No._____

In the Supreme Court of the United States

DONALD J. TRUMP, PETITIONER

v.

NORMA ANDERSON, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Supreme Court of Colorado held that President Donald J. Trump is disqualified from holding the office of President because he "engaged in insurrection" against the Constitution of the United States—and that he did so after taking an oath "as an officer of the United States" to "support" the Constitution. The state supreme court ruled that the Colorado Secretary of State should not list President Trump's name on the 2024 presidential primary ballot or count any write-in votes cast for him. The state supreme court stayed its decision pending United States Supreme Court review.

The question presented is:

> Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?

PARTIES TO THE PROCEEDING

Petitioner President Donald J. Trump was intervenor-appellee/cross-appellant in the state supreme court.

Respondents Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian were petitioners-appellants/cross-appellees in the state supreme court.

Respondent Jena Griswold was respondent-appellee in the state supreme court.

Respondent Colorado Republican State Central Committee was intervenor-appellee in the state supreme court.

A corporate disclosure statement is not required because President Trump is not a corporation. *See* Sup. Ct. R. 29.6.

STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

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PETITION FOR WRIT OF CERTIORARI

It is a "'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)). Petitioner President Donald J. Trump ("President Trump") is *the* leading candidate for the Republican Party nomination for President of the United States.[1] Over 74 million Americans voted for President Trump in the 2020 general election, including more than 1.3 million voters in

1. *See 2024 Republican Presidential Nomination*, RealClearPolitics (last accessed Jan. 2, 2024), https://www.realclearpolling.com/polls/president/republican-primary/2024/national (reporting an average lead of over 50% in national polling above his nearest competitor for the Republican nomination.).

the State of Colorado.[2] Yet, on December 19, 2023, the Colorado Supreme Court ordered President Trump removed from the presidential primary ballot—a ruling that, if allowed to stand, will mark the first time in the history of the United States that the judiciary has prevented voters from casting ballots for the leading major-party presidential candidate.

In our system of "government of the people, by the people, [and] for the people,"[3] Colorado's ruling is not and cannot be correct. This Court should grant certiorari to consider this question of paramount importance, summarily reverse the Colorado Supreme Court's ruling, and return the right to vote for their candidate of choice to the voters.

The question of eligibility to serve as President of the United States is properly reserved for Congress, not the state courts, to consider and decide. By considering the question of President Trump's eligibility and barring him from the ballot, the Colorado Supreme Court arrogated Congress' authority.

In addition, even if the Colorado Supreme Court could consider challenges to President Trump's eligibility, which it cannot, it misapplied the law. First, the President is not "an officer of the United States," he took a different oath than the one set forth in section 3, and the presidency is

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2. *Federal Elections 2020: Election Results for the US. President, the U.S. Senate and the U.S. House of Representatives*, Federal Election Commission (Oct. 2022), https://www.fec.gov/resources/cms-content/documents/federalelections2020.pdf.

3. *See* Abraham Lincoln, *Gettysburg address delivered at Gettysburg Pa. Nov. 19th, 1863*, Nat'l Archives, https://www.loc.gov/resource/rbpe.24404500/?st=text.

not an "office under the United States." Thus, President Trump falls outside the scope of section 3. Second, the Colorado Supreme Court erred in how it described President Trump's role in the events of January 6, 2021. It was not "insurrection" and President Trump in no way "engaged" in "insurrection." Third, the proceedings in the Colorado Supreme Court were premature and violated the Electors Clause.

Finally, there are many other grounds for reversal, as many scholars have pointed,[4] including the three grounds for reversal presented in the petition for certiorari filed last week by the Colorado Republican State Central Committee.

OPINIONS BELOW

The state supreme court's opinion is at 2023 WL 8770111, and is reproduced at App. 1a–183a. The district court's opinion is at 2023 WL 8006216, and is reproduced at App. 184a–284a.

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4. *See* Samuel Moyn, *The Supreme Court Should Overturn the Colorado Ruling Unanimously*, New York Times (Dec. 22, 2023), available at http://nyti.ms/3va3CaU; Lawrence Lessig, *The Supreme Court Must Unanimously Strike Down Trump's Ballot Removal*, Slate (Dec. 20, 2023), available at http://bit.ly/4awV7XT; Richard A. Epstein, Misguided Disqualification Efforts, Defining Ideas (Nov. 16, 2023), available at http://hvr.co/48fEX3x; John Harrison and Saikrishna Prakash, *If Trump Is Disqualified, He Can Still Run*, Wall Street Journal (Dec. 20, 2023) , available at http://on.wsj.com/47f7HrS; Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, available at http://bit.ly/48vZ6Sz.

JURISDICTION

The state supreme court entered judgment on December 19, 2023. App. 1a. President Trump timely filed this petition on January 3, 2024. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are at App. 318a–325a.

STATEMENT

Over the last few months, more than 60 lawsuits or administrative challenges have been filed seeking to keep President Trump from appearing on the presidential primary or general-election ballot. The common theory behind these lawsuits and challenges is that President Trump is somehow disqualified from holding office under section 3 of the Fourteenth Amendment because of an allegation that he "engaged in insurrection" on January 6, 2021.[5] Courts considering these claims—including state supreme courts in Michigan and Minnesota—have all rejected them for varying reasons, contrary to the Colorado Supreme Court's ruling of December 19, 2023, which ordered the Colorado Secretary of State to exclude President Trump from the presidential primary ballot. The court stayed its ruling until January 4, 2024, and announced that the stay would automatically continue if

5. *See* William Baude and Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev. ___ (forthcoming 2024), available at http://bit.ly/3RCboSp.

