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

REPLY BRIEF FOR THE PETITIONER

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President Donald J. Trump won the Iowa caucuses with the largest margin ever for a non-incumbent and the New Hampshire primary with the most votes of any candidate from either party. He is the presumptive Republican nominee and the leading candidate for President of the United States. In our system of "government of the people, by the people, [and] for the people,"[1] the American people—not courts or election officials—should choose the next President of the United States. As this Court has explained: "The right to vote freely for the candidate of one's choice is of the essence of a demo-

1. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), (transcript available from the Library of Congress, http://bit.ly/3SoPVgm).

cratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Yet at a time when the United States is threatening sanctions against the socialist dictatorship in Venezuela for excluding the leading opposition candidate for president from the ballot,[2] respondent Anderson asks this Court to impose that same anti-democratic measure at home. To date, at least 60 state and federal courts throughout the country have refused to remove President Trump from the ballot. The Colorado Supreme Court is the lone outlier, and this Court should reverse, for the reasons below, and protect the rights of the tens of millions of Americans who wish to vote for President Trump.

I. THE PRESIDENT IS NOT AN "OFFICER OF THE UNITED STATES"

Section 3 contains two reticulated lists of officers and offices, neither of which expressly mentions the president. Anderson would have us believe that the presidency is tacitly subsumed within generic catch-all phrases such as "officer of the United States" and "office … under the United States." But she cannot overcome the overwhelming textual and structural evidence that "officer of the United States," as used throughout the Con-

2. Regina Garcia Cano, *US Government Pulls Some of Venezuela's Sanctions Relief After Court Blocks Opposition Candidate*, Associated Press (Jan. 29, 2024), http://bit.ly/3uqodaU; Karine Jean-Pierre, Press Secretary, Press Briefing at The White House (Jan. 29, 2024), http://bit.ly/3UrHi7j.

stitution, refers only to appointed and not elected officials. And her arguments that the presidency qualifies as an "office … under the United States" also fail to persuade.

1. Anderson insists that every person who holds a "federal office" is an "officer of the United States." *See* Anderson Br. 35 ("[T]he holder of a federal office is an "officer of the United States."); *id.* at 36–37 (citing opinions of Attorney General Stanberry). That is wrong because the Speaker of the House and President Pro Tempore of the Senate are "officers" and hold "federal offices,"[3] yet they cannot be "officers of the United States" because they are not subject to impeachment[4] and are not commissioned by the president.[5] Unless Anderson is prepared to jettison *Blount's Case* and subject the Speaker and President Pro Tempore to impeachment, she must concede that "officers of the United States" re-

3. U.S. Const. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers"); U.S. Const. art. I, § 3, cl. 5 ("The Senate shall chuse their other Officers"). If the Speaker and President Pro Tempore are not "officers" within the meaning of the Constitution, then the Presidential Succession Law is unconstitutional. *See* 3 U.S.C. § 19; U.S. Const. art. II, § 1, cl. 6 (allowing only "officers" to act as president when the presidency and vice presidency are vacant); Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113 (1995).

4. Pet. Br. 24 & n.27 (discussing Blount's Case); U.S. Const. art. II, § 4 (subjecting "all civil Officers of the United States" to impeachment).

5. U.S. Const. art. II, § 3 ("[The President] … shall Commission all the Officers of the United States.").

fers only to a subset of federal officeholders. And the only sensible construction of this phrase—in light of the Appointments Clause, the Commissions Clause, and the Impeachment Clause—is that "officers of the United States" refers to *appointed* federal officials and excludes elected individuals such as the Speaker, the President Pro Tempore, and the President and Vice President.[6]

Anderson reiterates her claim that section 3 establishes "symmetry in pairing barred offices with excluded individuals." Anderson Br. 35. That is wrong because: (1) "Member of Congress" sweeps more broadly than "Senator or Representative in Congress";[7] (2) Section 3 prohibits disqualified individuals from serving in the Electoral College, without disqualifying former electors who engaged in insurrection;[8] and (3) the canons of construction counsel against giving equivalent meanings to differently phrased provisions, especially when Congress

6. Anderson falsely claims that our interpretation limits "officers of the United States" to "presidential appointees." Anderson Br. 39, 41. "Officers of the United States" include inferior officers appointed by courts or heads of department. *See Morrison v. Olson*, 487 U.S. 654, 670–71 (1988).

