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 PROFESSORS AND LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTERESTS OF THE *AMICI CURIAE*

The amici curiae listed below are professors and legal scholars. Collectively, we have more than one hundred years of experience in teaching and writing about constitutional law. Our primary interest is to help ensure that the Court resolves this case in a manner that is consistent with federalism and separation of powers principles.[1]

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SUMMARY OF ARGUMENT

The American people deserve to know as soon as possible whether Donald Trump is qualified to serve as President under Section Three of the Fourteenth Amendment. *Amici* express no view as to whether Donald Trump is, or is not, eligible. Instead, we contend that the question whether the Fourteenth Amendment bars Mr. Trump from serving as President is properly within the Court's jurisdiction and should be resolved promptly on the merits. This Court is the only institution with the authority to provide a final, definitive answer to that question

before voters cast their ballots. Moreover, this Court will perform a valuable service to the nation by carrying out its duty "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Exercising its power under Article II of the U.S. Constitution to determine the manner of appointing its presidential electors, the Colorado legislature enacted a statute to permit adjudication of issues related to a presidential candidate's eligibility for office, with the goal of ensuring that the state's electors are not pledged to a candidate who cannot serve. Acting pursuant to that Colorado statute, the state's supreme court ruled that Mr. Trump is disqualified by Section Three of the Fourteenth Amendment. This Court has the power to review that decision. *See* 28 U.S.C. § 1257(a). As this Court has made clear more than once, "the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky ex. rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012). Here, the Court has a duty to decide the merits of the Section Three question because there are "judicially discoverable and manageable standards" and there is no "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id*. at 195. If the Court decides that Mr. Trump is not eligible, Congress retains the power to "remove such disability." U.S. Const., amend XIV, sec. 3.

Petitioner is profoundly mistaken to claim that the Colorado Supreme Court "overstepped its authority and usurped power properly allocated to Congress." *Trump v. Anderson*, Petition for Writ of

Certiorari, at 23 [hereinafter "Trump Petition"]. Before Election Day, the Constitution vests power in state legislatures to "direct" the "manner" of appointing electors. U.S. Const., art. II, sec. 1, cl. 2. States have historically exercised that power to exclude unqualified candidates from presidential ballots and federal courts have consistently upheld their authority to do so. *See, e.g.*, *Hassan v. Colorado*, 495 F. App'x 947 (10th Cir. 2012) (Gorsuch, J.). Only after members of the Electoral College cast their votes does responsibility shift to Congress under Section Three of the Twentieth Amendment to resolve any remaining disputes. It would be inconsistent with the Constitution's text and federal structure to hold that congressional inaction—Congress's choice not to enact legislation to implement Section Three of the Fourteenth Amendment—preempts the Article II power of state legislatures to create procedures for resolving eligibility questions before Election Day.[3]

Congress has no power to act under the Twentieth Amendment until January 2025. Nothing in the Constitution requires this nation to live with uncertainty for the next year. This Court has the power to decide now whether Mr. Trump is ineligible to serve as President under the Fourteenth Amendment. If this Court decides by June 2024 that Mr. Trump is not eligible to be President, then the delegates to the Republican Party Convention will have the opportunity to select a different nominee to represent their party. If this Court holds that Mr.

[3] Throughout this brief, we use the term "Election Day" as a shorthand to refer to the date on which members of the Electoral College cast their votes.

Trump is eligible, that ruling will bind all fifty states. Either way, this Court can help ensure an orderly electoral process by issuing a final, authoritative decision on the merits so that voters and electors know whether Mr. Trump is constitutionally disqualified.

ARGUMENT

I. The Question Whether Mr. Trump is Eligible is a Justiciable Legal Question

This Court stated in *Zivotofsky*: "[A] controversy involves a political question ... where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky*, 566 U.S. at 195 (internal quotations and citations omitted); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). There are unquestionably judicially manageable standards to resolve Petitioner's Fourteenth Amendment claim. Moreover, there is no textually demonstrable commitment of the question to a coordinate department.

A. There Are Judicially Manageable Standards to Resolve Petitioner's Fourteenth Amendment Claim

In *Rucho*, this Court held that partisan gerrymandering claims raise nonjusticiable political questions because the Constitution provides no "standard for deciding how much partisan dominance is too much." *Id*. at 2498. Moreover, "federal courts are not equipped to apportion political power as a matter of fairness," in part because "it is not even clear what fairness looks like in this context." *Id*. at 2499-2500.