President Trump sought review in this Court before that date. App. 114a.

The respondents in this case include six individuals eligible to vote in Colorado's Republican presidential primary (the "Anderson litigants")[6] who sued Colorado Secretary of State Jena Griswold in state district court, claiming that section 3 establishes "a constitutional limitation on who can run for President."[7]

The Anderson litigants sued under sections 1-1-113(1) and 1-4-1204(4) of the Colorado Revised Statutes. Section 1-1-113(1) allows an eligible voter to sue any person "charged with a duty" under the Colorado Election Code, but only if that person "has committed or is about to commit a breach or neglect of duty or other wrongful act." Colo. Rev. Stat. § 1-1-113(1) (App. 319a).[8] And section 1-4-

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6. The Anderson litigants are "petitioners" in the state-court proceeding but respondents in this Court. Secretary Griswold is a respondent in both the state-court proceedings and this Court. To avoid confusion, we will use the parties' names rather than their status.

7. *Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶ 343, available at http://bit.ly/3vgwuP2.

8. The full text of Colo. Rev. Stat. § 1-1-113(1) provides:

> When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good

(continued…)

1204(4) specifically authorizes an eligible voter to challenge "the listing of any candidate on the presidential primary election ballot" under the procedures in section 1-1-113, although section 1-4-1204(4) imposes additional rules for these types of lawsuits and demands that they be resolved with extraordinary speed: they must be filed with the district court within five days of the filing deadline, heard within five days of filing, and the district court must issue findings of fact and conclusions of law within 48 hours of the hearing. Colo. Rev. Stat. § 1-4-1204(4) (App. 325a).

Nothing in Colorado's Election Code requires the Secretary of State to evaluate the qualifications of presidential primary candidates. Instead, the Colorado statutes require a presidential primary candidate to submit a "notarized statement of intent." Colo. Rev. Stat. § 1-4-1204(1)(c) (App. 324a). This statement-of-intent form, which appears on the Secretary of State's website,[9] requires presidential candidates to "affirm" that they meet the Constitution's age, residency, and natural-born citizenship requirements by checking the following boxes:

Qualifications for Office (You must check each box to affirm that you meet all qualifications for this office)

☐ Age of 35 Years ☐ Resident of the United States for at least 14 years ☐ Natural-born U.S. Citizen

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> cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

9. *See* http://bit.ly/41xG63P [http://perma.cc/PE28-ZLD5].

The statement-of-intent form also requires candidates to sign an "affirmation" that they "meet all qualifications for the office prescribed by law":

Applicant's Affirmation
I intend to run for the office stated above and solemnly affirm that I meet all qualifications for the office prescribed by law.

A signature line appears below this affirmation, along with an unfilled notarial certificate. Colorado law imposes no duty on the Secretary of State to verify or second-guess the candidate's sworn representations, or to exclude presidential candidates from the ballot if the Secretary disbelieves or disagrees with the candidate's sworn representations.

The Anderson litigants nonetheless insist that Secretary Griswold has a "mandatory duty" to enforce section 3 of the Fourteenth Amendment regardless of what state law might provide,[10] and they derive this "duty" from the Secretary's oath to support the U.S. Constitution.[11] They also incorrectly claim that any decision to include President Trump on the presidential primary ballot would violate the Constitution and therefore qualify as "a breach or neglect of duty or other wrongful act" within the meaning

10. *Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶ 440, available at http://bit.ly/3vgwuP2 ("The Secretary has a mandatory duty to support, obey, consider, apply, and enforce the U.S. Constitution, including Section 3 of the Fourteenth Amendment, in executing her official duties.").

11. *See Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶ 439, available at http://bit.ly/3vgwuP2 ("Both the Secretary and this Court are required by law to take an oath to support the U.S. Constitution, including Section 3 of the Fourteenth Amendment.").

of section 1-1-113(1).[12] Therefore, they sued for relief under section 1-1-113(1), which authorizes a state district court to "issue an order requiring substantial compliance with the provisions of" the Colorado Election Code. *See* Colo. Rev. Stat. § 1-1-113(1).[13]

I. THE DISTRICT COURT PROCEEDINGS

The Anderson litigants filed their petition on September 6, 2023. App. 12a. The district court did not, however, hold a hearing within five days of the filing, as required by section 1-4-1204(4). *See* Colo. Rev. Stat. § 1-4-1204(4). Instead, the district court held a status conference on September 18, 2023, after the statutory deadline for the hearing had passed, and it scheduled a five-day hearing to begin on October 30, 2023—54 days after the petition's filing date.[14] Then, the district court denied the motions to

12. *See Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶ 442, available at http://bit.ly/3vgwuP2 ("Any action by the Secretary to provide ballot access to a presidential primary candidate who fails to meet all constitutional qualifications for the Office of President is . . . 'a breach or neglect of duty or other wrongful act'" (citing Colo. Rev. Stat. 1-1-113(1)).

13. The Anderson litigants also brought a claim for declaratory relief against both Secretary Griswold and President Trump but dropped this count after President Trump moved to dismiss. *See Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶¶ 449–452, available at http://bit.ly/3vgwuP2; *Anderson v. Griswold*, 2023CV32577, Omnibus Ruling on Pending Dispositive Motions at ¶¶ 1, 6, available at http://bit.ly/3veph1O. President Trump then rejoined the case as an intervenor. *See Anderson v. Griswold*, 2023CV32577, President Donald J. Trump's Unopposed Motion to Intervene, available at http://bit.ly/3tupoFU.