   Anderson also quotes Chief Justice Marshall and suggests that every federal employee is an "officer of the United States," but the Court has emphatically rejected that stance. *Compare* Anderson Br. 35 ("'If employed on the part of the United States, he is an officer of the United States.'" (quoting *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823)), *with United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021) (distinguishing "officers" from "'lesser functionaries' such as employees or contractors").

7. Pet. Br. 29 & nn.39–40.

8. Pet. Br. 30.

could have used identical wording in the lists of offices and officers.[9] Anderson does not deny any of this, but she tries to get around these admitted asymmetries by observing that electors and non-voting "members" of Congress are not constitutionally required to swear or affirm their support of the Constitution. *See* U.S. Const. art. VI cl. 3; Anderson Br. 36 & n.10. But nonvoting delegates and resident commissioners have always sworn such an oath[10] and many presidential electors do,[11] even though Article VI does not require it. And section 3 turns on whether the oath was previously taken, not on whether it was constitutionally compelled. So Anderson cannot establish the "symmetry" that she insists upon, and she has no basis for demanding correspondence between the "officers of the United States" and those who hold an "office … under the United States."

Anderson tries to get traction from non-constitutional sources that describe the president as an "officer" in the colloquial sense of the word. *See* Anderson Br. 37–39. But none of this purports to interpret the meaning of "officer of the United States" in the Constitu-

9. Pet. Br. 30–31 (citing *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 544 (2012); *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

10. 2 U.S.C. § 25.

11. 8 Colo. Code Regs. § 1505-1-24 (requiring presidential electors to swear or affirm that they will support the Constitution of the United States); Md. Code, Election Law Code § LAW 8-505 (same).

tion.[12] And none of it can alter or affect the constitutional meaning of this phrase. President Johnson cannot make the President into a constitutional "officer of the United States" by issuing a proclamation describing himself that way, any more than Congress can change the meaning of the Fourteenth Amendment by enacting a statute that purports to define its substantive reach. *See City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). And no proclamation, floor statement, or court opinion can overcome the fact that elected officials—including the President, Vice President, and members of Congress—cannot be characterized as "officers of the United States" because: (1) They are not commissioned by the President; (2) They are not "appointed" pursuant to Article II; and (3) They are excluded from the "civil officers of the United States" described in the Impeachment Clause.

Anderson eventually gets around to addressing the Commissions Clause, the Appointments Clause, and the Impeachment Clause. *See* Anderson Br. 40–43. She claims that the Commissions Clause "means only that the President alone has the power to grant commissions,"[13] but that stance cannot be squared with the constitutional language. The Commissions Clause does not say: "[T]he President alone may Commission the Officers of the United States." It says that the president

12. None of the judicial opinions cited by Anderson consider or address whether the president is an "officer of the United States" as that phrase is used in the Constitution. *See* Anderson Br. 38–39.

13. Anderson Br. 42.

"*shall* Commission *all* the Officers of the United States." U.S. Const. art. II, § 3 (emphasis added). "Shall" means must,[14] and "all" means every one.[15] And when the Constitution requires every "officer of the United States" to be commissioned by the president, the contrapositive follows as a matter of logic: Anyone who is *not* constitutionally required to be commissioned by the President cannot be an "officer of the United States." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157, 162 (1803) (holding that the issuance of a presidential commission is a legal prerequisite to a valid appointment).

Anderson tries to get around the Appointments Clause by observing that it requires the president and Senate to appoint only those officers "whose Appointments are not herein otherwise provided for." Anderson Br. 40 (quoting U.S. Const. art. II, § 2). Then she insists that this caveat refers to the "appointments" of the President, Vice President, Speaker of the House, and President Pro Tempore of the Senate—which would make each of them into an "officer of the United States." *Id.* This is wrong for many reasons.

14. *See Maine Community Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."); *Murphy v. Smith*, 583 U.S. 220, 223 (2018) ("[T]he word 'shall' usually creates a mandate, not a liberty").

15. *All*, Merriam-Webster, https://bit.ly/42uzBPy ("every member or individual component of"); *All*, The Britannica Dictionary, https://bit.ly/492JiY0 ("every member or part of").

First. The president is not "appointed" by the Electoral College; he is *elected*.[16] And only an appointed and not an elected official can be an "officer of the United States." *See Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 497–98 (2010) ("The people do not vote for the 'Officers of the United States.'" (quoting U.S. Const. art. II, § 2, cl. 2)). House and Senate members, for example, are elected rather than "appointed,"[17] so they cannot qualify as "officers of the United States" under the "otherwise provided for" caveat.[18] The Constitution consistently describes the President as elected and not appointed,[19] and he cannot be regarded as an "officer of the United States" for the same reason.