This case does not present comparable difficulties. To resolve this case, the Court does not need to make any independent judgment about fairness, nor does it need to decide how much insurrection is too much. In essence, the Court is asked to resolve two distinct sets of legal issues grounded in the precise text of Section Three of the Fourteenth Amendment. First, the Court must decide whether the Presidency is an "office . . . under the United States" and whether Donald Trump "previously [took] an oath . . . as an officer of the United States . . . to support the Constitution of the United States." U.S. Const., amend. XIV, sec. 3. *See Anderson v. Griswold*, Colo. Supreme Court Case No. 23SA300, 2023 CO 63, paras. 127-161 (Dec. 19, 2023). These are pure questions of law that simply require the Court to do what it does best: consider the text, history, purpose and structure of Section Three. "Recitation of these arguments—which sound in familiar principles of constitutional interpretation—is enough to establish that this case does not 'turn on standards that defy judicial application.'" *Zivotovsky*, 566 U.S. at 201 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1964)). Indeed, the Court has often construed the precise term, "officer," in the context of Appointments Clause controversies. *See, e.g., Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010). So apparent is the standard nature of the interpretive task presented in this case, Mr. Trump did not even argue in the Colorado courts that courts lack judicially manageable standards to resolve these questions.

The other question is whether Donald Trump "engaged in insurrection or rebellion against" the Constitution of United States. U.S. Const., amend.

XIV, sec. 3. Interpretation of the phrase "engaged in insurrection" also involves an exercise in constitutional interpretation similar to the tasks that this Court regularly undertakes. Historically, both state and federal courts have found the task of construing these terms in Section Three to be judicially manageable. *See, e.g., United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (construing the word "engaged"); *New Mexico ex rel. White v. Griffin*, 2022 WL 4295619 (N.M. Dist. Ct. Sep. 6, 2022) (holding that Defendant was disqualified under Section Three of the Fourteenth Amendment); *Worthy v. Barrett*, 63 N.C. 199, 202 (1869) (appeal dismissed sub nom. *Worthy v. Comm'rs*, 76 U.S. 611 (1869)); *In re Tate*, 63 N.C. 308 (1869) (ruling that a county attorney was disqualified from holding office under Section Three). State courts have also construed the term "insurrection" in several other contexts. *See, e.g., A & B Auto Stores of Jones St., Inc. v. City of Newark*, 256 A.2d 110, 118 (N.J. Law. Div. 1969) (considering definition of "insurrection" in the context of city's liability for property damages). Moreover, this Court has repeatedly construed the Constitution's many related terms involving violence against the government, including what it means to "levy war" against the United States, *see, e.g., Ex parte Bollman*, 8 U.S. 75 (1807); and what it means to give "aid and comfort," *see, e.g., Cramer v. United States,* 325 U.S. 1 (1945). In short, this Court has been facing legal questions involving violence against the government since shortly after the country's founding, and has been construing the meaning of the various legal terms for that violence as a matter of both statutory and constitutional interpretation for just as long. *See*

Deborah Pearlstein, *Law at the End of War*, 99 Minn. L. Rev. 143 (2014).

Once the Court decides how to interpret the phrase "engaged in insurrection," it must apply the law to the facts. Fortunately, the Colorado District Court made detailed factual findings on this question. *See Anderson v. Griswold*, Final Order, paras. 61-193 (Nov. 17, 2023) (Case No.: 2023CV32577, District Court, City and County of Denver). The District Court made those findings after conducting a five-day trial with "direct- and cross-examination of fifteen witnesses, and the presentation of ninety-six exhibits." *Anderson v. Griswold*, Co. Supreme Court Case No. 23SA300, 2023 CO 63, para. 84 (Dec. 19, 2023). Of course, this Court might reach a different legal conclusion than the Colorado Supreme Court as to whether Donald Trump "engaged in insurrection" within the meaning of Section Three of the Fourteenth Amendment. However, the argument that this Court lacks "judicially discoverable and manageable standards," *Rucho*, 139 S. Ct. at 2494, for deciding that question is clearly without merit.

B. There Is No Textually Demonstrable Commitment of the Issue to a Coordinate Political Department

Mr. Trump separately argues that the question of his eligibility for the Presidency "is nonjusticiable and reserved to Congress." Trump Petition, at 20. The text of Section Three contains no such reservation, nor does it specify which constitutional actor may determine eligibility. Section Three says: "Congress may by a vote of two-thirds of each House, remove such disability." U.S. Const, amend XIV, sec. 3. This

language does not authorize Congress to make an initial determination about whether a potential candidate is disqualified under Section Three. To the contrary, it clearly implies that someone other than Congress must make that initial determination before Congress exercises its power to "remove such disability." Given that the Constitution grants state governments "far-reaching authority over" the presidential election process, *Chiafolo v. Washington*, 140 S. Ct. 2316, 2324 (2020), the most natural inference is that state legislatures—acting pursuant to their express power to determine the manner for appointing electors, U.S. Const. art. II, sec. 1, cl. 2—may empower state courts, or Secretaries of State, to make the initial determination about eligibility of presidential candidates.