14. App. 12a–13a; *see also Anderson v. Griswold*, 2023CV32577, Minute Order, http://bit.ly/3S53Qtb.

dismiss filed by President Trump and the Colorado Republican State Central Committee, which had intervened in the case.[15] The district court denied President Trump basic discovery tools, including the opportunity to depose experts or potential witnesses, compel production of documents, or receive timely disclosures. App. 126a. And the compressed timeframe gave President Trump only 10 days to identify and disclose his rebuttal witnesses and 18 days to identify and disclose his rebuttal experts.[16]

The district court held a five-day hearing that ran from October 30, 2023, through November 3, 2023. But the district court did not issue findings of fact and conclusions of law within 48 hours of that hearing, as required by section 1-4-1204(4). *See* Colo. Rev. Stat. § 1-4-1204(4). Instead, the district court held closing argument on November 15, 2023—12 days after the conclusion of the hearing—and issued findings of fact and conclusions of law on November 17, 2023. App. 14a (¶ 22).

The district court's findings of fact rely heavily on the Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol, HR 117-663, 117th Cong., 2d Sess. (Dec. 22, 2022) ("the January 6 Report"), which the court admitted into evidence over President Trump's hearsay objections.[17] The district court

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15. App. 13a–14a; *see also Anderson v. Griswold*, 2023CV32577, Omnibus Ruling on Pending Dispositive Motions at ¶¶ 1, 6, available at http://bit.ly/3veph1O; *Anderson v. Griswold*, 2023CV32577, Order Re: Donald J. Trump's Motion to Dismiss Filed September 29, 2023, available at http://bit.ly/3GWQit6.

16. *See Anderson v. Griswold*, 2023CV32577, Event Comments, http://bit.ly/3S8vqpq.

17. App. 191a–199a (¶¶ 20–38).

also relied on testimony from Peter Simi, a professor of sociology at Chapman University, whom the district court qualified as an expert on political extremism and "the communication styles of far-right political extremists."[18] The district court based its finding that President Trump intended to incite violence on January 6, 2021, on Simi's analysis of Trump's "history with political extremists,"[19] as well as Simi's opinion that Trump "developed and employed a coded language based in doublespeak that was understood between himself and far-right extremists, while maintaining a claim to ambiguity among a wider audience."[20] The district court also relied on Simi's testimony in finding that President Trump's speech at the Ellipse on January 6, 2021, was specifically intended to provoke a violent response from his audience. Simi conceding that he relied exclusively on public speeches and the January 6th report to opine on reactions to President Trump's words; he conducted no research, interviews, or fieldwork of his own. Simi also disclaimed any opinion on President Trump's intent or state of mind.[21] According to the district court:

> As Professor Simi testified, Trump's speech took place in the context of a pattern of Trump's

18. App. 201a (¶ 42).

19. App. 209a–214a (¶¶ 61–86).

20. App. 213a–214a (¶ 83).

21. *See* Trial Transcript Day 2, at 205:19–23, available at http://bit.ly/3S3HTuv ("Q. . . . [D]o you have evidence that it was President Trump's intention to call them to action? A. My, you know, opinion is not addressing that issue. Again, not in President Trump's mind.").

> knowing "encouragement and promotion of violence" to develop and deploy a shared coded language with his violent supporters. An understanding had developed between Trump and some of his most extreme supporters that his encouragement, for example, to "fight" was not metaphorical, referring to a political "fight," but rather as a literal "call to violence" against those working to ensure the transfer of Presidential power. . . . Trump understood the power that he had over his supporters.

App. 228a–229a (¶¶ 142–143). Yet the district court used Simi's testimony to support its factual finding that President Trump intended to incite violence. App. 228a–229a (¶¶ 142–143).

For its conclusions of law, the district court held that the Colorado Election Code does not allow the Secretary of State to assess a presidential candidate's eligibility under section 3 of the Fourteenth Amendment. App. 248a (¶ 224) ("[T]he Court agrees with Intervenors that the Secretary cannot investigate and adjudicate Trump's eligibility under Section Three of the Fourteenth Amendment"). But it nonetheless held that section 1-4-1204(4) gives *courts* that authority because it requires district courts to "hear the challenge and assess the validity of all alleged improprieties" and "issue findings of fact and conclusions of law." App. 248a (¶ 224). But section 1-4-1204(4) also says that any "challenge to the listing of any candidate on the presidential primary election ballot must be made . . . in accordance with section 1-1-113(1)." Colo. Rev. Stat. § 1-4-1204(4). And section 1-1-113(1) allows relief

only when "*a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act*"—and it allows only the issuance of orders "requiring substantial compliance with the provisions of this [election] code." Colo. Rev. Stat. § 1-1-113 (emphasis added). The district court did not explain how the Anderson litigants could proceed under section 1-1-113 when its opinion admits that Secretary Griswold had done nothing wrong—and when it further acknowledges that the Colorado Election Code *forbids* Secretary Griswold "investigate[ing] and adjudicate[ing] Trump's eligibility under Section Three of the Fourteenth Amendment." App. 248a (¶ 224); *see also* App. 41a (¶ 80) ("[S]ection 1-1-113 . . . proceedings entertain only one type of claim—election officials' violations of the Election Code—and one type of injunctive relief—an order compelling substantial compliance with the Election Code.").

