No. 23-719

In the

Supreme Court of the United States

DONALD J. TRUMP,

PETITIONER,

v.

NORMA ANDERSON, ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF PROFESSOR DEREK T. MULLER AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

HEATHER GEBELIN HACKER
Counsel of Record
HACKER STEPHENS LLP
108 Wild Basin Rd., Suite 250
Austin, Texas 78746
heather@hackerstephens.com
(512) 399-3022

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Derek T. Muller is a Professor of Law at Notre Dame Law School.[1] His research focuses on election law, particularly the role of states in the administration of federal elections. He has written extensively about topics at issue in this case, and this scholarship long predates this controversy. Some of those pieces include:

- *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559 (2015), which examines who holds the power to review the qualifications of presidential candidates, including whether states hold that power;
- *'Natural Born' Disputes in the 2016 Presidential Election*, 85 Fordham L. Rev. 1097 (2016), which evaluates how state courts and state election officials went about reviewing the qualifications of presidential candidate Ted Cruz and other 2016 Republican presidential primary candidates challenged for being ineligible to serve as president; and
- *Weaponizing the Ballot*, 48 Fla. St. U. L. Rev. 61 (2021), which looks at the scope of state power to include or exclude presidential candidates on the ballot, and the contours of the procedures that are within the appropriate scope of their authority.

Professor Muller filed amicus briefs in support of no party in *Cawthorn v. Amalfi*, 35 F.4th 245 (4th Cir. 2022) and *Greene v. Secretary of State*, 52 F.4th 907 (11th Cir.

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[1] Pursuant to Rule 37.6, undersigned counsel certifies that no person other than *amicus curiae* or his counsel authored the brief in whole or in part nor made a monetary contribution intended to fund the preparation or submission of the brief. Notre Dame Law School is not a signatory to the brief, and the views expressed here are solely those of *amicus curiae*.

2022) on distinct but related issues of state power to adjudicate the qualifications of congressional candidates. *See Cawthorn*, 35 F.4th at 272 & 274 n. 10 (Richardson, J., concurring in the judgment) (citing Professor Muller's scholarship). He also filed briefs in support of neither party in *Growe v. Simon*, 997 N.W. 2d 81 (Minn. 2023) (mem.), and *Anderson v. Griswold*, __ P.3d __, 2023 WL 8770111 (Colo. Dec. 19, 2023) (en banc), both Section 3 challenges to former president Donald Trump's candidacy. *See Anderson*, 2023 WL 8770111, at *76 n.3 (Berkenkotter, J., dissenting) (citing Professor Muller's brief).

Professor Muller's interest in the case is public in nature. As a scholar of election law, he desires to see the case decided in a way that fits the best reading of the United States Constitution and existing precedent, and in a way that ensures proper adjudication of future disputes in contested election cases.

SUMMARY OF ARGUMENT

States hold the power to adjudicate the qualifications of presidential candidates. That power extends to the general election, even though the election is formally a process to appoint presidential electors. And that power extends to the primary election, even though state voters are formally selecting delegates to a party's nominating convention. But states have no obligation to evaluate the qualifications of presidential candidates, and states may choose to permit openly unqualified presidential candidates to appear on the ballot.

This brief describes historical state practices and how those longstanding practices comport with the Constitution, particularly the power of state legislatures under Article II, Section 1, Clause 2 to direct the manner of appointing presidential electors. This brief takes no question on substantive legal or factual questions surrounding Section 3 of the Fourteenth Amendment, or how this specific provisions interacts with this brief's overall claims. But as a precursor to any substantive analysis of Section 3, this Court should reach two threshold legal conclusions.

First, a state legislature is permitted under the United States Constitution to provide mechanisms for the review of the qualifications of presidential candidates and for the exclusion of ineligible candidates. Second, a state election official has no obligation—indeed, no authority—to investigate the qualifications of presidential candidates or exclude ineligible presidential candidates from the ballot, unless state law authorizes such power. The brief concludes by noting that other election law doctrines constrain state power in this case, and that this Court should be aware of the potential effects a decision

could have in other matters relating to presidential elections.