Nothing in the Twelfth Amendment alters this basic allocation of authority. The Twelfth Amendment sets forth the President of the Senate's role in counting votes *after* they have been cast by the Electoral College. The Twelfth Amendment also authorizes the House of Representatives to select the President in cases where no candidate secures a majority of electors. *See* U.S. Const., amend XII. However, the Twelfth Amendment is entirely silent on the question of *who* is to make any determination as to candidates' qualifications or eligibility before the Electoral College votes. Indeed, before 1868, apart from Congress's power to "determine the time of choosing the electors, and the day on which they shall give their votes," U.S. Const., art. II, sec. 1, cl. 4, the only role that the Constitution assigned to Congress in presidential elections came *after* the electors had met in their respective states. This temporal limit on Congress's

role was entirely consistent with the Constitution's grant of primary authority over the conduct of presidential elections to the states themselves. U.S. Const, art. II, sec. 1, cl. 2 ("Each State shall appoint [electors] in such Manner as the Legislature thereof may direct . . . ."). In this context, it is inconceivable that the authors of the Fourteenth Amendment believed that they were, *sub silentio*, assigning Congress a new, pivotal role to make all determinations of candidate eligibility for the Presidency under either Article II or Section Three *before* the Electoral College votes.

The political question doctrine is a "narrow exception" to the general rule that "the Judiciary has a responsibility to decide cases properly before it." *Zivotofsky*, 566 U.S. at 194-95. Consistent with the narrowness of the exception, this Court has rarely concluded that an issue has been "textually committed" to a political department, such that the judiciary is deprived of jurisdiction to adjudicate the case. Notably, Section Three is strikingly different from those other, exceptional cases. In *Nixon v. United States*, 506 U.S. 224, 230-31 (1993), for example, this Court held that the Impeachment Clause manifests a textually demonstrable commitment to a coordinate branch because the Constitution states explicitly: "The Senate shall have the *sole power* to try all impeachments." U.S. Const., Art. I, sec. 3, cl. 6 (emphasis added). In contrast, neither the Twelfth nor the Fourteenth Amendment grants Congress any *express* power—much less the

sole power—to decide whether a candidate meets the eligibility requirements for the Presidency.[4]

The other constitutional provisions that Mr. Trump cites in his petition are equally unavailing. Article II authorizes states to appoint Electors "in such Manner as the Legislature thereof may direct." U.S. Const., art. II, sec. 1, cl. 2. Far from granting exclusive authority to Congress, it grants explicit authority to state legislatures. Article II, section 1, clause 4 empowers Congress to "determine the Time of choosing the Electors, and the Day on which they shall give their votes." However, it does not grant Congress the power to decide whether a candidate is qualified to serve. Article II, section 1, clause 5 establishes eligibility requirements for the Presidency, but it does not specify which government actor or actors have the authority to decide whether those eligibility requirements have been met in a particular case. Article II, section 1, clause 6 addresses "removal of the President from office." It has been modified by the Twenty-Fifth Amendment. None of these Article II provisions grants Congress explicit—much less exclusive—authority to decide whether Section Three of the Fourteenth Amendment

[4] Section Five of the Fourteenth Amendment does grant Congress power to enact legislation to enforce Section Three. U.S. Const., amend XIV, sec. 5. In theory, Congress could use that power to enact federal legislation to preempt state laws related to the qualifications of presidential candidates. However, as discussed in Part II of this brief, Section Five has no preemptive effect by itself, in the absence of any federal legislation to implement Section Three.

disqualifies a potential presidential candidate from serving as President.

Section Three of the Twentieth Amendment likewise does not alter the preceding analysis. That Section addresses situations in which "the President elect shall have died" prior to inauguration, or "a President shall not have been chosen" before the scheduled inauguration date, "or if the President elect shall have failed to qualify." U.S. Const., amend. XX, sec. 3. The Twentieth Amendment says nothing about who decides whether "the President elect shall have failed to qualify," much less award to Congress exclusive power to decide that question. The Amendment does grant Congress certain powers that are operative in the period between Election Day and Inauguration Day. As with the Twelfth Amendment, one could reasonably infer that the Twentieth Amendment grants Congress an implied power to make decisions about eligibility after Election Day. However, nothing in the text of the Twentieth Amendment supports an inference that the Amendment implicitly bars states from exercising their constitutional authority over the electoral process by making independent decisions about candidate eligibility before electors cast their ballots.

