may never occur." *Bd. of Dirs., Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 105 P.3d 653, 656 (Colo. 2005).

In the case below, the Colorado Supreme Court first erred in finding the matter ripe, i.e. that it had jurisdiction to determine whether the candidate was fit to serve as President. That determination was based on C.R.S. 1-1-113(1), which provides for jurisdiction when: (1) an eligible elector; (2) files a verified petition in a district court of competent jurisdiction; (3) alleging that a person charged with a duty under the Election Code; (4) has committed, or is about to commit, a breach of duty or other wrongful act. *See* App. 40a at ¶ 47. "[T]he petitions alleged that the Secretary was about to commit a breach of duty or other wrongful act under the Election Code by placing President Trump on the presidential primary ballot because he is not constitutionally qualified to hold office." App. 42a at ¶ 48.

The Colorado Supreme Court put the cart before the horse. As other courts have found when ruling on this exact issue: Courts have a "duty not to 'decide questions of a constitutional nature unless absolutely necessary to a decision.'" *United States v. Trump*, No. CR 23-257 (TSC), ––– F. Supp. 3d –––, 2023 WL 8359833, at *15 (D.D.C. Dec. 1, 2023), *cert.*

denied before judgment, No. 23-624, —— S. Ct. ——, 2023 WL 8857247 (U.S. Dec. 22, 2023) (quoting *Clinton v. Jones*, 520 U.S. 681, 690 & n.11, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997)).

A deeply rooted doctrine in constitutional law is that constitutional questions may not be decided unless they are unavoidable. *Griffith v. Franklin Cnty.*, 975 F.3d 554, 571 n.5 (6th Cir. 2020); *Mockeridge v. Alcona Cnty.*, No. 1:21-CV-12896, 2023 WL 3194475, at *1 (E.D. Mich. Apr. 21, 2023). Courts must refrain from premature adjudication of constitutional questions at all costs. *Clinton*, 520 U.S. at 690 (stressing "the importance of avoiding the premature adjudication of constitutional questions"). Under both the United States and Colorado constitutions, political parties are private associations that may set their own qualifications on how to nominate candidates for primary elections. Courts may not usurp state or federal constitutional law in order limit a voter's access to a candidate of their choice. Voters have the right to vote for, or against, any candidate a private political party deems fit for the ballot. And, at least until such a candidate is deemed to be the winner of that private political party's primary election, it is not the province of any court to make a premature determination about that candidate's qualification to serve in office under Section Three of the Fourteenth Amendment.

As this matter was not ripe for decision, the ruling of the Colorado Supreme Court should be reversed.

II. The Colorado Supreme Court Erred in its Interpretation of the Fourteenth Amendment of the United States Constitution.

Even if this matter were ripe for adjudication, the Colorado Supreme Court erred both by finding that it was an appropriate venue to determine this matter and by failing to recognize that the Fourteenth Amendment requires implementing legislation, which has already been adopted and which does not disqualify Mr. Trump from the Presidency.

A. The Colorado Supreme Court may not Independently Determine Qualifications for the President of the United States.

The Colorado Supreme Court erred in removing Donald Trump from Colorado's primary for failure to satisfy the "qualifications for President" under Section Three of the Fourteen Amendment. In *Anderson*, the Colorado Supreme Court allowed Respondents to challenge Donald Trump's appearance on Colorado's primary ballot under C.R.S. 1-1-113(1), which allegedly creates a cause of action allowing for judicial review of the "qualifications" of candidates, including candidates for the Presidency. App. 51a-52a at ¶ 60. The Colorado Supreme Court further held that Section Three of the Fourteenth Amendment is a "qualification" in the same manner as age or citizenship. App. 56a-58a at ¶¶ 65-66.

In interpreting the Constitution, courts begin with the original public meaning of the Constitution's text. *Abbott v. Biden*, 70 F.4th 817, 829 (5th Cir. 2023). A court's duty is to interpret the Constitution in light of its text, structure, and original understanding, as informed by history and tradition. *Id.* at 827. "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731, 51 S.Ct. 220, 75 L.Ed. 640 (1931). It is the duty of judges "to interpret the Constitution based on the text and original understanding of the relevant provision—not based on public policy considerations, or worse, fear of public opprobrium or criticism from the political branches." *Miller v. Bonta*, No. 19CV01537BENJLB, ––– F. Supp. 3d –––, 2023 WL 6929336 (S.D. Cal. Oct. 19, 2023) (quoting *United States v. Rahimi*, 61 F.4th 443, 462 (5th Cir. 2023), *cert. granted*, ––– U.S. ––––, 143 S. Ct. 2688, ––– L. Ed. 2d –––– (Ho, J., concurring)).