ARGUMENT

I. States have the power to review the qualifications of presidential candidates.

The Constitution and this Court's precedent establish that states have broad power to conduct presidential elections. In recent decades, states have exercised that power to judge the qualifications of presidential candidates. That practice is consistent with the Constitution's text and structure, which does not exclude states from the exercise of this power. And states have exercised similar power in presidential primaries.

A. The Presidential Electors Clause grants states broad power over presidential elections.

Article II, Section 1, Clause 2—the Presidential Electors Clause—of the United States Constitution provides, "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors . . . ." This clause is the source of authority for how states go about choosing presidential electors. And this is a broad power, described by this Court as "plenary," *McPherson v. Blacker*, 146 U.S. 1, 25 (1892), and "far-reaching," *Chiafalo v. Washington*, 591 U.S. __, 140 S. Ct. 2316, 2324 (2020).[2]

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[2] *Accord Chiafalo*, 140 S.Ct. at 2334 (Thomas, J., concurring in the judgment) (concluding that "nothing in the text or structure of Article II and the Twelfth Amendment contradicts the fundamental distribution of power preserved by the Tenth Amendment" and that states hold power over presidential elections as long as the Constitution is silent on the matter).

The legislature's power to "direct" the "manner" of appointing electors includes the decision whether the legislature or the people choose electors. And it includes the decision whether to divide the state into districts, each choosing one elector; or to permit voting for all of the state's electors. *See McPherson*, 146 U.S. at 29–36. Consistent with this broad power to direct the manner of appointing electors, state legislatures have developed different mechanisms over the years.

For instance, states may add qualifications to presidential electors, such as requiring electors live in the state. *Chiafalo*, 140 S.Ct. at 2324. States may require electors to take a pledge to vote for specific presidential and vice-presidential candidates. *Ray v. Blair*, 343 U.S. 214, 227–30 (1952). States may strip electors of their office or fine them for disobeying that pledge. *Chiafalo*, 140 S.Ct. at 2328; *Colo. Dep't of State v. Baca*, 140 S. Ct. 2316 (2020) (per curiam) (mem.). States may replace electors after Election Day. *See, e.g.*, 3 U.S.C. § 4. States may require electors to be chosen at large as a single bloc of electors, and states prohibit voters from choosing among individual electors. States need not even print the names of electors on the ballot. Instead, in a practice that began in the earlier twentieth century, states may simply print the names of presidential and vice-presidential candidates on the ballot without naming any electors.[3]

Even though states are formally choosing presidential electors, and those electors then vote for the

[3] *See, e.g.*, George C. Sikes, *A Step Toward the Short Ballot*, 11 Nat'l Municipal Rev. 260 (1922) (describing new systems in Nebraska and Iowa) L.C. Miller, *Taking the Cross-Word Puzzle Out of Elections*, 10 Marq. L. Rev. 22 (1925) (describing new system in Wisconsin).

president and vice president, states unquestionably exercise broad discretion over how they appoint electors. That power extends to rules relating to the appearance of presidential candidates on the ballot.

B. For more than fifty years, states have determined whether candidates are ineligible and removed ineligible candidates from the presidential ballot.

Since at least 1968, states have occasionally exercised the power to review the qualifications of presidential candidates and to exclude ineligible candidates from the ballot. And exclusions have survived judicial scrutiny.

California excluded Eldridge Cleaver from the ballot in 1968. Cleaver was the 33-year-old nominee of the Peace and Freedom Party.[4] He challenged the exclusion in state court, which rejected his challenge.[5] Cleaver petitioned for certiorari to this Court. Without comment, the Court rejected the petition. *Cleaver v. Jordan*, 393 U.S. 810 (1968). A denial of a petition for writ of certiorari says little, if anything, about the merits. But it demonstrates the fact that a state did exclude a candidate from the ballot for failure to meet the qualifications for office, long ago.

