No. _____

In the Supreme Court of the United States

COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,
Petitioner,

v.

NORMA ANDERSON, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

PETITION FOR WRIT OF CERTIORARI

MICHAEL W. MELITO
MELITO LAW LLC
ROBERT A. KITSMILLER
PODOLL & PODOLL, P.C.
[redacted]

CHRISTINA A. COMPAGNONE
OLIVIA F. SUMMERS
GARRETT A. TAYLOR
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

JAY ALAN SEKULOW
Counsel of Record
JORDAN A. SEKULOW
STUART J. ROTH
ANDREW J. EKONOMOU
JANE SERENE RASKIN
WALTER M. WEBER
BENJAMIN P. SISNEY
NATHAN MOELKER
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Counsel for Petitioner

QUESTIONS PRESENTED

The Supreme Court of Colorado held that states possess authority, regardless of the lack of congressional authorization, to determine that a presidential candidate is disqualified under Section Three of the Fourteenth Amendment and that former President Donald J. Trump is disqualified as an insurrectionist. The Questions Presented are:

1. Whether the President falls within the list of officials subject to the disqualification provision of Section Three of the Fourteenth Amendment?

2. Whether Section Three of the Fourteenth Amendment is self-executing to the extent of allowing states to remove candidates from the ballot in the absence of any Congressional action authorizing such process?

3. Whether the denial to a political party of its ability to choose the candidate of its choice in a presidential primary and general election violates that party's First Amendment Right of Association?

PARTIES

Petitioner Colorado Republican State Central Committee was Intervenor-Appellee in the state courts. The following were Petitioners-Appellants/Cross-Appellees in the state courts and are respondents here: Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian. Jena Griswold, in her official capacity as Colorado Secretary of State, was Respondent-Appellee in the state courts and is a respondent here. Donald J. Trump was Intervenor-Appellee/Cross-Appellant in the state courts and is a nominal respondent here.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Anderson v. Griswold*, 2023 CO 63, No. 2023SA300 (CO S. Ct. Dec. 19, 2023) (disqualifying Pres. Trump from ballots)

- *Anderson v. Griswold*, No. 2023CV32577 (Colo. Dist. Ct. Nov. 17, 2023) (Held Pres. Trump is not disqualified from ballots)

- *Anderson v. Griswold*, No. 2023CV32577, (Colo Dist. Ct. Oct. 20, 2023) (denying motions to dismiss)

Counsel is not aware of any other related proceedings under Supreme Court Rule 14.1(b)(iii).

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

PARTIES ii

RELATED PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 2

I. Proceedings in the Denver District Court 2

II. Proceedings in the Colorado Supreme Court 4

REASONS FOR GRANTING THE WRIT 6

I. The President Is Not an Officer of the United States Covered Within the Disqualification Provision of Section Three of the Fourteenth Amendment 11

II. Section Three of the Fourteenth Amendment Is Not a Self-Executing Authority for State Courts and Litigants to Use as a Sword Against Presidential Candidates. 16

III. The Colorado Supreme Court's Decision Violates the Colorado Republican Party's First Amendment Associational Right to Choose Its Own Political Candidates. 26

CONCLUSION 34

APPENDIX CONTENTS

Page(s)

Appendix A: Supreme Court of Colorado, Opinion (Dec. 19, 2023)……1a

Appendix B: Colorado District Court Omnibus Ruling (Oct. 20, 2023) 1b

Appendix C: Colorado District Court Final Order (Nov. 17, 2023) 1c

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Celebrezze, 460 U.S. 780 (1983).....29

Anderson v. Griswold, 2023 CO 63..... 1

Anderson v. Griswold, No. 2023CV32577, 2023 Colo. Dist. LEXIS 362 (Colo. Dist. Ct. Nov. 17, 2023).....1

Anderson v. Griswold, No. 2023CV32577, 2023 Colo. Dist. LEXIS 369 (Colo Dist. Ct. Oct. 20, 2023).....1

Bates v. Jones, 131 F.3d 843 (9th Cir. 1997).....32

Buckley v. Valeo, 424 U.S. 1 (1976).....29

Burdick v. Takushi, 504 U.S. 428 (1992) 31

Cal. Democratic Party v. Jones, 530 U.S. 567, (2000) 26, 27, 31

Cale v. Covington, 586 F.2d 311 (4th Cir. 1978) 17, 18

Caplan v. Trump, No. 0:23-cv-61628-RLR, 2023 U.S. Dist. LEXIS 199051 (S.D. Fla. Aug. 31, 2023).....9

Castro v. Dahlstrom, No. 1:23-cv-00011-JMK (D. Alaska filed Sept. 29, 2023) 8

Castro v. Fontes, No. 23-3960 (9th Cir. filed Dec. 8, 2023)..... 8

Castro v. Fontes, No. CV-23-01865-PHX-DLR, 2023 U.S. Dist. LEXIS 215802 (D. Ariz. Dec. 4, 2023)..... 8

Castro v. Trump, No. 9:23-cv-80015-AMC, 2023 U.S. Dist. LEXIS 194440 (S.D. Fla. June 26, 2023)..... 9

Castro v. Warner, No. 2:2023cv00598, 2023 U.S. Dist. LEXIS 195186 (S.D.W. Va. Sept. 7, 2023)..... 9

Cawthorn v. Amalfi, 35 F.4th 245 (4th Cir. 2022) 10

City of Boerne v. Flores, 521 U.S. 507 (1997) 19

Clark v. Weber, No. 2:23-CV-07489-DOC-DFMx, 2023 U.S. Dist. LEXIS 189172 9

Davis v. Wayne Cnty. Election Comm'n, Nos. 368615, 368628, 2023 Mich. App. LEXIS 9150 (Mich. Ct. App. Dec. 14, 2023) 9