16. U.S. Const. art. II, § 1, cl. 1 ("The … President … shall …, together with the Vice President, … be *elected*, as follows" (emphasis added)); U.S. Const. art. II, § 1, cl. 6 ("until … a President shall be *elected*." (emphasis added)); U.S. Const. art. II, § 1, cl. 7 (prohibiting changes to the president's salary "during the Period for which he shall have been *elected*" (emphasis added)); U.S. Const. amend. XXII ("No person shall be *elected* to the office of the President more than twice" (emphasis added)).
17. U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative … who shall not, *when elected*, be an Inhabitant of that State" (emphasis added)); U.S. Const. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was *elected* …" (emphasis added)); U.S. Const. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, *elected* by the people" (emphasis added)).
18. Pet. Br. 24 n.27 (describing Blount's Case, which established that Senators and Representatives are not subject to impeachment as "civil officers of the United States.").
19. *See supra* note 16.

Anderson's stance also has implications for the Sinecure Clause, which says that "[n]o Senator or Representative shall, during the Time for which he was elected, be *appointed* to any civil Office under the Authority of the United States … [if] the Emoluments whereof shall have been encreased during such time." U.S. Const. art. I, § 6, cl. 2 (emphasis added). If this Court holds that presidents and vice presidents are "appointed," then any Senator who became president or vice president before the expiration of his six-year term will have served in violation of the Constitution if the president or vice president's salary had increased during that Senate term but before his "appointment" to office. It would also empower Congress to strategically disqualify sitting Senators from the presidency by voting to increase the president's salary by a small amount.

Second. Even if the President could somehow be described as an "appointed" rather than elected official, he *still* cannot be characterized as an "officer of the United States" under the "otherwise provided for" caveat because: (1) He does not receive a presidential commission; and (2) He is listed separately from "civil officers of the United States" in the Impeachment Clause. The Speaker of the House and the President Pro Tempore of the Senate likewise cannot be squeezed into the "otherwise provided for" caveat—even if one considers them "appointed" officials—because they are not commissioned by the president and cannot be impeached.[20]

20. *See supra* note 18.

Third. Anderson is wrong to claim that our interpretation leaves the "otherwise provided for" caveat without any work to do. *See* Anderson Br. 40. The Constitution "otherwise provide[s]" for the appointments of inferior officers[21] and recess appointees,[22] and this caveat refers (at the very least) to the appointments of these "officers of the United States," who need not receive a presidential appointment with the Senate's advice and consent. It could also refer to the appointment of legislative "officers" such as the House parliamentarian, who is unilaterally appointed by the Speaker pursuant to 2 U.S.C. § 287a and U.S. Const. art. I, § 2, cl. 5, although these officials cannot qualify as "officers of the United States" unless they are subject to impeachment and required to be commissioned by the President.

Anderson claims that the Impeachment Clause lists the president and vice president separately from "all civil Officers of the United States" to avoid confusion that might arise from the president's role as both a "civil" and "military" officer. *See* Anderson Br. 41. But this does not explain why the Impeachment Clause omits the word "other" before "civil Officers of the United States," and it cannot explain the separate enumeration of the vice

21. U.S. Const. art. II, § 2, cl. 2 ("[B]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

22. U.S. Const. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

president, who has no military responsibilities. The only plausible inference is the one drawn by Justice Story: That the president and vice president are listed separately from "all civil Officers of the United States" because they are *not* "officers of the United States." Pet. Br. 21–22. And if Anderson wants to argue that the Impeachment Clause lists the president separately to "avoid . . . uncertainty" while simultaneously insisting that the president falls within the "civil Officers of the United States," then she must explain why section 3 *fails* to explicitly mention the President as a covered officer given the many difficulties with characterizing the president as an "officer of the United States."

Anderson observes that President Trump's interpretation of "officers of the United States" will exempt the vice president from the oath requirement of Article VI. *See* Anderson Br. 41; U.S. Const. art. VI, cl. 3. But the first Congress enacted legislation requiring the vice president to swear the same oath as everyone else listed in Article VI. *See* 1 Stat. 23. And a statutory oath requirement can reach beyond those mentioned in Article VI. *See* 5 U.S.C. § 3331. So the absence of an explicit constitutional oath requirement for the vice president is no reason for concern, and is certainly no reason to force the president into the category of "officers of the United States."