"In the first place, it is so fundamental as to require no citation of authority that Constitutional provisions and statutes in pari materia should be read together, and all sections accorded equal dignity in interpreting their meaning. Wherever possible, all provisions should be given effect, and each interpreted in light of the others, as so to reconcile them, if possible, and to render none nugatory. Particular provisions shall prevail over those of a general nature." *Lemon v. Bossier Par. Sch. Bd.*, 240 F. Supp. 743, 744 (W.D. La. 1965). In determining the meaning of its text, the Constitution can and must apply to

circumstances beyond those the Founders specifically anticipated. *United States v. Simien*, 655 F. Supp. 3d 540 (W.D. Tex. 2023), *recons. denied*, No. SA-22-CR-00379-JKP, 2023 WL 3082358 (W.D. Tex. Apr. 25, 2023). Where a constitutional clause is clear and unambiguous on its face, courts will not construe the clause. *Santa Fe Cmty. Coll. v. Ztark Broadband, LLC*, 643 F. Supp. 3d 1259 (D.N.M. 2022).

Colorado is permitted to review the established qualifications of candidates for the office of President. *See*, *e.g.*, *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (disqualification for failure to meet age threshold). But states may not impose impermissible qualifications for office. *See*, *e.g.*, *Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881. This includes the office of the President. *Id.* "A State has no reserved power to establish qualifications for the office of President." *Id.* at 861. The Qualifications Clause lays down the sole qualifying criteria for the President of the United States:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

U.S. CONST., art. II, § 1, cl. 5. As this Court has explained, "the Qualifications Clauses were intended

to . . . fix as exclusive the qualifications in the Constitution." *Thornton*, 514 U.S. 779, 806, 115 S. Ct. 1842, 131 L. Ed. 2d 881.[4]

In a thinly veiled attempt to lure this Court into a political matter, the Colorado Supreme Court blatantly violated a core constitutional principle. *See*, *e.g.*, *Griffin v. Padilla*, 408 F. Supp. 3d 1169, 1179 (E.D. Cal. 2019), *appeal dismissed and remanded*, No. 19-17000, 2019 WL 7557783 (9th Cir. Dec. 16, 2019), *and vacated*, No. 2:19-CV-01477-MCE-DB, 2020 WL 1442091 (E.D. Cal. Jan. 13, 2020) (petitioners were likely to succeed on merits of claim that California state law requiring presidential candidates to disclose their federal tax returns as precondition to appearing on state's partisan presidential primary ballot violated First Amendment rights to freedom of association and ballot access). These principles apply with equal force to state primaries as to the general election. *Id.* at 1179 n.12 (citing *Tashjian v. Republican Party*, 479 U.S. 208, 227, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986)).

Before making its errant ruling, the Colorado Supreme Court recognized that "the Supreme Court has twice declined to address whether Section Three—which disqualifies an oath-breaking insurrectionist from holding office—amounts to a qualification for office." App. 56a at ¶ 65 (citing *Powell v. McCormack*, 395 U.S. 486, 520 n.41, 89 S. Ct. 1944, 23 L. Ed. 2d 491

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[4] *Thornton* dealt with congressional term limits, but the qualifications clauses for both houses of Congress and for the Presidency are close parallels, and the *Thornton* rationale should apply with equal force to the presidential Qualifications Clause.

(1969) (describing Section Three and similar disqualification provisions in the federal constitution but declining to address whether such provisions constitute "qualification[s]" for office because "both sides agree[d] that [the candidate] was not ineligible under" Section Three or any other, similar provision); *Thornton*, 514 U.S. 779, 787 n.2, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (seeing "no need to resolve" the same question regarding Section Three in a case concerning the propriety of additional qualifications for office)). Rather than following this Court's wisdom and declining to rule on the issue, the Colorado Supreme Court followed two trial courts that concluded Section Three is the *functional equivalent* of a qualification for office. *See* App. 57a at ¶ 65 (citing *Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1316 (N.D. Ga. 2022) ("Section [Three] is an existing constitutional disqualification adopted in 1868—similar to but distinct from the Article I, Section 2 requirements that congressional candidates be at least 25 years of age, have been citizens of the United States for 7 years, and reside in the states in which they seek to be elected."); *State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *24 (D.N.M. Sept. 6, 2022) ("Section Three imposes a qualification for public office, much like an age or residency requirement.")).

Following these lower courts, rather than exercising judicial discretion, led the Colorado Supreme Court to err.

B. Section Three of the Fourteenth Amendment is Not Self Executing

Section Three is not self-executing. It does not independently provide a cause of action for anyone to sue anyone, anytime, in order to disqualify them from office. Nor does it provide every state's Secretary of State with the authority to determine such constitutional questions independently.