Duke v. Cleland, 954 F.2d 1526 (11th. Cir. 1992) ... 27

Ex parte Va., 100 U.S. 339 (1879) 17

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) 12

Greene v. Sec'y of State, 52 F.4th 907, 910 (11th Cir. 2022) 10

Griffin's Case, 11 F. Cas. 7, 22 (C.C.D. Va. 1869) 19-24

Growe v. Simon, No. A23-1354 (Minn. Nov. 8, 2023) 27, 31

Growe v. Simon, No. A23-1354, 2023 Minn. LEXIS 571 (Minn. Sept. 12, 2023) 9

Hansen v. Finchem, 2022 Ariz. Super. LEXIS 5 (Maricopa Cnty. Sup. Ct. 2022) 21

Hansen v. Finchem, No. CV 2022-004321, 2022 Ariz. Super. LEXIS 5 (Ariz. Sup. Ct. Apr. 21, 2022) 10

Katzenbach v. Morgan, 384 U.S. 641 (1966) 17, 19

Lake County v. Rollins, 130 U.S. 662 (1889) 15

Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014) 32

Meyer v. Grant, 486 U.S. 414 (1988) 29

Mills v. Alabama, 384 U.S. 214 (1966) 29

Norman v. Reed, 502 U.S. 279 (1992) 32

Ownbey v. Morgan, 256 U.S. 94 (1921) 7, 17, 21

Rothermel v. Meyerle, 136 Pa. 250 (1890) 22

State v. Buckley, 54 Ala. 599 (Ala. 1875) 22

Stencil v. Johnson, 605 F. Supp. 3d 1109 (E.D. Wis. 2022) 10

Tashjian v. Republican Party, 479 U.S. 208 (1986) 31

The Civil Rights Cases, 109 U.S. 3 (1883) 17, 18

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 30, 31, 32

United States Term Limits v. Thornton, 514 U.S. 779 (1995) 25

United States v. Mouat, 124 U.S. 303 (1888) 12

Williams v. Rhodes, 393 U.S. 23 (1968) 30

STATUTES

18 U.S.C. § 2383 ..... 16, 24

28 U.S.C. § 1257 1

C.R.S. § 1-1-113 4

C.R.S. § 1-4-1204 28

OTHER AUTHORITIES

CO GOP's Mot. to Dismiss 28

Cong. Globe, 41st Cong., 1st Sess. 626 (1869) 23

Cong. Rec. Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap 145 (1876) 13

DAVID MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES 346 (1878) 13

Enforcement Act of 1870, ch. 114, 16 Stat. 140, 143-44 23

JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS (2018) 7

The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141 (1867) 10, 14, 15

U.S. CONST. amend. I 1, 28

U.S. CONST. amend. XIV 2, 11,

U.S. CONST. art. II 11, 12, 14

U.S. CONST. art. VI 14

RULES

Supreme Court Rule 14.1(b)(iii) iii

OPINIONS BELOW

The *per curiam* opinion of the Colorado Supreme Court was published as *Anderson v. Griswold*, 2023 CO 63, Pet. App. A. The Final Order issued by the District Court for the City and County of Denver is as follows: *Anderson v. Griswold*, No. 2023CV32577, 2023 Colo. Dist. LEXIS 362 (Colo. Dist. Ct. Nov. 17, 2023), Pet. App. C. The District Court's Omnibus Ruling on Pending Dispositive Motions is available as *Anderson v. Griswold*, No. 2023CV32577, 2023 Colo. Dist. LEXIS 369 (Colo Dist. Ct. Oct. 20, 2023), Pet. App. B.

JURISDICTION

The Colorado Supreme Court issued its judgment on December 19, 2023, affirming in part and reversing in part the district court's order. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

Section Three of the Fourteenth Amendment provides as follows:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. CONST. amend. XIV, § 3.

STATEMENT OF THE CASE

I. Proceedings in the Denver District Court

Six Colorado electors filed a verified petition against Colorado Secretary of State Jena Griswold

and President Trump in the Denver District Court on September 6, 2023. The electors sought an order under Colorado Revised Statute section 1-4-1204 declaring President Trump constitutionally disqualified from the presidency and directing the Colorado Secretary of State to exclude his name from the 2024 primary and general election ballots.[1]

The Colorado Republican State Central Committee ("Colorado Republican Party" or the "Party") intervened in Denver District Court with several claims: (1) the relief sought violates the Party's First Amendment rights; (2) Section Three of the Fourteenth Amendment does not apply to the President and is not self-executing such that a state disqualification proceeding would lie; and, (3) the Colorado Election Code does not allow for the Secretary of State to determine constitutional qualifications. The parties exchanged motions to dismiss. The district court issued an omnibus order on Oct. 20, 2023. Pet. App. 46b. In that order, the district court granted the Electors' Motion to Dismiss the Party's First Amendment claim. It denied President Trump's Motion to Dismiss, adopted by the Party, that was based on constitutional challenges to the suit's attempt to adjudicate whether President Trump is disqualified. The district court also denied the Party's Motion to Dismiss on statutory grounds.

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1 During litigation, the Electors dropped their declaratory claim leaving only their claim under C.R.S. § 1-4-1204. As a result, President Trump was technically removed as a defendant. However, he immediately and without objection intervened and reentered the proceeding.