The district court went on to hold that President Trump had "engaged in insurrection" within the meaning of section 3. App. 249a–277a (¶¶ 225–298). But the district court ultimately concluded that section 3 was inapplicable to President Trump because he never took an oath "as an officer of the United States." App. 282a (¶ 313) ("[T]he Court is persuaded that 'officers of the United States' did not include the President of the United States."). It also held that the presidency is not an "office . . . under the United States" for purposes of section 3. App. 278a–279a (¶ 304).

II. THE STATE SUPREME COURT PROCEEDINGS

Both the Anderson litigants and President Trump sought review in the Colorado Supreme Court,[22] which accepted jurisdiction and reversed the district court. App. 1a–183a.

The Colorado Supreme Court first addressed whether the Anderson litigants could pursue their claims under section 1-1-113, which requires an allegation that Secretary Griswold would "commit a breach or neglect of duty or other wrongful act"[23] by allowing President Trump on the ballot. The court acknowledged that the Colorado Election Code imposes no "duty" on Secretary Griswold to determine whether presidential primary candidates satisfy the qualifications for office:

> [I]f the contents of a signed and notarized statement of intent appear facially complete . . . the Secretary has no duty to further investigate the accuracy or validity of the information the prospective candidate has supplied. . . . To that extent, we agree with President Trump that the Secretary has no duty to determine, beyond what is apparent on the face of the required documents, whether a presidential candidate is qualified.

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22. *See* Colo. Rev. Stat. § 1-1-113(3) ("The proceedings may be reviewed and finally adjudicated by the supreme court of this state, if either party makes application to the supreme court within three days after the district court proceedings are terminated, unless the supreme court, in its discretion, declines jurisdiction of the case.").

23. Colo. Rev. Stat. § 1-1-113(1).

App. 32a (¶ 59). Yet the court still held that Secretary Griswold would commit a "wrongful act" within the meaning of section 1-1-113 by allowing a disqualified candidate to appear on a presidential primary ballot. App. 33a–34a (¶ 62).

The court reached this conclusion by claiming that section 1-4-1203(2)(a) allows only "qualified" candidates to participate in Colorado's presidential primary. App. 21–22a (¶ 37); App. 33a (¶ 62). But section 1-4-1203(2)(a) says nothing of the sort. It says (in relevant part):

> [E]ach political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election.

Colo. Rev. Stat. § 1-4-1203(2)(a) (App. 321a). This is a restriction only on the *political parties* that may participate in Colorado's presidential primary—and it requires only that a participating political party have *at least one* "qualified candidate entitled to participate in the presidential primary election pursuant to this section." *Id.* Section 1-4-1203(2)(a) does not say that all of a party's presidential candidates must be "qualified." And it does not require (or even allow) Secretary Griswold or the courts to purge individual candidates from a qualifying party's primary ballot based on their own assessments of a candidate's qualifications. No one contests that the Colorado Republican Party has at least one qualified presidential candidate who is indisputably "entitled to participate in the presidential

primary election."[24] That is all that is needed to show that the Colorado Republican Party is "entitled to participate" in the presidential primary election under section 1-4-1203(2)(a), and section 1-4-1203(2)(a) has no further role to play.

The Colorado Supreme Court also held that a presidential candidate is not "qualified" within the meaning of section 1-4-1203(2)(a) unless he is "qualified to hold office under the provisions of the U.S. Constitution"[25]—and that he must be qualified to hold office *before* his name is added to the primary ballot. App. 36a (¶ 67) ("[A]ll presidential primary candidates [must] be constitutionally 'qualified' *before* their names are added to the presidential primary ballot pursuant to section 1-4-1204(1)."). The court did not consider the possibility that a presidential candidate who is currently disqualified might become qualified before the inauguration, such as a candidate who has not yet turned 35 or reached the 14-year residency mark but will do so before Inauguration Day, or a candidate currently disqualified under section 3 who can seek congressional removal of the disability. The court also dismissed out of hand President Trump's argument that section 3 bars individuals only from holding office, and not from running

24. *See* News Release, State of Colorado Department of State (Dec. 12, 2023), available at http://bit.ly/41Ayuxq (reporting that seven Republican presidential candidates, including Ron DeSantis, Nikki Haley, and Vivek Ramaswamy, "have submitted the necessary paperwork and meet the criteria for candidacy").

25. App. 35a (¶ 64); *see also* App. 34a (¶ 63) ("'[Q]ualified' in section 1-4-1203(2)(a) must mean, at minimum, that a candidate is qualified under the U.S. Constitution to assume the duties of the office of President.").

for or being elected to office. App. 36a (¶ 67) ("Nor are we persuaded by President Trump's assertion that Section Three does not bar him from running for or being elected to office because Section Three bars individuals only from holding office.").[26]

Having concluded that the Anderson litigants could proceed under section 1-1-113, the state supreme court went on to consider the merits. It rejected President Trump's due-process challenge to the district court's expedited consideration of the section 1-1-113 claims. App. 41a–45a. It also held that the disqualification imposed by section 3 is self-executing and attaches automatically without any need for congressional enforcement legislation. App. 45a–55a; *see also* App. 50a–53a (rejecting the rationale of *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815) (*Griffin's Case*)). And it rejected President Trump's argument that section 3 presents a non-justiciable political question. App. 55a–61a.