In 1972, 31-year-old presidential candidate Linda Jenness attempted to appear on the Illinois ballot as the Socialist Workers Party candidate. The Illinois State

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[4] Associated Press, *Eldridge Cleaver Kept Off Ballot*, San Clemente Daily Sun-Post, Aug. 22, 1968, at 1; Associated Press, *McCarthy, Cleaver Lose Court Fight for California Ballot Spot*, Sacramento Bee, Oct. 7, 1968, at 1.

[5] Associated Press, *Write-In Candidate Names Are Approved*, Petaluma Argus-Courier, Sept. 28, 1968, at 1.

Electoral Board excluded her from the ballot for her failure to sign a loyalty oath and because she was underage. A federal court found that the loyalty oath was unconstitutional, but it also found that excluding Jenness violated "no federal right." *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (per curiam).

Review of qualifications of candidates and exclusion of ineligible candidates continues to this day. States routinely exclude ineligible candidates. In 2008, for instance, Róger Calero, a Nicaraguan national, was the Socialist Workers Party nominee for president. In some states, Calero's name appeared on the ballot. In others, a stand-in candidate, James Harris, appeared in Calero's place in states where Calero was excluded from the ballot.[6] In 2012, Abdul Hassan, who was not a natural born citizen, could not attest that he met this qualification for office and sued to appear on the ballot. Hassan's claims failed in Iowa, Montana, New Hampshire, and Colorado.[7] Also in 2012, Peta Lindsay, a 27-year-old nominee for the Peace and Freedom Party, was excluded from the

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[6] *See* Fed. Elec. Comm'n, Official General Election Results for United States President, Nov. 4, 2008, https://www.fec.gov/resources/cms-content/documents/2008pres.pdf; Kirsten Lindermayer, *The presidential candidate who can't become president*, Phil. Inquirer, Feb. 20, 2008, https://www.inquirer.com/philly/hp/news_update/20080220_The_presidential_candidate_who_cant_become_president.html.

[7] *See Hassan v. Iowa*, 2012 WL 12974068 (S.D. Iowa Apr. 26, 2012), *aff'd*, 493 F. App'x 813 (8th Cir. 2012); *Hassan v. Montana*, 2012 WL 8169887 (D. Mont. May 3, 2012), *aff'd*, 520 F. App'x 553 (9th Cir. 2013); *Hassan v. New Hampshire*, 2012 WL 405620, at *4 (D.N.H. Feb. 8, 2012); *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1201 (D. Colo.), *aff'd*, 495 F. App'x 947 (10th Cir. 2012).

California ballot. The decision was upheld in federal court. *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014).

Challenges to candidacies of John McCain, Barack Obama, and Ted Cruz routinely arose in recent years. Many challenges were dismissed because courts lacked jurisdiction to decide the claims. But a few election boards and courts reached the merits and concluded that candidates were "natural born citizens" and eligible to serve as president.[8]

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[8] *See, e.g.*, *Ankeny v. Gov. of Ind.*, 916 N.E.2d 678, 688 (Ind. Ct. App. 2009) (state appellate court finding in challenge to Barack Obama's and John McCain's candidacies that a "natural-born citizen" was someone born within the borders of the United States); *Farrar v. Obama*, OSAH-SECSTATE-CE-1215136-60-MALIHI (Ga. Office of State Admin. Hearings Feb. 3, 2012) (administrative law judge holding that Barack Obama, a person born in the United States, is a natural born citizen regardless of the citizenship of his parents); *Joyce v. Cruz*, 16 SOEB GP 526 (Ill. State Bd. of Elections Jan. 28, 2016) (state election board concluding that Ted Cruz "became a natural born citizen at the moment of his birth" because his mother "was a U.S. citizen"); Transcript of Proceeding at 23, Challenge to Marco Rubio, Cause No. 2016-2 (Ind. Election Comm'n Feb. 19, 2016), https://perma.cc/T5RL-26P4 (by a vote of 3-1, Indiana Election Commission rejected a motion to exclude Cruz from the ballot); *Williams v. Cruz*, OAL Nos. STE 5016-16, STE 5018-16 (N.J. Office of Admin. Law Apr. 13, 2016) (administrative law judge finding that "Senator Cruz meets the Article II, Section I qualifications and is eligible to be nominated for President"); *Elliott v. Cruz*, 137 A.3d 646, 658 (Pa. Commw. Ct. 2016), *aff'd*, 134 A.3d 51 (Pa. 2016) (state trial court concluding that "Ted Cruz is eligible to serve as President of the United States").