An evidentiary hearing was held October 30 through November 3, and the district court entered its final order on November 17, 2023. Pet. App. 125c. The court ruled that President Trump is not one of the "officers of the United States" described in Section Three of the Fourteenth Amendment and ordered the Colorado Secretary of State to place President Trump on the presidential primary ballot. *Id.*

Despite this dispositive ruling on the law in favor of President Trump, the district court also purported to make a factual finding that President Trump engaged in an insurrection.

II. Proceedings in the Colorado Supreme Court

Pursuant to C.R.S. § 1-1-113(3), the Electors sought review by the Supreme Court of Colorado on November 20, 2023. President Trump brought a cross-appeal. Oral arguments were held on December 6, 2023, and the Colorado Supreme Court issued its judgment on December 19, 2023. Pet. App. 223a. The supreme court affirmed in part and reversed in part the district court's order, ultimately concluding that President Trump was disqualified from appearing on the ballot. *Id.*

The Colorado Supreme Court held that "states have the constitutional power to assess presidential qualifications," Pet. App. 24a, that Colorado law authorizes such challenges, *id.*, and that Section Three of the Fourteenth Amendment imposes such a

qualification regarding insurrections, Pet. App. 56a-58a.

The court further held that the Party's First Amendment right was not violated by excluding from the primary or general ballot a candidate the state determined, through its courts, to be disqualified. Pet. App. 63a-68a.

Reversing the district court, the Colorado Supreme Court held that Section Three does apply to the Office of the President. It also held that Section Three of the Fourteenth Amendment is self-executing and that Congress need not pass implementing legislation for the disqualification provision to attach.

Finally, the Colorado Supreme Court affirmed the trial court's factual findings and legal conclusions that President Trump had engaged in insurrection and so was disqualified from both the primary and general ballot.

Three justices dissented, arguing that the Colorado Supreme Court was without jurisdiction to decide this insurrection challenge.

The state supreme court stayed its order to allow review in this Court:

> [W]e stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires, it shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot until

> the receipt of any order or mandate from the Supreme Court.

Pet. App. 224a. This petition followed.

REASONS FOR GRANTING THE WRIT

For the first time in American history, a former President has been disqualified from the ballot, a political party has been denied the opportunity to put forward the presidential candidate of its choice, and the voters have been denied the ability to choose their Chief Executive through the electoral process. This unprecedented decision urgently merits this Court's review to prevent "the potential chaos wrought by an imprudent, unconstitutional, and standardless system in which each state gets to adjudicate Section Three disqualification cases on an ad hoc basis. Surely, this enlargement of state power is antithetical to the framers' intent." Pet. App. 316a (Samour, J., dissenting). By excluding President Trump from the ballot, the Colorado Supreme Court engaged in an unprecedented disregard for the First Amendment right of political parties to select the candidates of their choice and a usurpation of the rights of the people to choose their elected officials.

Rejecting a long history of precedent, a state's highest court has now concluded that individual litigants, state courts, and state election officials in each of the 50 states plus the District of Columbia possess legal authority to enforce Section Three of the Fourteenth Amendment to remove presidential candidates. With the number of challenges to

President Trump's candidacy now pending in other states, ranging from lawsuits to administrative proceedings, there is a real risk the Colorado Supreme Court majority's flawed and unprecedented analysis will be borrowed, and the resulting grave legal error repeated. While fifty-one different solutions may be a great idea for federalist experimentation, *see* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS (2018), it would be a recipe for national disaster if applied to the question whether a presidential candidate is constitutionally qualified for office.

The Colorado Supreme Court's decision is wrong for a host of reasons. As most relevant here, it improperly applied precedent establishing the First Amendment right of political parties, failed to apply precedent repeatedly holding that the Fourteenth Amendment is not a self-executing sword, *see, e.g., Ownbey v. Morgan*, 256 U.S. 94, 112 (1921), and incorrectly concluded that the President is an "officer of the United States." This alone would present grounds for review in any circumstance.

But it is the radical effects of the Colorado Supreme Court's decision that particularly necessitate this Court's review as soon as reasonably possible. The Colorado Supreme Court has decided "to bar former President Donald J. Trump ('President Trump')—by all accounts the current leading Republican presidential candidate (and reportedly the current leading overall presidential candidate)—from Colorado's presidential primary ballot." Pet. App. 244a (Samour, J., dissenting). The historical significance of this decision cannot be overstated. The

Colorado Supreme Court has removed the leading Republican candidate from the primary and general ballots, fundamentally changing the course of American democracy. And its significance is not merely political, but legal. Rejecting a long history of precedent, a state Supreme Court has now concluded that individual litigants, state courts, and secretaries of state in all 50 states plus the District of Columbia have authority to enforce Section Three of the Fourteenth Amendment.

Unless the Colorado Supreme Court's decision is overturned, any voter will have the power to sue to disqualify any political candidate, in Colorado or in any other jurisdiction that follows its lead. This will not only distort the 2024 presidential election but will also mire courts henceforth in political controversies over nebulous accusations of insurrection.

Indeed, the catastrophic effects of the Colorado Supreme Court's decision are already foreshadowed in pending and recently decided cases involving attempts to deny President Trump access to the 2024 ballot:

> *Castro v. Dahlstrom*, No. 1:23-cv-00011-JMK (D. Alaska filed Sept. 29, 2023).
>
> *Castro v. Fontes*, No. 23-3960 (9th Cir. filed Dec. 8, 2023) (on appeal from *Castro v. Fontes*, No. CV-23-01865-PHX-DLR, 2023 U.S. Dist. LEXIS 215802 (D. Ariz. Dec. 4, 2023)) (pending, appeal filed by Plaintiff after case was dismissed for lack of subject-matter jurisdiction).