Indeed, if the Twelfth and Twentieth Amendments are construed, separately or together, to grant Congress the exclusive authority to make decisions about candidate eligibility, then no government actor at the state or federal level would have any authority to make such decisions prior to Election Day, because the procedures in the Twelfth and Twentieth Amendments do not become operative

until after Election Day. It would be manifestly absurd to construe the Constitution in a manner that postpones decisions about candidate eligibility until after the person has already been elected. A decision to disqualify a candidate after election would constitute a much more severe disruption of the electoral process than a decision to disqualify the candidate before that candidate's name appears on the ballot. Nothing in the Constitution requires courts to construe the relevant constitutional provisions in a manner that maximizes disruption of the electoral process.

C. Prudential Considerations Weigh in Favor of a Decision on the Merits

The political question doctrine is rooted "in Article III's 'case' or 'controversy' language." *Zivotofsky*, 566 U.S. 189, 207 (Sotomayor, J., concurring in part) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). The Article III "case or controversy" requirement is a limitation on the jurisdiction of federal courts. U.S. Const., art. III. Therefore, if this Court rules that the question presented is a political question, it must dismiss the case for lack of jurisdiction. In that case, the Colorado Supreme Court decision will stand and Mr. Trump will be excluded from the presidential ballot in Colorado. More importantly, if the Court dismisses the case on political question grounds, it will give a green light to state election officials and state courts in all fifty states to decide for themselves whether Mr. Trump is disqualified under Section Three of the Fourteenth Amendment. As of this writing, Mr. Trump faces disqualification challenges in active lawsuits in at

least fourteen states. *See* Lawfare, *Tracking Section 3 Trump Disqualification Challenges*, https://www.lawfaremedia.org/current-projects/the-trump-trials/section-3-litigation-tracker. If the Court dismisses this case for lack of jurisdiction, it is likely that state officers in several other states will take actions to exclude Mr. Trump from the ballot. In that case, registered Republican voters in several states could be barred from voting for the Republican presidential candidate, should Mr. Trump be selected as the Republican nominee.

If this Court rules on the merits that Mr. Trump is eligible, then all fifty states will be legally obligated to include his name on the ballot, assuming that he is the Republican Party nominee. If this Court rules on the merits that Mr. Trump is not eligible, and the Court issues its ruling before the end of June, then the delegates to the Republican Party Convention in July will have the opportunity to select a different candidate who is eligible to become President. Either way, American voters will get what they deserve: an electoral contest in which the nominees of both major political parties are eligible to serve as President and are included on the ballot in all fifty states.

II. Congress Does Not Have Exclusive Authority to Decide Presidential Eligibility Questions

Petitioner contends that "Congress—not a state court—is the proper body to resolve questions concerning a presidential candidate's eligibility." *Trump* Petition, at 19. Petitioner's claim of exclusive congressional authority is astoundingly broad. Petitioner would have this Court construe the Fourteenth Amendment to rob state legislatures of their Article II power to regulate the electoral process for presidential elections, U.S. Const. art. II, sec. 1, cl. 2, thereby depriving state governments of their "far-reaching authority over" the presidential electoral process. *Chiafolo*, 140 S. Ct. at 2324. In particular, Petitioner contends that state legislatures may not create state law causes of action to enforce the disqualification rule in Section Three without prior authorization from Congress. *See* Trump Petition, at 19-23. That claim, if accepted, would radically alter the division of legislative power over the electoral process between the states and the federal government, converting state legislatures into supplicants who must request congressional authorization before exercising their Article II authority.

A. The Constitution's Text Refutes the Claim that Congress Has Exclusive Authority

Article II grants state governments the power to appoint presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II, sec. 1, cl. 2. The Tenth Amendment reserves to the

States powers "not delegated to the United States." U.S. Const., amend X. The power to regulate the jurisdiction of state courts is unquestionably one of those powers reserved to the states. The combination of the Article II power over presidential elections and the reserved power to regulate state courts means that state legislatures may confer jurisdiction on state courts to decide questions of presidential eligibility, at least in the absence of any federal legislation preempting state law. Moreover, under the Supremacy Clause, state courts have a constitutional duty to enforce the Constitution—including Section Three of the Fourteenth Amendment—in cases where state legislatures have granted them adjudicatory jurisdiction. U.S. Const., art. VI, cl. 2 ("the judges in every state shall be bound thereby"). In this case, the Colorado Supreme Court faithfully executed its constitutional duty under the Supremacy Clause: it applied Section Three in a case where the state legislature had conferred adjudicatory jurisdiction.