C. The Constitution does not expressly or implicitly remove power from states to judge the qualifications of presidential candidates.

This approach fits the Constitution's text and structure. To start, there is no "textually demonstrable constitutional commitment of the issue" to another body. *Baker v. Carr*, 369 U.S. 186, 217 (1962).[9] Furthermore, I have expressly argued in other cases that states lack the power to judge the qualifications of *congressional* candidates. *See* Muller, *Scrutinizing*, 90 Ind. L.J. at 594–98. But while the Constitution expressly vests the power to be "*the*" judge of congressional elections in each house of Congress, there is no such power for presidential elections. *See* U.S. Const. art. I, § 5, cl. 1; *Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986) (opinion of Scalia, J.) ("The exclusion of others—and in particular of others who are judges—could not be more evident.").

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[9] It is worth noting that, formally, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Baker*, 369 U.S. at 210. That said, if a power is given to a branch of the federal government that is "unreviewable" by federal courts, *see Powell v. McCormack*, 395 U.S. 486, 520 (1969), or left to that branch's "final responsibility," *see Nixon v. United States*, 506 U.S. 224, 240 (1993) (White, J., concurring in the judgment), it is hard to find circumstances in which a state might review the determination. *Accord Roudebush v. Hartke*, 405 U.S. 15, 25–26 (1972) (state may not "usurp" or "impair" Senate's power to judge the elections and returns of its members). *But see Strunk v. N.Y. State Bd. of Elections*, 950 N.Y.S.2d 722, 2012 WL 1205117, at *11–12 (Sup. Ct. Apr. 11, 2012) (state court finding itself bound by the "political question doctrine" when presidential candidates' qualifications were challenged).

That means states are not excluded from the range of actors who may judge presidential qualifications. Voters, for instance, might judge the qualifications of candidates and decide not to vote for candidates if they believe the candidates are ineligible. Presidential electors might judge the qualifications of presidential candidates, as might Congress when it convenes to count electoral votes. *See* Derek T. Muller, *Electoral Votes Regularly Given*, 55 Ga. L. Rev. 1529, 1538–39 (2021). But no one holds the exclusive power to judge presidential qualifications, and certainly nothing in the text of the Constitution purports to oust states from exercising a similar power.

State power over the "manner" of appointing electors is broad. Recall that a state legislature may choose to keep this power to itself and appoint electors. That has not happened since Colorado did so in 1876.[10] State legislatures have preferred to empower the people of the state to choose presidential electors. And in doing so, surely the state legislature can limit the people's choice to only eligible presidential candidates, as the legislature holds the greater power of choosing the electors itself.

The state's interest in ensuring that voters and electors choose only eligible candidates is heightened in a presidential election. In the past, Congress has refused to count electoral votes when electors vote for an ineligible candidate. Muller, *Regularly Given*, 55 Ga. L. Rev. at 1538 n.42. A state risks losing its representation in the Electoral College—the mechanism to express the state's

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[10] Svend Petersen, *A Statistical History of the American Presidential Elections With Supplementary Tables Covering 1968-1980* 45 (1981).

preferences in a presidential election—if Congress refuses to count those votes. And when Congress counts electoral votes, it only does so once every four years. There is no opportunity for a special election to make up for a state's failure to send a full delegation of electors whose votes will be counted in Congress. States may rightly take precautions to ensure that only votes cast for eligible candidates will be sent to Congress.