Clark v. Weber, No. 2:23-CV-07489-DOC-DFMx, 2023 U.S. Dist. LEXIS 189172 (Cent. D. Cal. Oct. 20, 2023) (dismissed *sua sponte* with prejudice, Plaintiff lacked standing).

Castro v. Trump, No. 9:23-cv-80015-AMC, 2023 U.S. Dist. LEXIS 194440 (S.D. Fla. June 26, 2023) (dismissed, lack of standing and ripeness).

Caplan v. Trump, No. 0:23-cv-61628-RLR, 2023 U.S. Dist. LEXIS 199051 (S.D. Fla. Aug. 31, 2023) (dismissed, lack of subject matter jurisdiction).

Davis v. Wayne Cnty. Election Comm'n, Nos. 368615, 368628, 2023 Mich. App. LEXIS 9150 (Mich. Ct. App. Dec. 14, 2023) (affirmed dismissals, no jurisdiction for lack of actual controversy and lack of ripeness).

Growe v. Simon, No. A23-1354, 2023 Minn. LEXIS 571 (Minn. Sept. 12, 2023) (dismissed, no error as to the issue of the presidential primary and lack of ripeness as to the issue of the general election).

Castro v. Warner, No. 2:2023cv00598, 2023 U.S. Dist. LEXIS 195186 (S.D.W. Va. Sept. 7, 2023) (summary judgment granted for lack of standing on December 20, 2023).

Other cases, not involving President Trump, have also raised questions surrounding the application of Section Three of the Fourteenth Amendment. *Cawthorn v. Amalfi*, 35 F.4th 245, 248 (4th Cir. 2022); *Greene v. Sec'y of State*, 52 F.4th 907, 910 (11th Cir. 2022); *Stencil v. Johnson*, 605 F. Supp. 3d 1109, 1113, 1119 (E.D. Wis. 2022); *Hansen v. Finchem*, No. CV 2022-004321, 2022 Ariz. Super. LEXIS 5 (Ariz. Sup. Ct. Apr. 21, 2022) (holding "no private right of action exists" to enforce the Disqualification Clause of the 14th Amendment). Most courts have rejected these lawsuits on jurisdictional grounds, but the Colorado Supreme Court has followed its own, path and split from the others, warranting this Court's review.[2]

The district court rightly concluded, in ruling that President Trump must be given access to the Colorado ballot, that any doubts regarding these interpretative questions should be resolved in favor of the democratic process. As Attorney General Stanbery noted after the Civil War, "[w]here, from the generality of terms of description, or for any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the law and in favor of the voter." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 160 (1867). The same is true here. Should this Court have any interpretative doubt, it

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2 The drastic effects of the Colorado Supreme Court's decision on the 2024 primary election necessitate this Court's immediate review, during this current term. The prompt hearing of this case is necessary to prevent the Colorado Supreme Court's decision from having an irreparable effect on the electoral process. Petitioner is prepared to abide by whatever expedited processes this Court may set. Along with the filing of this Petition for Certiorari, the Party is filing a Motion to Expedite.

should resolve that doubt in favor of the democratic process.

I. The President Is Not an Officer of the United States Covered Within the Disqualification Provision of Section Three of the Fourteenth Amendment.

The trial court reached the correct conclusion: the President is not covered by Section Three. The Fourteenth Amendment only disqualifies those who serve in specific roles. Specifically, a person is disqualified only if he "previously [took] 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." U.S. CONST. amend. XIV, § 3. Because President Trump was never a congressman, state legislator, or state officer, Section Three applies to him only if he was an "officer of the United States." *Id.* But that term as used in Section Three does not cover the President.[3]

The Constitution makes very clear that the President is not an officer of the United States. For example, the Commissions Clause states that the President "shall Commission all the Officers of the United States." U.S. CONST. art. II, § 4. If the

3 Moreover, there are legitimate grounds for questioning whether the Presidency is included within the scope of offices *from* which individuals are disqualified. For example, Section Three, in listing positions from which people can be disqualified, specifies Electors, who are selected by the people. Thus, it is that stage of the process the drafters of Section Three chose to protect against insurrectionists, not the stage at which the President is elected.

President is an officer of the United States, then the President commissions himself. On the contrary, the presidency is not among the specific roles enumerated, nor is the President an officer of the United States. "The people do not vote for the 'Officers of the United States.' . . . They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497-98 (2010) (internal citations omitted). *See United States v. Mouat*, 124 U.S. 303, 307 (1888) ("Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.").

It is undisputed that the presidency can be considered an "office." But Section Three does not disqualify all "officers" in a general sense. Instead, it only disqualifies "officers of the United States." This term of art is used in only three places in the Constitution: Section Three of the Fourteenth Amendment, The Commissions Clause, and The Appointments Clause, which provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. CONST. art. II, § 3.

Accordingly, it is the President who appoints the officers of the United States and has authority to commission those officers. He is not, himself, therefore,

an officer of the United States. "Officer of the United States" is limited, each time it is used, to explicitly not include the Presidency.

The Colorado Supreme Court reasoned that, because the President is an "officer" in a general sense, he is, therefore, also an "officer of the United States" in the specific sense intended by the drafters. That is not how constitutional interpretation works. The Constitution uses a distinct, specific term, "officer of the United States." Generic references to the term officer do not overcome the more specific meaning evidenced by the constitutional language. Nor does any historical source indicate that this term was not to be understood in the specific sense it is used in the Constitution's text. In fact, the historical evidence is to the contrary.