The Constitution grants state governments much broader authority over presidential elections than it does with respect to congressional elections. Under Article II, "Each state shall appoint [electors] in such manner as the legislature thereof may direct." U.S. Const. art. II, sec. 1, cl. 2. Congress has the power to "determine the time of choosing the electors," U.S. Const. art. II, sec. 1, cl. 4. However, Congress has no power to regulate the "manner" of appointing electors; that power is granted exclusively to the states. Here, it is instructive to compare the Article II provisions for presidential elections with the Article I provisions for congressional elections. Under Article I, state legislatures are authorized to prescribe "the times,

places and manner of holding elections for Senators and Representatives," but "Congress may at any time by law make or alter such regulations." U.S. Const. art. I, sec. 5, cl. 1. Thus, the text makes clear that Congress plays a dominant role with respect to congressional elections. However, the Constitution assigns states the dominant role with respect to presidential elections. Even so, under Petitioner's bizarre theory, Section Three of the Fourteenth Amendment inverted the relationship between state legislatures and Congress with respect to presidential elections, forcing states to obtain permission from Congress before they enact laws to ensure that the "manner" of appointing electors is consistent with the substantive restrictions in Section Three.

The Constitution does include a small number of provisions that require state legislatures to obtain congressional consent before exercising their legislative powers. For example, "No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . ." U.S. Const. art. I, sec. 10, cl. 2. Similarly, "No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace . . . ." U.S. Const. art. I, sec. 10, cl. 3. If the Fourteenth Amendment's drafters intended to create a rule requiring state legislatures to obtain congressional consent before enacting legislation to enforce Section Three, they could have adopted language similar to that found in Article I, Section 10. In fact, though, Section Three does not include any language framed as a limitation on the legislative power of states, nor does it include any language suggesting that state legislatures must obtain congressional consent before

exercising their legislative powers. *See* U.S. Const. amend XIV, sec. 3. In short, Petitioner advocates a construction of Section Three that is wholly divorced from the actual text of the Constitution.

The same conclusion is apparent when comparing Section Three of the Fourteenth Amendment with Section Five of Article I. Under Article I, "Each House shall be the Judge of the . . . qualifications of its own Members." U.S. Const. art. I, sec. 5, cl. 1. In contrast, the Fourteenth Amendment does not include any language stating or implying that Congress "shall be the judge" of which persons are qualified to hold office under Section Three; it merely authorizes Congress to "remove such disability" after someone else makes an initial determination that a person is not qualified. The Constitution is silent as to *who* makes that initial determination. However, since Article II gives state governments the primary responsibility for regulating the presidential election process until the electors cast their votes, the drafters of the Fourteenth Amendment probably assumed that state governments—through either executive or judicial officers—would make the initial determination about a candidate's eligibility under Section Three.

Petitioner's argument relies heavily on Section Five of the Fourteenth Amendment, which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const, amend XIV, sec. 5. We assume that Section Five grants Congress the power to enact federal legislation that would preempt state laws conferring jurisdiction on state courts to adjudicate

presidential eligibility questions. However, it is undisputed that Congress has not enacted any such legislation. Absent such legislation, Petitioner is forced to argue that Section Three and Section Five together have a dormant preemptive effect that bars state legislatures from exercising their Article II authority unless and until Congress enacts Section Five legislation. *See* Trump Petition, at 19-23; *see also Colorado Republican State Central Committee v. Anderson*, Petition for Writ of Certiorari, at 16-26. Although this Court has on rare occasions relied on a dormant preemption rationale, *see, e.g., Zschernig v. Miller*, 389 U.S. 429 (1968), it has never accepted a dormant preemption theory in which congressional inaction bars states from exercising powers—like the Article II power to regulate the "manner" of appointing presidential electors—that the Constitution grants expressly to state legislatures.

B. Petitioner's Claim of Exclusive Congressional Authority is Inconsistent with the Constitution's Federal Structure

The Constitution assigns state officers a central role in enforcing federal law. Under the Supremacy Clause, state courts are obligated to enforce supreme federal law. U.S. Const., art. VI, cl. 2. Under the Oath or Affirmation Clause, "members of the several state legislatures, and all executive and judicial officers . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution." U.S. Const., art. VI, cl. 3. The Fourth Amendment, to cite just one example, would be a dead letter if state executive officers and state courts did not enforce it on

a daily basis. Even so, Petitioner contends that Section Three carved out an exception to both the Supremacy Clause and the Oath or Affirmation Clause so that state officers are not bound by Section Three—even in cases where state legislatures authorize them to enforce Section Three—unless Congress enacts legislation to implement Section Three. *See* Trump Petition, at 19-23; *see also Colorado Republican State Central Committee v. Anderson*, Petition for Writ of Certiorari, at 16-26. That construction of Section Three is fundamentally at odds with our Constitution's system of dual sovereignty.