Finally, the Colorado Supreme Court reversed the district court's conclusions that section 3 is inapplicable to President Trump, holding both that the president is an "officer of the United States," and that the presidency is an "office . . . under the United States." App. 61a–76a. It also affirmed the district court's findings that President Trump "engaged in insurrection,"[27] and rejected

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26. The Colorado Supreme Court appeared to disavow the idea that section 3 itself places a "duty" on Secretary Griswold to keep Trump off the ballot, or that certifying Trump to the ballot would violate the Fourteenth Amendment. App. 37a–38a (¶ 71) ("[T]he Electors do not . . . allege a violation of the Constitution. Instead, they allege a 'wrongful act' under section 1-1-113.").

27. App. 83a–100a.

President Trump's First Amendment arguments.[28] The court concluded by holding that "it would be a wrongful act under the Election Code for the Secretary to list President Trump as a candidate on the presidential primary ballot," and it forbade the Secretary to "list President Trump's name on the 2024 presidential primary ballot" or "count any write-in votes cast for him." App. 114a. But the court stayed its ruling until January 4, 2024, and announced that the stay would automatically continue if President Trump sought review in this Court before that date. App. 114a.

Three justices dissented in separate opinions. Chief Justice Boatright argued that section 1-1-113's "expedited procedures" and strict statutory deadlines make it impossible for section 1-1-113 proceedings to accommodate the "uniquely complex questions" that arise from section 3 and its application to President Trump. App. 115a–124a. Justice Berkenkotter dissented on similar grounds,[29] and she also attacked the majority's false and atextual claim that section 1-4-1203(2)(a) allows only "qualified" candidates to appear on a party's presidential primary ballot. App. 177a–182a. Finally, Justice Samour would have followed the reasoning of *Griffin's Case* and declared section 3 non-self-executing. App. 125a–161a. Justice Samour also argued that the proceedings violated due process, as the district court denied discovery, rushed the proceedings, and based its factual findings on a hearsay congressional report and experts of dubious reliability. App. 158a (¶ 342) ("I have been involved in the justice system for thirty-

28. App. 100a–114a.

29. App. 162a–177a.

three years now, and what took place here doesn't resemble anything I've seen in a courtroom.").[30]

REASONS FOR GRANTING THE PETITION

The Colorado Supreme Court has no authority to deny President Trump access to the ballot. By doing so, the Colorado Supreme Court has usurped Congressional authority and misinterpreted and misapplied the text of section 3.

I. THE ISSUES PRESENTED IN THIS PETITION ARE OF EXCEPTIONAL IMPORTANCE AND URGENTLY REQUIRE THIS COURT'S PROMPT RESOLUTION

The questions presented in this Petition are of the utmost importance. President Trump is the leading candidate for the nomination for President of the United States of one of two major political parties. In 2020, President Trump received more than 74 million votes nationally, and more than 1.3 million votes in Colorado alone, to be re-

30. The federal questions sought to be reviewed were timely and properly raised in the district court and state supreme court. *See* Proposed Findings and Conclusions, http://bit.ly/3vlw9up at 34–38 (meaning of Colorado election statutes); *id.* at 40–58 (section 3 inapplicable to Trump); *id.* at 58–63 (requested relief would unconstitutionally impose additional qualifications for office); *id.* at 63–72 (section 3 non-self-executing); *id.* at 73–83 (political question); *id.* at 101–77 (Trump didn't "engage in insurrection"); Opening-Answer Br., http://bit.ly/3tz8Ht5 at 5–13 (section 3 inapplicable to Trump); *id.* at 13–16 (meaning of Colorado election statutes); *id.* at 18–21 (section 3 non-self-executing); *id.* at 21–25 (political question); *id.* at 25–28 (requested relief would unconstitutionally impose additional qualifications for office); *id.* at 29–43 (Trump didn't "engage in insurrection").

elected as President of the United States. Thus, the Colorado Supreme Court decision would unconstitutionally disenfranchise millions of voters in Colorado and likely be used as a template to disenfranchise tens of millions of voters nationwide. Indeed, the Maine Secretary of State, in an administrative proceeding, has already used the Colorado proceedings as justification for unlawfully striking President Trump from that state's ballot.[31] President Trump has appealed that decision.

II. DISPUTED QUESTIONS OF PRESIDENTIAL QUALIFICATIONS ARE RESERVED FOR CONGRESS TO RESOLVE

Not all claims are "properly suited for resolution by the . . . courts." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019). "Sometimes . . . 'the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.'" *Id.* at 2494 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality op.)); *see also Baker v. Carr*, 369 U.S. 186, 217 (1962). This presents just such a case.

Congress—not a state court—is the proper body to resolve questions concerning a presidential candidate's eligibility. First, the Constitution provides a role for Congress in resolving disputed presidential elections. To wit, the Constitution expressly provides that:

> [I]f the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified

31. *See* http://bit.ly/48kFqRR.

> . . . and the Congress may by law provide for the case wherein neither a President elect nor a vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

U.S. Const. amend. XX § 3. Similarly, both Article II and the Twelfth Amendment prescribe a role for Congress in Presidential elections. U.S. Const. art. II, cl. 3; U.S. Const. amend. XII. And the Fourteenth Amendment itself embodies a clear textual commitment of authority to Congress, with section 3 giving it the power to lift any "disability" under that Section and section 5 expressly providing that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, §§ 3, 5. There is no similar commitment of questions concerning presidential eligibility to state courts, particularly in the absence of a duly enacted enforcement statute.