Less than a decade after the ratification of the Fourteenth Amendment, Senator Newton Booth posited, "the President is not an officer of the United States." Cong. Rec. Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap 145 (1876). Senator Boutwell likewise explained that "according to the Constitution, as well as upon the judgment of eminent commentators, the President and Vice-President are not civil officers." *Id.* at 130. Near the same time, a treatise determined "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States.'" DAVID MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES 346 (1878).

Most importantly, Attorney General Henry Stanbery defined the term officer in the Fourteenth Amendment as "military as well as civil officers of the

United States who had taken the prescribed oath." 12 U.S. Op. Att'y. Gen. at 158. He declared that the phrase "Officers of the United States" includes, "without limitation," any "person who has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States." *Id.* at 203.

A president does not take the "official oath" that Attorney General Stanberry viewed as dispositive, and thus is not subject to Article Three. There are two oaths of office in the Constitution. Article VI, Section 3 of the Constitution provides that "[t]he 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." U.S. CONST. art. VI, § 3. Thus, all executive officers take an oath to support the Constitution. But the President does not take such an oath: Article II, Section 1 states that the President, instead and singularly, takes an oath to "preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, § 1. This distinct phrasing further indicates that for the purposes of Article VI, Section 3, the President is clearly, explicitly, not an officer of the United States.

The actual language of the Fourteenth Amendment uses the words of Article VI, not Article II. The Colorado Supreme Court discussed extensively the overlapping duties between the two oaths, Pet. App. 142a-143a, but that similarity in practice does

not erase the linguistic difference between the two oaths.

The court below cited this Court's statement, "[t]he simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." *Lake County v. Rollins*, 130 U.S. 662, 671 (1889). True enough. But here, the simplest and most obvious reading of Section Three is that it means what it says, disqualifying those who took an "official oath" to support the Constitution. 12 U.S. Op. Att'y Gen. at 203. No amount of discussion or obfuscation can change the simple fact that the President Trump did not take *that* oath. The Constitution is clear.

The Supreme Court of Colorado opined that it would make no sense to put in place an insurrectionist bar for every other federal office, but not for the President (or Vice-President). Pet. App. 140a. But there is a key difference. Every Senator or Representative represents a geographic area where sympathy for insurrection was (at the time of the post-Civil War era) a real and legitimate concern. Lower federal officers, meanwhile, are not elected and thus do not face national electoral scrutiny. Only the President (and Vice-President) face nationwide electoral accountability. And if an electoral majority of the voters determine that they want a certain individual as Chief Executive, regardless of alleged or even actual past transgressions, that is their national choice under the Constitution. In short, the President and his role is different in a way that matters.

II. Section Three of the Fourteenth Amendment Is Not a Self-Executing Authority for State Courts and Litigants to Use as a Sword Against Presidential Candidates.

The decision below suffers from many flaws. But, as Justice Samour observed in his dissent, "the majority's ruling that Section Three is self-executing [is] the most concerning misstep." Pet. App. 249a-250a. Congress, and Congress alone, can enforce Section Three. Yet Congress has not provided a private cause of action under Section Three. And the only current enforcement mechanism even arguably available is 18 U.S.C. § 2383, a criminal statute banning insurrection and providing a penalty of disqualification. But President Trump has not been indicted under Section 2383, let alone tried and convicted as would be required to trigger application of Section Three. In fact, after nearly three years of investigation—first by the United States Attorney for the District of Colombia and then by a Special Counsel specifically tasked with investigating and prosecuting the events of January 6—President Trump, although indicted on several charges, has not been accused of violating Section 2383. Indeed, adding insult to injury, the only time President Trump actually faced a formal allegation of insurrection—in the context of an impeachment proceeding appropriate to political questions such as this—he was acquitted after a trial in the U.S. Senate. A lawsuit cannot provide an end-run around the

mechanisms that Congress establishes for enforcing the Constitution.

This Court has repeatedly held that the Fourteenth Amendment does not itself create a self-executing cause of action. Section Five of the Fourteenth Amendment explicitly confers the enforcement power *on Congress* to determine "whether and what legislation is needed to" enforce the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). Accordingly, it is Congress that enforces the Fourteenth Amendment by positive legislation. "It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." *Ex parte Va.*, 100 U.S. 339, 345 (1879); *Ownbey*, 256 U.S. at 112 ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy.").

The Colorado Supreme Court misunderstood this fundamental point. In support of its assertion that the Fourteenth Amendment is self-executing, it cited *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). Pet. App. 79a-80a. But, as the Fourth Circuit carefully explained in *Cale v. Covington*, 586 F.2d 311, 316-17 (4th Cir. 1978) in direct response to the same argument, *The Civil Rights Cases* addressed whether the Fourteenth Amendment provides a self-executing *defense*, which it does. In some circumstances the Fourteenth Amendment is self-executing as a *shield*, providing a constitutional defense even if not explicitly provided for by law. But in no circumstance is the Fourteenth Amendment a

self-executing *sword*. As the court thoroughly explained:

> It is true that in *The Civil Rights Cases*, the Court referred to the Fourteenth Amendment as self-executing, when discussing the Fifteenth, but it is also true that earlier in the opinion, discussing § 1 of the Fourteenth Amendment, the court stated: "in order that the national will, thus declared, may not be a mere brutum fulmen, the last section of the amendment invests Congress with power to enforce it by appropriate legislation." *The Civil Rights Cases* did not overrule *Ex Parte Virginia*, and any apparent inconsistency between the two just quoted statements in the *Civil Rights Cases* may be resolved, we think, by reference to the protection the Fourteenth Amendment provided of its own force as a shield under the doctrine of judicial review.