It is also hard to accept Anderson's construction of "officer of the United States" when section 3 covers only those who swear an oath to "support" the Constitution. Anderson says that the presidential oath to "preserve, protect, and defend" is just another way of promising to

"support" the Constitution. *See* Anderson Br. 43–44. But then she needs to explain why the drafters of section 3 would create this ambiguity by using the word "support"—and excluding any reference to the presidential oath—if the president were understood to be included as a covered officer.

Anderson is also wrong to say that President Trump's interpretation of section 3 "def[ies] common sense." *See* Anderson Br. 44–45. It was entirely sensible for section 3 to exclude the president as a covered "officer" because: (1) No ex-president supported the confederacy except John Tyler, who died in 1862;[23] (2) Each of our 46 presidents, except George Washington and Donald Trump, would be covered by section 3 because they held a previous job listed in the amendment; and (3) Former presidents rarely seek election or appointment to office, and the overwhelming majority retire from public service. Indeed, Anderson's construction of section 3 will allow the courts to eject a *sitting* president from office, apart from the impeachment process, if a court independently determines that he "engaged in insurrection" against the Constitution, even if Congress refuses to impeach and convict on that ground.

Finally, Anderson does not even mention *United States v. Smith*, 124 U.S. 525 (1888), or *United States v. Mouat*, 124 U.S. 303 (1888), which make clear that the president is *not* an "officer of the United States"—either under the Appointments Clause or under any federal

23. Pet. Br. 32 & n.42.

statute using this phrase.[24] A ruling that adopts Anderson's construction of "officers of the United States" will overrule the interpretations adopted in *Smith* and *Mouat*.

2. Anderson describes the presidency as an "office" (which it undoubtedly is)[25] and insists that "office … under the United States" encompasses every federal "office." *See* Anderson Br. 34 ("'[U]nder the United States' … distinguish[es] federal offices from offices 'under any State.'"). Anderson's construction of "office … under the United States" is wrong. The Speaker of the House and President Pro Tempore of the Senate are "officers"[26] who hold federal "offices." But neither holds an "office … under the United States" because the Incompatibility Clause bars House and Senate members from "holding" such an office. *See* U.S. Const. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

Anderson says it is "clear" that "office … under the United States" includes the presidency,[27] but the evidence is far from "clear." *See* Amicus Br. of Professor Kurt T. Lash. The most troublesome evidence for Anderson is that section 3 does not mention the presidency or

24. In a footnote, Anderson falsely suggests that these cases involve only the president's authority to appoint "other officers." Anderson Br. 40 n.13.

25. Pet. Br. 25–26 & nn.34–35.

26. *See* note 3 and accompanying text.

27. Anderson Br. 34.

the vice presidency as covered "offices"—even though it specifically enumerates senators, representatives, and electors for president and vice president. And a draft of section 3 introduced by Representative Samuel McKee explicitly listed the presidency and vice presidency as "offices" closed to confederate rebels,[28] yet this was rejected in favor of the enacted language, which omits any mention of the presidency and instead disqualifies individuals from serving as electors.

The Colorado Supreme Court tried to explain this by observing that senators, representatives, and electors do not hold "offices … under the United States" and therefore needed to be separately enumerated. Pet. App. 63a–64a. But it was at least debatable whether that phrase would encompass the presidency,[29] especially when the cognate phrase "*officers of* the United States" excludes the president every time it appears in the Constitution. Pet. Br. 20–33. So one would expect the text of section 3 to specifically mention the presidency in the list of enumerated offices rather than leave this matter to a contestable inference. *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (clear statement needed for statutory language to encompass the president).

II. PRESIDENT TRUMP DID NOT "ENGAGE IN INSURRECTION"

Anderson claims that the events at the U.S. Capitol were an "insurrection" and that President Trump "en-

28. Cong. Globe, 39th Cong., 1st Sess., at 919 (1866).

29. Amicus Br. of Professor Kurt T. Lash.

gaged" in it by supposedly "inciting" the crowd. *See* Anderson Br. 15–33. This is wrong on every count. There was no "insurrection," President Trump did not "incite" anything, and President Trump did not "engage in" anything that constitutes "insurrection."