Considering the Constitutional role for Congress in addressing presidential qualifications, it is little surprise that every court except Colorado that has addressed the political question doctrine when presented with the question of determining President Trump's eligibility has held that question is nonjusticiable and reserved to Congress. Indeed, every federal court that addressed this issue with regard to the eligibility of President Barack Obama, Sen-

ator John McCain, and Senator Ted Cruz held that the issue was for Congress and not the federal courts.[32]

It would be beyond absurd—particularly in light of the Fourteenth Amendment's enlargement of federal authority—that this issue would be nonjusticiable by

32. *See, e.g.*, *Castro v. N.H. Sec'y of State*, Case No. 23-cv-416-JL, 2023 WL 7110390, at *9 (D.N.H. Oct. 27, 2023) (footnote omitted) *aff'd on other grounds* --- F.4th ----, 2023 WL 8078010 (1st Cir. Nov. 21, 2023) ("[T]he vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications."); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008) ("Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates."); *Grinols v. Electoral College,* No. 2:12-cv-02997-MCE-DAD, 2013 WL 2294885, at *5–7 (E.D. Cal. May 23, 2013) ("[T]he Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States."); *Grinols v. Electoral Coll.*, No. 12-CV-02997-MCE-DAD, 2013 WL 211135, at *4 (E.D. Cal. Jan. 16, 2013) ("These various articles and amendments of the Constitution make it clear that the Constitution assigns to Congress, and not the Courts, the responsibility of determining whether a person is qualified to serve as President."); *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *12–16 (S.D. Miss. Mar. 31, 2015) ("[T]hese matters are entrusted to the care of the United States Congress, not this court."); *Kerchner v. Obama*, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009) ("The Constitution commits the selection of the President to the Electoral College in Article II, Section 1, as amended by the Twelfth Amendment and the Twentieth Amendment, Section 3," and "[n]one of these provisions evince an intention for judicial reviewability of these political choices.").

federal courts yet properly heard and decided by courts in 51 jurisdictions. The election of the President of the United States is a national matter, with national implications, that arises solely under the federal Constitution and does not implicate the inherent or retained authority of the states. *See generally Cook v. Gralike*, 531 U.S. 510, 552 (2001) ("It is no original prerogative of state power to appoint a representative, a senator, or a president for the union.").

Further, in the absence of enforcement legislation adopted under section 5 of the Fourteenth Amendment, courts lack judicially manageable standards for resolving disputes over presidential disqualifications.

The Colorado Republican State Central Committee has argued that section 3 is not self-executing. This question alone is worthy of consideration by this Court.

Even if section 3 does not *require* enforcement legislation to have effect, the lack of such legislation deprives the courts of judicially manageable standards. Procedurally, section 3 is silent on whether a jury, judge, or lone state election official makes factual determination and is likewise silent on the appropriate standard of review, creating the prospect of some courts adopting a preponderance of the evidence standard, others a clear and convincing evidence standard, while still others requiring a criminal conviction. Similarly, states have different approaches to voter standing. As a result, a voter in one state may be able to challenge a presidential candidate's qualifications, while similarly situated voters in another state cannot. Substantively, the terms "engage" and "insurrection" are unclear and subject to wildly varying standards. The

result is that 51 different jurisdictions may (and have) adopted divergent rulings based on different standards on the same set of operative facts.

Resolving these conflicts requires making policy choices among competing policy and political values. These are fundamentally legislative exercises that are properly suited for Congressional—rather than judicial—resolution.

Moreover, the result of divergent standards and determinations is particularly problematic in presidential elections. As this Court has recognized, "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest" because "the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation" and "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983) (footnotes and citations omitted).

By purporting to determine a presidential candidate's qualification under section 3 of the Fourteenth Amendment, the Colorado Supreme Court has overstepped its authority and usurped power properly allocated to Congress.

III. SECTION 3 IS INAPPLICABLE TO PRESIDENT TRUMP

Section 3 begins "[n]o 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 . . ." It does not list the presidency. Moreover, it lists offices in descending

order, beginning with the highest federal officers and progressing to the catch-all term "any office, civil or military, under the United States." Thus, to find that section 3 includes the presidency, one must conclude that the drafters decided to bury the most visible and prominent national office in a catch-all term that includes low ranking military officers, while choosing to explicitly reference presidential electors. This reading defies common sense and is not correct.

Similarly, Section 3's disqualification can apply only to those who have "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." U.S. Const. amend. XIV, § 3. It is undisputed that President Trump never took such an oath as a member of Congress, as a state legislator, or as a state executive or judicial officer. App. 279a (¶ 305).

Lastly, section 3 cannot apply to President Trump unless the president qualifies as an "officer of the United States." The Constitution's text and structure make clear that the president is not an "officer of the United States." The phrase "officer of the United States" appears in three constitutional provisions apart from section 3, and in each of these constitutional provisions the president is excluded from the meaning of this phrase. The Appointments Clause requires the president to appoint ambassadors, public ministers and consuls, justices of the Supreme Court, and "*all other Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const.

art. II, § 2, cl. 2 (emphasis added). The Commissions Clause similarly requires the President to "Commission *all the Officers of the United States*." U.S. Const. art. II, § 3 (emphasis added). The president does not (and cannot) appoint or commission himself, and he cannot qualify as an "officer of the United States" when the Constitution draws a clear distinction between the "officers of the United States" and the president who appoints and commissions them.