Cale, 586 F.2d at 316-17 (rejecting the argument that there is an implied cause of action under the Fourteenth Amendment because the Amendment is self-executing). The *Cale* court observed, "the Congress and Supreme Court of the time were in agreement that affirmative relief under the amendment should come from Congress." *Id.* at 316. As Justice Samour explained in his dissent, based in large part on his analysis of *Cale*, "I do not think [self-executing] means what [my colleagues in the majority] think it means." Pet. App. 247a (quoting

The Princess Bride (20th Century Fox 1987); *see also* Pet. App. 269a-270a.

The Colorado Supreme Court also relied on *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997), to support its assertion that the Fourteenth Amendment is self-executing. However, *City of Boerne* did not suggest that a Fourteenth Amendment case could proceed without Congress creating a cause of action. Instead, it cited with approval, *Katzenbach,* 384 U.S. at 651*,* which recognized both the existence of a self-executing *defensive* right and that, for an affirmative remedy to exist under the Fourteenth Amendment, Congress must create a cause of action.[4]

In the seminal *Griffin's Case*, 11 F. Cas. 7, 22 (C.C.D. Va. 1869), Chief Justice Salmon Chase, riding circuit, specifically held that only Congress can provide the means of enforcing Section Three. Although not binding on this court, *Griffin's Case* nonetheless represents strong persuasive authority from one of this Court's most significant Chief Justices, an individual with close-in-time knowledge of the Fourteenth Amendment's meaning. No court before the recent debates over ballot eligibility has

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[4] The Colorado Supreme Court also reasoned from the fact that Section Two of the Fourteenth Amendment, eliminating the counting of enslaved persons as three-fifths of a person, appears to be self-executing. The most significant problem with this argument is that Congress did in fact, by reapportionment, enforce that provision. The Apportionment Act of 1872, 17 Stat. 28 (42d Cong.) (apportioning Representatives to the various states based on Section Two's command.) Because Congress *did* enforce Section Two, there was never a need to address whether it *could have* been enforced through a private cause of action.

formally disagreed with Chief Justice Chase's analysis of this issue or held that Section Three is self-executing.

In *Griffin*, defendant Ceasar Griffin filed a federal action against Judge Sheffey, former Confederate Officer and judge in Griffin's trial, arguing that the Fourteenth Amendment automatically acted to remove Judge Sheffey from office, "operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at 23. The federal district court agreed and ordered Griffin's immediate discharge from custody.

On appeal, Chief Justice Chase observed that "it is obviously impossible to [disqualify] by a simple declaration . . . . [I]t must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate." *Id.* Chase concluded that the Due Process Clause foreclosed the argument that Section Three automatically disqualifies someone from offense without a trial:

> Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an ex post facto, are inconsistent in their spirit and general purpose with a provision which, at once without trial, deprives a whole class of

> persons of offices held by them, for cause, however grave.

Id. at 26. Accordingly, Chief Justice Chase held that the provisions of Section Three can only be enforced by Congress. "To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by Congress." *Id.* It was the very language of the Fourteenth Amendment, Chief Justice Chase continued, that put this proposition beyond doubt: "Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision[s] of this article.'" *Id.* (quoting U.S. CONST. amend. XIV, § 5). He concluded that

> the intention of the people of the United States, in adopting the Fourteenth Amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislations of congress in its ordinary course.

Id.

Subsequent cases recognized the reasoning of *Griffin*. *See, e.g., Hansen v. Finchem*, 2022 Ariz. Super. LEXIS 5 (Maricopa Cnty. Sup. Ct. 2022) ("[G]iven the current state of the law and in accordance with the United States Constitution, Plaintiffs have no private right of action to assert

claims under the Disqualification Clause"), *aff'd on other grounds*, 2022 Ariz. LEXIS 168 (Ariz. S. Ct. May 9, 2022); *Rothermel v. Meyerle*, 136 Pa. 250, 254 (1890) (citing *Griffin's Case*, 11 F. Cas. at 26) ("[I]t has also been held that the Fourteenth Amendment, as indeed is shown by the provision made in its fifth section, did not execute itself."); *State v. Buckley*, 54 Ala. 599, 616 (Ala. 1875) (Stone, J.) (same). The Colorado Supreme Court tried to distinguish these cases, pointing out that in some of them, such as *Rothermel*, the court's analysis was limited and instead simply acknowledged *Griffin*'s holding. Pet. App. 94a. But that has it backward. *Rothermel* and the like cases did not need to independently analyze *Griffin*, not because its holding was dubious, but because its holding was clear and well established. Needlessly reciting *Griffin*'s analysis would have been superfluous. Instead, the courts simply acknowledged *Griffin*'s unassailable conclusion.

The challengers here present *Griffin* as an outlier, but it is not. *Griffin* reflects this Court's repeated emphasis on the need for Congress to enforce the Fourteenth Amendment. No one at the time rejected or attacked *Griffin*. On the contrary, as the cases cited above indicate, it was repeatedly treated as authoritative.

Moreover, as Justice Samour discussed in his dissent below, implementing legislation is also critical for due process reasons. Without implementing legislation, there can be no clarity as to what standards may be required:

> Section Three doesn't spell out the procedures that must be followed to determine whether someone has engaged in insurrection after taking the prerequisite oath. That is, it sheds no light on whether a jury must be empaneled, or a bench trial will suffice, the proper burdens of proof and standards of review, the application of discovery and evidentiary rules, or even whether civil or criminal proceedings are contemplated. This dearth of procedural guidance is not surprising: Section Five of the Fourteenth Amendment specifically gives Congress absolute power to enact legislation to enforce Section Three.