First. The events of January 6 were not an "insurrection," as they did not involve an organized attempt to overthrow or resist the U.S. Government. *See* Amicus Br. of Indiana et al. 8–17; Michael W. McConnell, *Is Donald Trump Disqualified from the Presidency? A Response to Matthew J. Franck*, Public Discourse (Jan. 18, 2024), http://bit.ly/49i9spw (events of January 6 were not "insurrection" because they "lasted only about three hours, most of the participants acted on the spur of the moment, few [if any] … carried firearms, and their objectives were narrow: to pressure Congress and the vice president to correct what they … thought were fraudulent election returns.").

Second. President Trump did not "incite" violence by telling his supporters to "fight," "fight like hell," march to the Capitol, and "take back our country." Anderson Br. 32 (claiming that these statements "explicitly" incited violence). Even the district court acknowledged that language of this sort is "prevalen[t] … in the political arena,"[30] and President Trump's statements are far less provocative than language that falls short of "incitement" under *Brandenburg*. *See Hess v. Indiana*, 414 U.S. 105, 107 (1973) ("We'll take the f—ing street again"); *Watts v. United States*, 394 U.S. 705, 706 (1969)

30. Pet. App. 276a (¶ 297).

("[T]he first man I want to get in my sights is L.B.J."); *Million Youth March, Inc. v. Safir*, 63 F. Supp. 2d 381, 391 (S.D.N.Y. 1999) ("hateful, racist, and offensive" remarks and open "call[s] for violence" did not constitute incitement). Anderson touts President Trump's 2:24 P.M. tweet, but that tweet did not call for any action whatsoever. It was also sent over an hour *after* disorder broke out at the Capitol and could not have "incited" events that were long underway.[31]

So the district court had to rely on Professor Simi's opinion that President Trump communicates in "coded language with his violent supporters"[32] to push President Trump's speech into the "incitement" category. Anderson now tries to downplay the role of Simi's testimony,[33] but she has nothing apart from Simi that can convert President Trump's statements—which would be constitutionally protected speech if uttered by any person other than President Trump—into criminally proscribable "incitement."

31. Similar deficiencies afflict Anderson's reliance on President Trump's statements *before* January 6, 2021, which are core political speech. *See* Anderson Br. 20–21. And Anderson's attempts to invoke President Trump's *post-speech* actions and alleged failures to deploy federal resources to stop the disorder fare even worse. *See id.* at 23–24, 26–27. Those are judicially unreviewable exercises of the President's law-enforcement discretion, *see United States v. Texas*, 599 U.S. 670, 678 (2023), and they could not have "incited" already-past events.

32. Pet. App. 228a (¶ 142).

33. Anderson Br. 28 ("Simi's testimony was … just one facet of the overwhelming and largely undisputed evidence presented at trial").

Third. Even if there had been "incitement" and "insurrection," President Trump *still* did not "engage in" it. "Incitement" (which did not occur here) is not "engagement" in "insurrection," because a person who "incites" seeks only to bring about "imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Not all lawlessness rises to the level of "insurrection." And the district court found only that President Trump's speeches and tweets "incited imminent lawless violence"[34]—not that they incited anything that might be characterized as "insurrection."

Even "incitement" of insurrection would not be enough to constitute "engagement in" insurrection, because incitement turns on whether a person's speech or conduct is "directed" toward and "likely to … produce" the relevant act of lawlessness. *See Brandenburg*, 395 U.S. at 447. "Engagement," by contrast, requires *active participation* in insurrection. *See* Black's Law Dictionary (11th ed. 2019) (defining "engage" as "employ or involve oneself; to take part in; to embark on.").

President Trump is *not* arguing that "engagement in insurrection" requires an individual to "personally commit[] violent acts." *See* Anderson Br. 29. President Trump is arguing that none of his actions—including his

34. Pet. App. 229a (¶ 144) ("Trump's Ellipse speech incited imminent lawless violence."); *id.* at 235a (¶ 172) ("Trump's 2:24 P.M. tweet further encouraged imminent lawless violence"); *id.* at 269a (¶ 282) (falsely claiming that Anderson could prove that President Trump "engaged in insurrection through incitement" if "his speech was intended to produce imminent lawless action and was likely to do so.").

speeches and social-media posts—can qualify as "*engagement in* insurrection." None of the authorities cited by Anderson that include "incitement" as "engagement in insurrection" involved speech or conduct of the sort that President Trump engaged in. *See* Anderson Br. 29–31.