The Impeachment Clause further confirms that the president is not an "officer of the United States." It states:

> The President, Vice President *and all civil Officers of the United States*, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U.S. Const. art. II, § 4 (emphasis added). The clause treats President and Vice President separately from "all civil Officers of the United States." There would be no basis to separately list the president and vice president as permissible targets of impeachment if they were to fall within the "civil Officers of the United States." If that phrase were to encompasses the president and vice president, then the Impeachment Clause would say that the "President, Vice President and all *other* civil Officers of the United States" are subject to impeachment and removal.

Then, there is the textual requirement that section 3 applies only to those who took an oath to "support" the Constitution of the United States—the oath required by Article VI. *See* U.S. Const. art. VI, § 3 ("The Senators and

Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to *support* this Constitution" (emphasis added)). The president swears a different oath set forth in Article II, in which he promises to "preserve, protect, and defend the Constitution of the United States"—and in which the word "support" is nowhere to be found. *See* U.S. Const. art. II ¶ 8. The argument that an oath to "preserve, protect, and defend" is just another way of promising to "support" the Constitution. App. 74a–76a, fails, because the drafters of section 3 had before them both the Article VI and Article II oaths, and they chose to apply section 3 only to those who took Article VI oaths. Conflating the two oaths would create ambiguity and contradiction, because the president was not understood to be included as an "officer of the United States."

The Colorado Supreme Court made no attempt to explain how "officers of the United States" can include the president when this phrase excludes the president everywhere else it appears in the Constitution. App. 70a–73a. The Court should grant certiorari and hold section 3 inapplicable to President Trump because he never swore an oath as an "officer of the United States."

IV. PRESIDENT TRUMP DID NOT "ENGAGE IN INSURRECTION"

The Court should also reverse the Colorado Supreme Court's holding that President Trump "engaged in insurrection."

First, the events of January 6, 2021, were not "insurrection" as that term is used in Section 3.

"Insurrection" as understood at the time of the passage of the Fourteenth Amendment meant the taking up of arms and waging war upon the United States. When considered in the context of the time, this makes sense. The United States had undergone a horrific civil war in which over 600,000 combatants died, and the very survival of the nation was in doubt. Focusing on war-making was the logical result.

By contrast, the United States has a long history of political protests that have turned violent. In the summer of 2020 alone, violent protestors targeted the federal courthouse in Portland, Oregon, for over 50 days, repeatedly assaulted federal officers and set fire to the courthouse, all in support of a purported political agenda opposed to the authority of the United States. *See Portland Riots Read Out: July 21*, U.S. Department of Homeland Security (Jul. 21, 2020), https://www.dhs.gov/news/2020/07/21/portland-riots-read-out-july-21. In the context of the history of violent American political protests, January 6 was not insurrection and thus no justification for invoking section 3.

Moreover, nothing that President Trump did "engaged" in "insurrection."

President Trump never told his supporters to enter the Capitol, either in his speech at the Ellipse[33] or in any of his statements or communications before or during the events at the Capitol. To the contrary, his only explicit

33. App. 285a–317a (transcript of President Trump's speech at the Ellipse on January 6, 2021).

instructions called for protesting "peacefully and patriotically,"[34] to "support our Capitol Police and Law Enforcement,"[35] to "[s]tay peaceful,"[36] and to "remain peaceful."[37]

The Colorado Supreme Court faulted President Trump for not responding, in their view, with alacrity when he learned that the Capitol had been breached.[38] Even, however, the Colorado Supreme Court conceded that not acting does not constitute "engagement" in insurrection. App. 91a (¶ 195) ("The force of the term to *engage* carries the idea of active rather than passive conduct, and of voluntary rather than compulsory action." (quoting The Reconstruction Acts, 12 Op. Att'y Gen. 141, 158 (1867)).

The Court should also review and reverse the Colorado Supreme Court's holding that President Trump's speech could be constitutionally proscribed incitement under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The state supreme court relied on Professor Simi's testimony and deferred to the district court's factfinding in wrongfully holding that President Trump had encouraged violence and that his words were likely to have that effect. App. 106a–113a. But constitutional speech protections should not turn on opinions from sociology professors, and constitutional facts of this sort should be reviewed de novo rather than deferentially. *See U.S. Bank National Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 967 n.4 (2018).

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34. App. 292.
35. *See* http://bit.ly/3H6t7g8.
36. App. 98a (¶ 217).
37. App. 98a (¶ 217).
38. App. 98a–99a (¶ 218).

V. THE COLORADO SUPREME COURT VIOLATED THE ELECTORS CLAUSE BY FLOUTING THE STATUTES GOVERNING PRESIDENTIAL ELECTIONS

The Electors Clause requires states to appoint presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. I, § 1, ¶ 2; *see also Moore v. Harper*, 600 U.S. 1, 36 (2023) ("[S]tate courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."); *Bush v. Gore*, 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring). The Colorado Supreme Court's ruling violates the Electors Clause in two respects.

First, the Colorado legislature allows the state judiciary to intervene in ballot disputes only when a person "charged with a duty" under the Colorado Election Code "has committed or is about to commit a breach or neglect of duty or other wrongful act." Colo. Rev. Stat. § 1-1-113(1). Secretary Griswold cannot breach or neglect any "duty" or commit a "wrongful act" under the Fourteenth Amendment by listing President Trump on the ballot, because section 3 merely bars individuals from *holding* office, not from seeking or winning election to office.

The Colorado Supreme Court tried to concoct a "wrongful act" by claiming that Secretary Griswold would violate section 1-4-1203(2)(a)—a provision of *state* election law—by certifying President Trump to the ballot. But section 1-4-1203(2)(a) limits only the *political parties* that may participate in Colorado's presidential primary

election, and requires only that participating political parties have at least one "qualified candidate":

> [E]ach political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election.