Pet. App. 246a.

Likewise, immediately after *Griffin*, Congress enacted the Enforcement Act of 1870 for the specific purpose of enforcing Section Three. Enforcement Act of 1870, ch. 114, 16 Stat. 140, 143-44. The Enforcement Act provided a civil quo warranto action (that has now been abolished and is no longer in force), specifically for the purpose of enforcing Section Three of the Fourteenth Amendment. Senator Trumbull, discussing the provision in Congress, explained, "The Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution." Cong. Globe, 41st Cong., 1st Sess. 626 (1869). He later reiterated this point, explaining that "[s]ome statute is certainly necessary to enforce the constitutional provision." *Id.* There does not appear to be any evidence of someone arguing in response at

those debates that a congressional enforcement mechanism was unnecessary. As Justice Samour explained, Pet. App. 281a-283a, the fact that Congress adopted enforcement legislation almost immediately after Chief Justice Chase concluded enforcement legislation was necessary is strong evidence that *Griffin* was correctly decided and accepted by the people of his day, people who had just adopted Section Three.

That this legislation is no longer in place does not alter the fact that Congress recognized legislation was necessary when it adopted it in 1870. If there exists any current descendant of the Enforcement Act, it is 18 U.S.C. § 2383, which defines insurrection and provides a penalty of disqualification. As noted above, not only has President Trump not been convicted of violating § 2383, he never has been charged under that statute. State courts lack authority to nonetheless rule him disqualified.

Justice Samour explained:

> Chief Justice Chase presciently observed that to "ascertain what particular individuals are embraced" by Section Three's disqualifying function, and to "ensure effective results" in a disqualification case, considerable "proceedings, evidence, decisions, and enforcements of decisions . . . are indispensable." *Griffin's Case*, 11 F. Cas. at 26. In my view, the unwieldy experience of the instant litigation proves beyond any doubt the foresight of Chief Justice Chase's pronouncements . . . , Section Three

> disqualification necessarily requires substantial procedural and normative mechanisms to ensure a fair and constitutionally compliant outcome.

Pet. App. 294a-295a.

In footnote 11 of its opinion, the Colorado Supreme Court argued that

> [t]he question of 'self-execution' that we confront here is not whether Section Three creates a cause of action or a remedy, but whether the disqualification from office defined in Section Three can be evaluated by a state court when presented with a proper vehicle (like section 1-1-113), without prior congressional authorization.

Pet. App. 78a. This is fundamentally flawed. There is no authority "permitting state legislatures to do that which, though delegated to it, Congress has declined to do." Pet. App. 298a (Samour, J., dissenting). As this Court has previously explained, although states in general retain broad authority, that authority does not extend to setting new qualifications for federal office. *United States Term Limits v. Thornton*, 514 U.S. 779, 832-33 (1995) ("The Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office.").

Despite all its lengthy arguments, the error of the decision below is basic. The court feared "the

absurd results" that would follow from not reaching a conclusion that Section Three is self-executing. Pet. App. 87a. But the true absurdity here would be rejecting 150 years of precedent to disqualify a former president for the first time in our history based on untested, novel Fourteenth Amendment theories. *Ownbey* 256 U.S. at 112 ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy."). Congress alone can enforce Section Three. Indeed, the whole point of the Fourteenth Amendment was to reign in rebellious states. To read Section Three as giving states veto power over presidential candidates would be to turn that amendment upside down.

III. The Colorado Supreme Court's Decision Violates the Colorado Republican Party's First Amendment Associational Right to Choose Its Own Political Candidates.

The Colorado Supreme Court's unprecedented decision violates the Colorado Republican Party's First Amendment associational right to place the political candidates of its choice on both the primary and general electoral ballots. As this Court recognized in *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000):

> In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most

> significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.

Id. See also Duke v. Cleland, 954 F.2d 1526, 1531 (11th. Cir. 1992).

The Colorado Supreme Court thus exceeded its authority in directing the removal of the Party's nominee from the ballot. As the Minnesota Supreme Court recently recognized in an analogous situation, *Growe v. Simon*, No. A23-1354 (Minn. Nov. 8, 2023), "although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes."

To more clearly elucidate the First Amendment violation that occurred here, consider the backdrop against which it occurred: The Colorado Election Code. On its face, the Election Code recognizes the rights of political parties and erects guardrails to constrain the Secretary of State from making discretionary (i.e., political, arbitrary) determinations that would violate those rights. These guardrails are critical, yet the Colorado Supreme Court crashed through them like a runaway truck. And the resulting legal disaster extends beyond misapplication of state law by a state's highest court. This disaster presents a constitutional crisis, national in scope. The Colorado Republican Party urges this Court to vindicate its First Amendment associational right disregarded below, and in so doing, avert the disaster.

The Colorado Election Code says what it says for a reason—state political parties have well-established First Amendment rights. As the Colorado Republican Party explained below,

> [t]he First Amendment to the United States Constitution, and Colorado law, C.R.S. § 1-4-1204(1), work in tandem to protect the Party's and candidates' rights to freely associate for purposes of engaging in political advocacy and expression – with certain enumerated, non-discretionary, compliance-confirming authorities reserved to the Secretary of State, and the discretionary authority reserved to the political parties.