Finally, the Court should not apply the clearly erroneous standard to constitutional facts or mixed questions of fact and law, such as whether President Trump "incited" violence or "engaged in" insurrection (which he did not as is clear from his speech and social-media posts). *See U.S. Bank National Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 583 U.S. 387, 396 n.4 (2018) (citing authorities). Clearly-erroneous review is appropriate for "basic" or "historical" facts—such as who said what, or when and where it was said—but the blanket deference demanded by Anderson is unwarranted. *See id.* at 394; Anderson Br. 18–19. The district court's findings involving President Trump's mens rea should also be reviewed independently, as no witness claimed to have firsthand knowledge of President Trump's intent or thought process. The trial court is in no better position than this Court to evaluate President Trump's state of mind based on the evidence presented. *See City of Houston v. Hill*, 482 U.S. 451, 458 n.6 (1987) ("An independent review of the record is appropriate where the activity in question is arguably protected by the Constitution.").

III. SECTION 3 SHOULD BE ENFORCED ONLY THROUGH CONGRESS'S CHOSEN METHODS OF ENFORCEMENT

President Trump is not arguing that section 3 is "non-self-executing." His claim is that section 3 may be enforced only through the congressionally enacted methods of enforcement.

Anderson does not deny that congressional implementing legislation can implicitly preclude other means of enforcing section 3, *see Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981), yet she presents no argument for why the *Sea Clammers* principle should not apply here. Instead, Anderson attacks the rationale of *Griffin's Case* and the Colorado Republican Party's claim that section 3 is "not self-executing." *See* Anderson Br. 52–56. But regardless of what litigants and commentators now think about *Griffin's Case*, the fact remains that it was the only judicial decision in place when Congress enacted (and later modified) its statutory regime to enforce section 3. Congress legislated on the understanding that its implementing legislation would be exclusive, so rejecting *Griffin's Case* now would not only undermine stare decisis principles but also repudiate the premise of the statutory enforcement regime that Congress has enacted.

Anderson notes that the Insurrection Act—the only surviving piece of congressional enforcement legislation—was enacted before the Fourteenth Amendment and sweeps more broadly than the constitutional disqualification. *See* Anderson Br. 53 n.19. But none of that undermines its exclusivity under *Sea Clammers*. When

Congress repealed the quo warranto provisions that it enacted in response to *Griffin's Case*, it knew that the Insurrection Act was the only means of enforcement left, and that the Insurrection Act would be the exclusive means of enforcing section 3 given the precedent of *Griffin's Case*. It defies belief that Congress, having abolished the quo warranto regime while leaving criminal prosecution under 18 U.S.C. § 2383 as the sole means of removing insurrectionist office-holders, would have wanted to allow state courts to enforce section 3 on their own by blocking candidates from the ballot.

Finally, Anderson's "self-execution" arguments and interpretation of section 3 would mean that President Trump could not constitutionally serve as president after January 6, 2021. This will open the door for litigants to challenge the validity of every executive action that President Trump and his administration took during his last two weeks in office.

IV. SECTION 3 CANNOT BE USED TO DENY PRESIDENT TRUMP ACCESS TO THE BALLOT

Anderson concedes that the states are constitutionally forbidden to add to or alter the Constitution's qualifications to the presidency. *See* Anderson Br. 49 ("[A] state has no power to add qualifications for the office of the Presidency"); Griswold Br. 28 ("It is beyond dispute that states cannot add or modify qualifications for the presidency."). And she acknowledges that Congress may "remove" a section 3 disability "at any time and for any reason." Anderson Br. 2. Yet Anderson argues that the Constitution allows Colorado to exclude President Trump from the ballot if this Court concludes that he is "pres-

ently" disqualified under section 3—even though Congress can lift that disability before the inauguration. *See* Anderson Br. 45–52.

Anderson's argument is foreclosed by *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), as she is demanding that President Trump qualify under section 3 not only on the dates that he *holds* office, but also on the dates of the primary and general elections and on any date that a court might rule on his ballot eligibility. Anderson's stance is indistinguishable from laws requiring congressional candidates to "inhabit" their state prior to Election Day, when the Constitution requires only that they inhabit the state "when elected."[35] Pet. Br. 44–45 (citing *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 589–90 (5th Cir. 2006), and other authorities); Amicus Br. of Senator Daines 5–20. Yet Anderson ignores the cases that disapprove attempts to alter the timing of Article I's congressional-residency requirements, and she makes no attempt to reconcile her argument with the holdings of those cases.