The Fourteenth Amendment expressly reserved enforcement authority to Congress: "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Thus, Congress has exclusive authority to enforce, via legislation, all the provisions of the Fourteenth Amendment, including disqualification under Section Three. This Court has held that the enforcement power of the Fourteenth Amendment lies only with Congress, and Section Five of the Fourteenth Amendment confers enforcement power with Congress to determine "whether and what legislation is needed to" enforce the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *see also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 33 (1991) (Scalia, J., concurring) ("It cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform."). If this doctrine applies to the vital individual rights protections of Section One, there is no reason it should not also apply to the political questions of Section Three.

More specifically, the seminal decision of *Griffin's Case* is in line with this Court's later decisions cited above. *See In re Griffin*, 11 F. Cas. 7, 22 (C.C.D. Va. 1869). There, Chief Justice Salmon Chase, sitting as Circuit Judge for Virginia held that only Congress could provide the means of enforcing Section Three as a cause of action. *Id.* at 9. Chief Justice Chase made clear "There are, indeed, other sections than the third, to the enforcement of which legislation is necessary; but ***there is no one which more clearly requires legislation in order to give effect to it***. The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections." *Id.* (emphasis added). That case has never been overruled and has been affirmed repeatedly by other courts and authorities. At least 17 cases in five states have positively cited the *Griffin's Case* conclusions—in fact, the case below appears to be the only negative treatment of *Griffin's Case*. Because the Fourteenth Amendment is not self-executing, the exclusive method for enforcing its provisions is through the provisions Congress may choose to establish for doing so. A private plaintiff seeking to enforce individual rights under Section One of the Fourteenth Amendment needs to utilize the mechanism Congress has established: 42 U.S.C. Section 1983. *See Foster v. Michigan*, 573 F. App'x. 377, 391 (6th Cir. 2014) ("[W]e have long held that § 1983 provides the exclusive remedy for constitutional violations."). The enforcement of Section Three is likewise entrusted to congressional authority.

C. Congress has Used its Implementing Power Under Section Five of the Fourteenth Amendment, Foreclosing the Analysis of the Colorado Supreme Court.

In *Greene v. Raffensperger*, United States Representative Marjorie Taylor Greene filed a Section 1983 action challenging the constitutionality of a Georgia statute permitting voters to institute an administrative proceeding to challenge whether individual candidates in their districts met requisite legal qualifications to run for their prospective positions. *See* 599 F. Supp. 3d 1283 (N.D. Ga. 2022). Voters intervened. *Id.* Representative Greene moved for a temporary restraining order and preliminary injunction. *Id.*

In denying injunctive relief, the Northern District of Georgia provided a historical synopsis of the Amendment:

> As previously noted, Section 3 of the Fourteenth Amendment prohibits certain individuals and office holders, who have previously taken an oath of office to support the Constitution of the United States, from holding federal or state office if they 'engaged in insurrection or rebellion' against the United States. This provision specifically states:
>
> > No person shall be a Senator or Representative

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

Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1312 (N.D. Ga. 2022). Importantly, the Fourteenth Amendment was passed and ratified in the years following the Civil War, and when the 39th Congress convened in December of 1865, "Senators and elected Representatives from the ex-Confederate States showed up ready to take their seats," thereby "infuriat[ing] most Republicans in Congress." *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87,

91 (2021). This inspired the inclusion of Section Three of the Fourteenth Amendment. *Id.* In the years after the passage of the Fourteenth Amendment, Section Three was relied on to exclude both state and federal officials from office. *Id.* at 88 (explaining that federal prosecutors brought action to oust half of the Tennessee Supreme Court); *id.* at 110–11 (noting that the Senate refused to seat a member-elect, Zebulon Vance, the wartime governor of North Carolina, on the grounds that he was ineligible under Section Three). *Greene*, 599 F. Supp. 3d at 1313.

But what the *Greene* holding fail to acknowledge was that the 60th Congress passed legislation on March 4, 1909. *See* 18 U.S.C. § 4 (Mar. 4, 1909, ch. 321, § 4, 35 Stat. 1088). This law, passed well after ratification of the Fourteenth Amendment, imposed a criminal standard for insurrection. This statute is enabling legislation. Section Four was amended to state as follows:

> 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 aide or comfort thereto, shall be imprisoned not more than ten years, or fined not more than ten thousand it dollars, or both; and shall, moreover, be incapable of holding any office under the United States.

This language is nearly identical to current statutes. *See* 18 U.S.C.A. § 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.").