CO GOP's Mot. to Dismiss 12-13. Specifically, under C.R.S. § 1-4-1204(1)(b) and the First Amendment, the Colorado Republican Party, not the Secretary of State, has the ultimate authority to determine whether an individual is a "bona fide candidate for president of the United States pursuant to political party rules." *Id.* The Colorado Republican Party, not the Secretary, sets its internal rules and determines the requirements for Republican nominees. By directing the Secretary of State to disqualify candidates based on amorphous and contested factual findings subject to deferential review, Pet App. 160a, the Colorado Supreme Court violated the Republican Party's right to freely associate and choose its political standard bearer. While there may be limited circumstances not at issue here in which a state official might properly adjudicate straightforward, nonpolitical matters like

age or residency, the First Amendment surely does not permit state authorities to go beyond and determine the complex, political question of insurrection.

Political speech is indispensable to a free society, and as such is afforded the broadest and most sacred First Amendment protections. Political speech includes "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). It embraces "[a]dvocacy of the election or defeat of candidates for federal office," "political policy," and "advocacy of the passage or defeat of legislation." *Buckley v. Valeo*, 424 U.S. 1, 48 (1976). A party's selection of a candidate is core political speech, further described as "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 422 (1988).

As this Court has recognized, the "exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983).

> We have repeatedly held that freedom of association is protected by the First Amendment. And of course, this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.

> Similarly, we have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." . . .

Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). As this Court explained in *Timmons v. Twin Cities Area New Party*, "[t]he First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas." 520 U.S. 351, 357 (1997). States may not enact "unreasonably exclusionary restrictions" on ballot access. *Id.* at 369.

The Colorado Supreme Court paid lip service to this principle, recognizing the Republican Party's "claim that it has a right to select its own candidate is uncontroversial, so far as it goes." Pet. App. 65a (citing *Timmons*, 520 U.S. at 359). But after recognizing the existence of the principle, the court failed to appropriately apply it, resulting in the instant constitutional error. "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Williams*, 393 U.S. at 31 (1968).

The Colorado Supreme Court properly recognized that certain appropriate and reasonable ballot exclusions may be permissible. For example, limiting ballot access "to those who have complied

with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable." *Burdick v. Takushi*, 504 U.S. 428, 440 n.10 (1992). However, the imposition of an "insurrection disqualification" here is a horse of a different color.

First, with respect to primary elections, the associational rights of political parties are at their apex. Parties are free to make their own choices, and courts rightly refuse to deny parties the opportunity to set their own requirements. *Jones*, 530 U.S. 567 (2000) (statute providing that any voter could vote in a party's primary unconstitutional); *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (statute's requirement that voters in a primary be members of that party unconstitutional). As the Minnesota Supreme Court correctly explained, a primary "is an internal party election to serve internal party purposes." *Growe v. Simon*, No. A23-1354 (Minn. Nov. 8, 2023). The cases cited by the Colorado Supreme Court as upholding an exclusion from the ballot, such as *Timmons*, 520 U.S. at 358, all involved an exclusion from the *general* ballot. This interference with the Party's internal decision-making during the primary election process is unprecedented.

Second, this Court is clear that even in the general elections, a political party retains First Amendment rights. States may not enact "unreasonably exclusionary restrictions." *Timmons*, 520 U.S. at 367. Laws regarding general ballot access must be "reasonable, politically neutral regulations." *Burdick*, 504 U.S. at 438. "[T]he State's asserted regulatory interests need only be 'sufficiently weighty

to justify the limitation' imposed on the Party's rights." *Timmons*, 520 U.S. at 364 (citing *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). *Timmons* does not give carte blanche to any purported election regulation. Instead, it explicitly requires that the State's proposed justification be both "reasonable" and "politically neutral." So, for example, courts have deemed age and residency requirements permissible under this standard. *See, e.g., Lindsay v. Bowen*, 750 F.3d 1061, 1063 (9th Cir. 2014) ("Distinctions based on undisputed ineligibility due to age do not "limit political participation by an identifiable political group whose members share a particular viewpoint, associational preference or economic status." *Bates v. Jones*, 131 F.3d 843, 847 (9th Cir. 1997))

By contrast, the requirement imposed by the Colorado Supreme Court here is heavily political, non-neutral, and not-generally-applicable. The state cannot impose its own, politically charged, interpretation of Section Three, when no congressional enactment has given it authority to do so. Congress defines the parameters of the enforcement of Section Three. Colorado exceeds its authority and violates the First Amendment by claiming the authority to remove a party's candidates from the ballot, absent a properly established adjudication of insurrection.

The Colorado Supreme Court reasoned that, "nothing in the U.S. Constitution expressly precludes states from limiting access to the presidential ballot to such candidates." Pet. App. 45a. But a state cannot purport to justify an infringement on a party's First

Amendment rights by arguing from the absence of a parallel constraint on state's rights.

The Republican Party has been irreparably harmed by the decision below. The state has interfered in the primary election by unreasonably restricting the Party's ability to select its candidates. As a natural and inevitable result, the state has interfered with the Party's ability to place on the general election ballot the candidate of its choice. And it has done so based on a subjective claim of insurrection the state lacks any constitutional authority to make.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

MICHAEL W. MELITO
MELITO LAW LLC
ROBERT A. KITSMILLER
PODOLL & PODOLL, P.C.
[redacted]

CHRISTINA A. COMPAGNONE
OLIVIA F. SUMMERS
GARRETT A. TAYLOR
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

JAY ALAN SEKULOW
Counsel of Record
JORDAN A. SEKULOW
STUART J. ROTH
ANDREW J. EKONOMOU
JANE SERENE RASKIN
WALTER M. WEBER
BENJAMIN P. SISNEY
NATHAN MOELKER
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Counsel for Petitioner

December 27, 2023