Anderson tries to analogize the Colorado Supreme Court's ruling to *Hassan v. Colorado*, 495 F. App'x 947 (10th Cir. 2012), and rulings that uphold ballot exclusions of naturalized citizens, 27-year-olds, and candidates who are *categorically* disqualified from the presidency. *See* Anderson Br. 47–48. But excluding those types of candi-

35. U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative … who shall not, *when elected*, be an Inhabitant of that State in which he shall be chosen" (emphasis added)); U.S. Const. art. I, § 3, cl. 2 (same rule for senators).

dates from the ballot does not in any way alter the Constitution's eligibility rules. None of these rulings allow states to deny ballot access to candidates whose qualifications are *contingent* upon future action (or inaction), and a state cannot use its ballot-access rules to accelerate the deadline for satisfying a constitutional qualification for office.[36]

Anderson is also wrong to say that President Trump is "presently" disqualified from holding office. *See* Anderson Br. 48 ("Section 3 imposes a *present* disqualification"). Section 3 is a prohibition only on *holding* office, and Congress can waive this prohibition between now and the end of the next presidential term. So no court or litigant can declare that President Trump is "presently" disqualified from holding office without assuming or predicting that Congress will refuse to lift any section 3 disability that might apply. Anderson may believe or hope that Congress will not waive section 3 between now and January 20, 2029. But neither the Colorado Supreme Court nor this Court can declare a candidate ineligible for the presidency *now* based on a prediction of what Congress may or may not do in the future. Nor can a court deprive a presidential candidate of the opportunity to petition Congress for a waiver—especially when Con-

36. Griswold falsely claims that our argument would forbid states to exclude foreign-born citizens from the presidential ballot on the off chance that the Constitution might be amended to allow them to serve before Inauguration Day. *See* Griswold Br. 30 n.10. Whether a state law alters the qualifications established by the Constitution obviously must be assessed under the Constitution as it currently exists.

gress is mostly likely to grant a waiver *after* the candidate has been elected, as its members will face political pressures to respect the will of the voters and allow the president-elect to take office. Anderson's position would also allow a state to block a 34-year-old from the presidential ballot, even if that candidate will turn 35 before Inauguration Day, on the ground that he is "presently disqualified" from holding office. *See* Anderson Br. 50.

Anderson and Griswold suggest that states can bar President Trump from the ballot to protect voters from potentially "wasting" their ballots on someone who may eventually be found ineligible for office. *See* Anderson Br. 47, 51; Griswold Br. 26. But it is for the individual voters to decide for themselves how to weigh this possibility when casting ballots, and a state cannot invoke this paternalism to prevent voters from supporting a candidate who may be eligible by Inauguration Day.

Finally, Anderson invokes the Electors Clause and *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020),[37] but neither does anything to support the Colorado Supreme Court's ruling. Anderson acknowledges that states are constitutionally forbidden to alter qualifications for the presidency,[38] so a state cannot bar its electors from voting for candidates who fail to satisfy an extraneous state-imposed qualification. *Chiafalo* is no help because there is no "long settled and established practice" of requiring electors to comply with state-imposed eligibility criteria. *See Chiafalo*, 140 S. Ct. at 2326. And the Electors Clause

37. Anderson Br. 46–47.

38. Anderson Br. 49.

empowers only a state *legislature*—not its judiciary—to direct the manner of choosing presidential electors. There is no legislative enactment that requires or even allows Colorado's Secretary of State to exclude supposed "insurrectionists" from the presidential primary ballot, and Anderson has yet to identify such a statute. *See* Anderson Br. 58–60; Pet. Br. 46–50.

V. THE COLORADO SUPREME COURT VIOLATED THE ELECTORS CLAUSE AND THE COLORADO ELECTION CODE

The Colorado Supreme Court adopted an atextual interpretation of Colo. Rev. Stat. § 1-4-1203(2)(a), which requires only that a *political party* that participates in Colorado's presidential primary election have *at least one* "qualified candidate." Anderson makes no attempt to reconcile the language of this statute with the Colorado Supreme Court's interpretation of it. This defeats any attempt to invoke Article II's Electors Clause or *Chiafalo*, because "the legislature" has not directed President Trump's exclusion from the ballot. *See* Anderson Br. 46.

CONCLUSION

The judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted.

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