Section Five of the Fourteenth Amendment provides that Congress shall have power to enforce, by appropriate legislation, the Amendment's provisions. U.S. CONST. amend. XIV, § 5. Enforcement power granted Congress under Section Five is a positive grant of legislative power. *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S. Ct. 1717, 1723-24, 16 L. Ed. 2d 828 (1966). Section Five does not place conditions on Congress' authority to enforce the Amendment. Congress has the power to enforce "the provisions of this article," not just the Equal Protection Clause. *United States v. Price*, 383 U.S. 787, 789 & n.2, 86 S. Ct. 1152, 1154 & n.2, 16 L. Ed. 2d 267 (1966) (noting Section Five empowers Congress to enforce "every right guaranteed by the Due Process Clause of the Fourteenth Amendment"); *see also* CONG.GLOBE, 42D CONG., 1ST SESS.APP. at 83 (1871) ("The fourteenth amendment closes with the words, 'the Congress shall have power to enforce, by appropriate legislation, the provisions of this article'—the whole of it, sir; all the provisions of the article; every section of it.") (statement of Rep. Bingham). There is no hierarchy amongst constitutional rights, including those within the Fourteenth Amendment. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628, 109 S. Ct. 2646, 2654, 105 L. Ed. 2d 528 (1989).

In exercising its authority under Section Five of the Fourteenth Amendment to enforce the substantive guarantees of the Amendment, Congress may do more than simply proscribe conduct that has been held unconstitutional: "Congress's authority extends to providing remedies and to deterring violations of rights guaranteed by the Fourteenth Amendment 'by prohibiting a somewhat broader swath of conduct.'" *Crumpacker v. Kansas Dept. of Human Resources*, 338 F.3d 1163, 1169 (10th Cir. 2003) (quoting *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727, 123 S. Ct. 1972, 1977, 155 L. Ed. 2d 953 (2003)). Where Congress has not exceeded its authority under Section Five by creating a new substantive constitutional right, it has the authority to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference. *Downing v. Board of Trs. of Univ. of Ala.*, 321 F.3d 1017 (11th Cir. 2003). Section Five allows Congress to "enact[ ] reasonably prophylactic legislation" to deter constitutional harm. *Allen v. Cooper*, 140 S. Ct. 994, 1004, 206 L. Ed. 2d 291 (2020).

"For legislation to be enacted under the Enforcement Clause of the Fourteenth Amendment, there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end (per Justice Kennedy, with three Justices concurring and one Justice concurring in result)." *Coleman v. Court Appeals Md.*, 566 U.S. 30, 132 S. Ct. 1327, 182 L. Ed. 2d 296 (2012). "Although this clause does not preclude courts from developing remedies to enforce this amendment, it

counsels strongly against judicial alteration of the scheme of enforcement developed by Congress." *Blake v. Town of Delaware City*, 441 F. Supp. 1189 (D. Del.1977). Congress "must tailor" legislation enacted under Section Five to "'remedy or prevent'" "conduct transgressing the Fourteenth Amendment's substantive provisions." *Coleman*, 566 U.S. 30 at 36. The "clause grants Congress broad power to effectuate goals of this amendment." *E.E.O.C. v. Elrod*, 674 F.2d 601 (7th Cir. 1982). *See, also, Salisbury v. Grimes*, 406 F.2d 50 (11th Cir. 1969). Under well-established rules of Constitutional interpretation, Section Five grants Congress broad power to effectuate the goals of the amendment:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power. The scope of Congress' power under Section Five is equivalent to that under the necessary and proper clause. The test of the propriety of legislation under the necessary and proper clause was established in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421, 4 L.Ed. 579 (1819): Let the end be legitimate, let it be

> within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist(ent) with the letter and spirit of the constitution, are constitutional.

E.E.O.C., 674 F.2d at 603-04 (cleaned up) (quoting *Ex Parte Virginia*, 100 U.S. 339, 345-56, 25 L. Ed. 676 (1879); *Katzenbach v. Morgan*, 384 U.S. 641, 650, 86 S. Ct. 1717, 1723, 16 L. Ed. 2d 828 (1966)). "In determining what is 'appropriate legislation' under [section] 5, the inquiry, then, is whether this enactment is 'plainly adapted' to the end of enforcing the appropriate clause and "not prohibited by but is consistent with 'the letter and spirit of the constitution.'" *E.E.O.C.*, 674 F.2d at 603-04 (quoting *Katzenbach*, 384 U.S. at 650, 86 S. Ct. at 1723, 16 L. Ed.2d 828).