Here, it is worth recalling events at the Philadelphia Convention that led to the adoption of the Supremacy Clause. James Madison and the Virginia delegation proposed a plan that would have given Congress the power to "negative" all state laws that conflicted with supreme federal law. *See generally* Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 William & Mary Q. 215 (1979). On July 17, the Convention decisively rejected Madison's proposed "negative." *See id.* at 226-27. Among other things, delegates objected that, under Madison's proposal, "all state laws . . . were to be suspended until approved by the national legislature." *Id.* at 227. On the same day that the Convention rejected Madison's proposal, other delegates introduced an early draft of what ultimately became the Supremacy Clause. *Id.* at 228. Under that Clause, "the judges in every state shall be bound" by the federal Constitution. U.S. Const., art. VI, cl. 2. The Supremacy Clause makes state judges "the first line of defense" to enforce federal law. Hobson, *supra*, at

228. Thus, the delegates to the Convention concluded that Madison's proposed "negative power was unnecessary because the state courts would consider invalid any law contravening the authority of the union." *Id.* at 228 (internal quotations and citations omitted).

Petitioner would have this Court construe Section Three in a manner that is antithetical to the constitutional design. Under Petitioner's construction of Section Three—similar to Madison's proposed "negative," which the Framers rejected—state legislatures could not enact laws governing the jurisdiction and procedure of state courts in election-related cases without approval from Congress. Similarly, state courts would be barred from enforcing Section Three—even in cases where the state legislature has granted them jurisdiction and created a cause of action—despite their constitutional duty under the Supremacy Clause to enforce supreme federal law, unless Congress first enacts legislation authorizing state courts to enforce Section Three. Far from being the "first line of defense" in constitutional enforcement, *id.*, at 228, as required by the Supremacy Clause, state courts would become silent accomplices to Section Three violations. It defies credulity to suggest that the Framers of the Fourteenth Amendment intended these results.

Indeed, Petitioner's congressional exclusivity claim is even more problematic because most of the officers who could potentially be disqualified under Section Three hold state and local government offices. *See* U.S. Const., amend XIV, sec. 3 (referring to "any office, civil or military . . . under any State"). *See also*

State v. Griffin, 2022 WL 4295619 (N.M. Dist. 2022) (disqualifying county commissioner under Section Three); *Worthy v. Barrett*, 63 N.C. 199 (1869) (disqualifying county sheriff under Section Three). Petitioner's argument, if accepted, would mean that states may not apply Section Three to disqualify candidates for state or local government offices, absent express congressional authorization. It is difficult to imagine a more severe affront to state sovereignty than a judicially created constitutional rule that restricts the power of state governments to enforce rules restricting the eligibility of candidates for state and local offices.

C. Petitioner's Claim of Exclusive Congressional Authority is at Odds with the Nineteenth Century Understanding of Section Three

Petitioner's claim is also directly at odds with the contemporaneous understanding of the Fourteenth Amendment at the time it was adopted. Shortly after the Fourteenth Amendment was ratified, North Carolina enacted a statute providing that "no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Article XIV, shall qualify under this act or hold office in this State." Acts of 1868 ch. 1, sec. 8 (*quoted in Worthy v. Barrett*, 63 N.C. 199 (1869)). Kenneth Worthy "received a majority of the votes cast in Moore County at the election of April 1868, for the office of sheriff." *Worthy v. Barrett*, 63 N.C. 199, 200 (1869). However, the county commissioners, acting pursuant to the North Carolina statute, refused to allow him to take office because he was ineligible

under Section Three. Worthy filed a writ of mandamus to compel the commissioners to allow him to assume the office of sheriff for which he had been elected. After a lower court granted the mandamus petition, the North Carolina Supreme Court reversed, holding that Section Three of the Fourteenth Amendment disqualified Worthy from serving as county sheriff. *See id.*, at 200-05. *See also In re Tate*, 63 N.C. 308 (1869) (holding that William Tate was ineligible to serve as State Solicitor).

Under Petitioner's theory, the North Carolina statute implementing Section Three was invalid because Congress had not previously enacted federal legislation authorizing states to pass statutes to enforce Section Three.[5] Apparently, though, lawyers and judges in 1869 did not understand Section Three in that way. The North Carolina Supreme Court had no difficulty applying the state statute to support its conclusion that Worthy was disqualified. *See Worthy*, 63 N.C., at 200-05. If Worthy's attorneys believed they had a plausible basis for challenging the state law on federal constitutional grounds, they surely would have raised that argument when they appealed to the U.S. Supreme Court. In fact, Worthy's attorneys did appeal the North Carolina decision to this Court. However, they did not raise a federal constitutional objection to the North Carolina statute, and this Court dismissed for lack of a federal question. *Worthy v. The Commissioners*, 76 U.S. 611 (1869). Thus, both the North Carolina Supreme Court decision and the

[5] Congress enacted legislation to enforce Section Three in 1870. Act of May 31, 1870 (First Ku Klux Klan Act), ch. 114, 16 Stat. 140, 143.

appeal filed by Worthy's attorneys show that lawyers and judges in 1869 understood that states had independent authority to implement Section Three.