Colo. Rev. Stat. § 1-4-1203(2)(a). The Colorado Supreme Court somehow managed to transform this statutory language into a requirement that *every* candidate that appears on a presidential primary ballot be "qualified,"—and it falsely claimed that Secretary Griswold would violate section 1-4-1203(2)(a) if she failed to remove disqualified presidential candidates from the Republican primary ballot.

Second, the state district court flouted the statutory deadlines in section 1-4-1204(4), which require a hearing to be held "[n]o later than five days after the challenge is filed," and require findings of fact and conclusions of law to issue "no later than forty-eight hours after the hearing." Colo. Rev. Stat. § 1-4-1204(4) (App. 325a). Section 1-4-1204(4) does not permit the type of ballot challenge brought by the Anderson litigants, which compelled the court to disregard the statutory deadlines in an unsuccessful effort to accommodate the complexity of the evidence and arguments presented. The Colorado Supreme Court praised the district court's efforts to "adjudicate this complex section 1-1-113 action" while admitting that the district court had failed to comply with the statutory deadlines. App. 43a (¶ 85). But the district court's "procedural Frankenstein," App. 157a (Samour, J., dissenting)

did not proceed in the "manner" directed by the legislature, as "the statutory timeline for a section 1-1-113 proceeding does not permit a claim as complex" as this one. App. 119a (Boatright, C.J., dissenting) (capitalization removed).

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

Section 3 of the Fourteenth Amendment prohibits individuals only from *holding* office:

> 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 . . .

U.S. Const. amend. XIV, § 3 (emphasis added). It does not prevent anyone from *running* for office, or from *being elected* to office, because Congress can remove a section 3 disqualification at any time—and Congress can remove that disability after a candidate is elected but before his term begins. *See id.* ("But Congress may by a vote of two-thirds of each House, remove such disability.").

This basis alone merits reversal of the Colorado Supreme Court, and by prohibiting states from using ballot access restrictions to enforce section 3, reversal would ensure that Congress retains its authority under section 3.

The Colorado Supreme Court claimed that it has no less authority to exclude President Trump from the ballot than it would a 28-year-old or a foreign national. App. 36a–37a (¶ 68); *see also Hassan v. Colorado*, 495 F. App'x 947 (10th Cir. 2012) (Gorsuch, J.) (upholding Colorado's decision to exclude a naturalized U.S. citizen from the

presidential ballot). That is wrong. Congress has *no* authority to add additional qualifications to the Constitution's age, residency, or natural-born citizenship requirements.

Forcing President Trump to prove that he is not disqualified before appearing on the ballot effectively adds a new, extra-constitutional requirement to running for office. But *U.S. Term Limits* renders the states powerless to add to or alter the Constitution's qualifications or eligibility criteria for federal officials, and states are equally powerless to exclude federal candidates from the ballot based on state-created qualifications or eligibility criteria not mandated by the Constitution. *See id.* at 799 ("'It is not competent for any State to add to or in any manner change the qualifications for a Federal office, as prescribed by the Constitution or laws of the United States'" (quoting G. McCrary, American Law of Elections § 322 (4th ed. 1897)); *id.* at 803–04 ("States thus 'have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. . . . It is no original prerogative of state power to appoint a representative, a senator, or president for the union.'" (quoting 1 Story § 627)); *id.* at 828–36 (rejecting state's attempt to deny ballot access to incumbent congressional candidates who had exceeded an allotted number of terms). Even the *Term Limits* dissenters acknowledged that states are forbidden from prescribing qualifications for the presidency beyond those specified in the Constitution. *See id.* at 855 n.6 (Thomas, J., dissenting) ("[T]he people of a single State may not prescribe qualifications for the President of the United States"); *id.* at 861 (Thomas, J., dissenting)

("[A] State has no reserved power to establish qualifications for the office of President"); *id.* at 861 (Thomas, J., dissenting) ("[T]he individual States have no 'reserved' power to set qualifications for the office of President"). And for good reason: The president, unlike members of Congress, represents and is elected by the entire nation,[39] and allowing each of the 51 jurisdictions to prescribe and enforce their own qualifications for a nationwide office would be a recipe for bedlam and voter confusion.

The Colorado Supreme Court's ruling violates *Term Limits* by adding a new qualification for the presidency. It requires that a president be "qualified" 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 whatever date a court renders judgment on his eligibility for the ballot. This is no different from a state enforcing a pre-election residency requirement for congressional or senatorial candidates, when the Constitution requires only that representatives and senators inhabit the state "when elected." *See* U.S. Const. art. I, § 2, ¶ 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)); *See* U.S. Const. art. I, § 3, ¶ 2 (same rule for senators); *see also Texas Democratic Party v. Benkiser*, 459 F.3d 582, 589–90 (5th Cir. 2006) (holding pre-election residency requirements unconstitutional under *Term Limits*); *Campbell v. Davidson*, 233 F.3d 1229, 1236 (10th Cir. 2000) (same); *Schaefer v. Townsend*,

39. *See Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2203 (2020) ("Only the President (along with the Vice President) is elected by the entire Nation.").

215 F.3d 1031, 1036 (9th Cir. 2000) (same). In each of these situations, a state violates *Term Limits* by altering the timing of a constitutionally required qualification for office.

CONCLUSION

The petition for writ of certiorari should be granted and the decision of the Colorado Supreme Court summarily reversed.

Respectfully submitted.

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