It is clear from the text of 18 U.S.C.A. § 2383 that Congress exercised its authority under Section Five to codify the language contained within Section Three of the Fourteenth Amendment. The clear text of 18 U.S.C.A. § 2383 reflects that text also contained within Section Three. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 950, 151 L. Ed. 2d 908 (2002) ("As in all statutory construction cases, we begin with the language of the statute.").

The Colorado Supreme Court relied on *State v. Griffin*, where the United States District Court for the District of New Mexico argued "Section Three imposes a qualification for public office, much like an age or

residency requirement; it is not a criminal penalty." App. 57a at ¶ 65 (citing No. D-101-CV-2022-00473, 2022 WL 4295619, at *24 (D.N.M. Sept. 6, 2022) (citations omitted)). The New Mexico Court further opined: "Nor is a criminal conviction (for any offense) a prerequisite for disqualification. Indeed, neither the courts nor Congress have ever required a criminal conviction for a person to be disqualified under Section Three." *See State*, 2022 WL 4295619, at *24. In doing so, the Colorado Supreme Court erred.

Congress implemented Section Three via 18 U.S.C.A. § 2383. It did so after the actions referenced by the court. "A statute's historical context is an important tool of interpretation, as courts 'often look to history and purpose to divine the meaning of language.'" *Texas v. Biden*, No. 6:22-CV-00004, —— F. Supp. 3d ——, 2023 WL 6281319, at *7 (S.D. Tex. Sept. 26, 2023). "Statutory language necessarily derives much of its meaning from surrounding circumstances." *Civ. Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 323, 81 S. Ct. 1611, 1617, 6 L. Ed. 2d 869 (1961). "The statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent." *United States v. Champlin Ref. Co.*, 341 U.S. 290, 297, 71 S. Ct. 715, 719–20, 95 L. Ed. 949 (1951). "Extratextual sources may not overcome the terms of a statute." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020). "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed'." *Great N. R. Co. v. United States*, 315 U.S. 262, 273, 62 S. Ct. 529, 533, 86 L. Ed. 836 (1942). Thus, as provided for in law,

reliance on a case and actions prior to the enactment of the enabling statute would be in err. This court should instead look to historical context including the subsequent passage and codification of Section Three in the United State Code.

The statute also codified disqualification, the penalty for conviction under the statute. As the text and history would reflect Congress' intent to enforce the terms of Section Three using its Section Five authority, this Court should find that 18 U.S.C.A. § 2383 is the implementing statute for Section Three. As such, pursuant to 18 U.S.C.A. § 2383, a conviction under the statute is required before Colorado may exercise its prerogative under Section Three through its alleged statutory scheme.

Thus, the ruling of the Colorado Supreme Court should be reversed.

CONCLUSION

The Supreme Court of Colorado's decision to remove a candidate for public office from the primary ballot of a private organization protected under fundamental constitutional principles reeks of political bias. Doing so under the guise of imposing a new constitutional requirement for President of the United States runs further afoul of well-established principles of state and federal constitutional law. The Colorado Supreme Court chose to force this Court into making a politically charged decision that will further degrade the discourse in America.

The Colorado Supreme Court has also chosen to exercise its judicial authority to issue a decision that is rushed and premature. Colorado's primary is months away, yet the Colorado Supreme Court has chosen to use a state statutory scheme to create legal theories for disqualification of political candidates out of whole cloth, in direct contradiction to the text of the United States Constitution. The Colorado Supreme Court has further chosen to ignore clear statutory text and historical context of the Amendment at issue, all in its pursuit to impose the Court's political will on not just a single Presidential candidate, but an entire group of disaffected and disenfranchised citizens who privately associate pursuant to First Amendment principles.

Finally, allowing for this decision to stand will lead to the very absurd results that this Court abhors. The cannons require that courts exercise their authority in a judicious, cautions, practical, and prudent manner. Courts are not to rush to judgment, or bend to political winds. Rather, courts are to look at the questions presented before them, and craft decisions that are narrow in scope and avoid sweeping change. The decision by the Colorado Supreme Court has already led other courts or administrative agencies to attempt to strike candidates for political reasons, which will almost certainly lead to the eventual breakdown of our constitutional order. Simply put, the ramifications of allowing the decision of the Colorado Supreme Court to stand are vast. And we pray this Court's wisdom prevails.

The *Amici*, therefore, respectfully suggest that this Court recognize the Colorado Supreme Court's decision for what it is: a naked attempt to injure the reputation of this Court while further attacking long held legal principles in pursuit of a preferred outcome.

For these reasons, this Court should reverse the decision of the Colorado Supreme Court's and instruct the Colorado Secretary of State to return presidential candidate Donald John Trump to Colorado's Republican primary ballot.

Respectfully submitted,

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