In re Griffin ("Griffin's Case"), 11 F. Cas. 7 (C.C.D. Va. 1869) is not to the contrary. *Griffin* held that a person who held office by virtue of an appointment that was lawful when made could not be removed from office without a procedure that complied with basic due process requirements. Caesar Griffin had been convicted of a crime in Virginia state court in what was admittedly a fair trial. *Id.*, at 22-23. The presiding judge, Hugh Sheffey, was duly appointed as a judge in February 1866, two years before the Fourteenth Amendment was ratified, *id.* at 23, but Griffin's trial occurred after ratification. After he was convicted in state court, Griffin filed a federal habeas petition to challenge his conviction. He argued that Judge Sheffey had no authority to preside over the criminal trial because Sheffey was automatically disqualified under Section Three of the Fourteenth Amendment. The federal district judge in the habeas case ruled "that the sentence of Caesar Griffin was absolutely null." *Id.*, at 23.

Justice Chase, sitting as a circuit judge in the appeal from that decision, framed the question as follows: "The general question to be determined . . . is whether or not the sentence of the circuit court of Rockbridge County must be regarded as a nullity because of the disability to hold any office . . . imposed by the fourteenth amendment, on the person who, in fact, presided as judge in that court." *Id.* at 23. Justice Chase held that Griffin was not entitled to habeas relief because a person who held office by virtue of an

appointment that was lawful when made (like Judge Sheffey) could not be removed from office without some type of evidentiary hearing to "ascertain what particular individuals are embraced by the definition" in Section Three. *Id.* at 26. (Prior to Griffin's conviction, no court or other tribunal had conducted an evidentiary hearing to determine whether Judge Sheffey was disqualified.) In that context, Chase said that legislation establishing procedures for that type of evidentiary hearing "can only be provided for by Congress." *Id.*

The Colorado Republican Party urges this Court to wrench these words out of context to support a conclusion that Virginia was constitutionally barred from enacting legislation to implement Section Three. *See Colorado Republican State Central Committee v. Anderson*, Petition for Writ of Certiorari, at 19-22. Read in context, though, that was clearly not what Chase meant. He was not reviewing the decision of a state court in a proceeding where Griffin challenged Sheffey's eligibility under Section Three. No such proceeding had ever occurred. Instead, Chase was reviewing a judicial decision in a case brought under a federal habeas statute *in federal court*. Thus, his statement that a procedural mechanism to enforce Section Three "can only be provided by Congress," *Griffin*, 11 F.Cas. at 26, clearly meant that Congress was the only institution with authority to enact legislation to enforce Section Three *in federal court*. Justice Chase never doubted the authority of the Virginia legislature to enact a statute—like the North Carolina legislation at issue in *Worthy v. Barrett*—to enforce Section Three against state officers in state court pursuant to state procedural rules. The

authority of the Virginia legislature to enact that type of statute was simply not relevant to the issue presented in *Griffin's Case* because Griffin never filed suit in state court to challenge Sheffey's eligibility under Section Three.

The implications for the Colorado Supreme Court decision in this case are clear. In accordance with the holding of *Griffin's Case*, Mr. Trump was entitled to an evidentiary hearing before being disqualified. Colorado state courts provided that evidentiary hearing in accordance with procedural rules enacted by the Colorado legislature. The Colorado legislature had the authority to enact those rules, just as the North Carolina legislature had the power to enact the statute applied in *Worthy v. Barrett*. The central holding in *Griffin's Case* is not to the contrary.

D. States Routinely Apply State Laws to Enforce Federal Constitutional Rules Governing the Eligibility of Presidential Candidates

Consistent with the Constitution's explicit grant of authority to state legislatures, U.S. Const., art. II, sec. 1, cl. 2, the electoral process between now and Election Day is governed primarily by the states. This Court has stated that Article II "gives the States far-reaching authority over presidential electors, absent some other constitutional constraint." *Chiafolo*, 140 S. Ct. at 2324. States have historically exercised their power over the electoral process to exclude unqualified candidates from presidential ballots—both through state executive officers and state courts—and federal courts have consistently

upheld their authority to do so. *See, e.g., Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (upholding decision by California Secretary of State to exclude candidate from presidential primary ballot because she was 27-years-old); *Hassan v. Colorado*, 870 F.Supp.2d 1192 (D. Colo. 2012) (upholding decision by Colorado Secretary of State to exclude candidate from presidential ballot because he was not a natural born citizen); *Socialist Workers Party of Illinois v. Ogilvie*, 357 F. Supp. 109 (N.D. Ill. 1972) (upholding decision by state electoral board denying certification to political party because party's candidate for President was only 31 years of age).

At common law, plaintiffs could bring *quo warranto* actions to challenge the entitlement of a public official to hold office. *See, e.g., Barton v. Frantz*, 55 Neb. 167, 75 N.W. 546 (1898); *State ex rel. Lilienthal v. Herndon*, 23 Fla. 287, 2 So. 4 (1887). Today, in most states, "the quo warranto action has been supplemented or replaced by a statutory scheme for contesting elections." James A. Gardner, *Protecting the Rationality of Electoral Outcomes, A Challenge to First Amendment Doctrine*, 51 U. Chicago L. Rev. 892, 904 n.57 (1984) (providing statutory citations for statutes in forty states). State courts have relied on these types of statutes to rule that Section Three of the Fourteenth Amendment requires elected officials who hold office under state law to be removed from office. *See, e.g., State v. Griffin*, 2022 WL 4295619 (N.M. Dist. 2022) (holding that defendant was disqualified under Section Three of the Fourteenth Amendment). Even so, under Petitioner's bizarre construction of Section Three, state courts that have jurisdiction in *quo warranto* or similar actions would be required to

disregard Section Three in cases where they have jurisdiction under state law. Petitioner's argument is impossible to reconcile with the text of the Supremacy Clause, which specifies that "the judges in every State shall be bound" by the U.S. Constitution in cases where they have jurisdiction. U.S. Const. art. VI, cl. 2.

The case of *Elliott v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016), is instructive. Ted Cruz was born in Canada. In 2016, he filed a petition to appear on the primary election ballot in Pennsylvania. *See id*. at 648. Carmon Elliott, a registered Republican voter, filed suit in Pennsylvania state court, relying on a state-law cause of action and seeking a declaration to exclude Senator Cruz from the ballot on the grounds that he is not a "natural born citizen." U.S. Const., art. II, sec. 1, cl. 5. The state court engaged in a detailed analysis of relevant legal authorities to support its conclusion that Senator Cruz is a "natural born citizen" within the meaning of Article II. *See Elliott*, 137 A.3d at 652-58. The Colorado state court decision in the present case is, in principle, very similar to *Elliott v. Cruz*. Plaintiffs below filed suit in state court, relying on a state law cause of action, and invoking a federal constitutional rule as the basis for their claim that a presidential candidate should be excluded from the state's primary election ballot.

Mr. Trump asserts that "Congress—not a state court—is the proper body to resolve questions concerning a presidential candidate's eligibility." Trump Petition, at 19. Frankly, it is not entirely clear whether Mr. Trump and the Colorado Republican Party believe that state courts and state executive officers are prohibited from making decisions about a

candidate's eligibility under Article II, which bars, *inter alia*, naturalized citizens and persons under 35-years-old from serving as President. U.S. Const., art. II, sec. 1, cl. 5. If that is their position, it flies in the face of decades of consistent state practice and federal judicial decisions upholding that practice. *See, e.g., Lindsay*, 750 F.3d 1061; *Hassan*, 870 F.Supp.2d 1192; *Socialist Workers Party*, 357 F. Supp. 109; *Elliott*, 137 A.3d 646.

Alternatively, Petitioners seem at times to suggest that their proposed rule of exclusive congressional power applies solely to the eligibility rule in Section Three of the Fourteenth Amendment, but not to the eligibility rules in Article II. *See, e.g.*, *Colorado Republican State Central Committee v. Anderson*, Petition for Writ of Certiorari, at 16 ("Congress, and Congress alone, can enforce Section Three.") If that is their position, they fail to explain why the eligibility rule in Section Three should be treated differently from the eligibility rules in Article II. As noted previously, state statutes in approximately forty states provide a procedural mechanism for plaintiffs to bring the modern equivalent of a common law *quo warranto* action to challenge the entitlement of a public official to hold office. Gardner, *supra*, 51 U. Chicago L. Rev. at 904 n.57. Assuming that state laws comply with procedural due process requirements, and assuming that these types of state statutes can be utilized to challenge a presidential candidate's eligibility under Article II, there is no valid reason to conclude that the same statutes cannot also be utilized to challenge a presidential candidate's eligibility under the Fourteenth Amendment. As then-Judge Gorsuch

stated: "A state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (2012) (upholding decision by Colorado Secretary of State to exclude candidate from presidential ballot because he was not a natural born citizen).

CONCLUSION

For the foregoing reasons, this Court should hold that the claim challenging Mr. Trump's eligibility under Section Three of the Fourteenth Amendment presents a justiciable question. Moreover, this Court should reject Petitioner's argument that an ill-defined concept of congressional exclusivity, which has no basis in the text of the Constitution, prohibits states from exercising their affirmative constitutional powers under Article II.

Respectfully submitted,

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