D. States have exercised a similar power in presidential primaries.

Challenges to presidential candidates in primary elections appear to be of more recent vintage but track the same kind of exercise of state power. Challenges to Ted Cruz's candidacy in 2016, for instance, arose exclusively in the context of a presidential primary.

The Supreme Court has long held that the right to vote in a *congressional* primary is protected by the federal Constitution. *See United States v. Classic*, 313 U.S. 299, 314–22 (1941). And a state-run primary is state action subject to federal constitutional limitations. *See, e.g.*, *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932). That said, "[t]he States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates." *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975).

Admittedly, a presidential primary process is farther removed from the presidential election than a typical primary. The presidential primary is one step in the selection of delegates from the state to a party's presidential nominating convention. After that nominating convention, the party's preferred presidential candidate

appears on the ballot in all states—and unlike a typical primary, a candidate who lost a state's presidential primary for a party may nevertheless appear as the nominee of that party on the general election ballot.

Still, three important principles guide the conclusion that states can exclude ineligible candidates from the presidential primary ballot. *First*, the state may administer its presidential primary election as it sees fit. *See Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 120–21 (1981) (noting that Wisconsin may choose to run an "open" presidential primary); *cf. Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215–16 n.6 (1986) (holding that state's placed an impermissible burden on political party with primary rules that clashed with party's associational preferences and distinguishing *Democratic Party*). *Second*, the state is bound by federal constitutional limitations in how it conducts its presidential primary, as if it were any other election. *See, e.g.*, *Yang v. Kosinski*, 960 F.3d 119, 130–34 (2d Cir. 2020); *Duke v. Smith*, 13 F.3d 388, 394 (11th Cir. 1994); *De La Fuente v. Simon*, 940 N.W.2d 477, 492–97 (Minn. 2020) (per curiam); *cf. Calif. Democratic Party v. Jones*, 530 U.S. 567, 573 (2000); *Griffin v. Padilla*, 408 F.Supp.3d 1169, 1177–81 (E.D. Calif. 2019), *vacated*, 2019 WL 7557783 (9th Cir. Dec. 16, 2019) (unpublished).[11] *Third*, the presidential nominating convention is free to ignore state presidential primary results that run afoul

[11] This Court has previously noted, "Any connection between the process of selecting electors [under art. II, § 1, cl. 2] and the means by which political party members in a State associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance." *Democratic Party*, 450 U.S. at 125 n.31.

of the party's rules. *See Democratic Party*, 450 U.S. at 126.

States may choose to run presidential primaries as they see fit. Sometimes, a state's ordinary rules exclude serious candidates from the ballot. *See, e.g.*, *Perry v. Judd*, 471 F. App'x 219 (4th Cir. 2012) (rejecting challenge by Texas Governor Rick Perry, who was unable to appear on the Virginia presidential primary ballot for failing to submit petitions with enough voter signatures in a timely fashion). And sometimes, states examine the qualifications of presidential primary candidates like Ted Cruz. The state is constrained by constitutional limitations. But if the state has the power to review qualifications and exclude ineligible candidates in the general election, it has that power in the primary election, too.

II. States have no obligation to review the qualifications of presidential candidates.

A state legislature may decide to enact a law that would enable review of the qualifications of presidential candidates. But states do not have an affirmative duty or obligation to investigate the qualifications of presidential candidates and prevent ineligible candidates from appearing on the ballot. And election officials certainly hold no independent authority to go forth and investigate the qualifications of candidates without express legislative authorization.

After states began printing their own ballots to distribute to voters in the late nineteenth century, states could determine which electors' names would appear on the ballot, and if a presidential candidate's name would appear on the ballot, too. *Cf.* Derek T. Muller, *Ballot Speech*, 58 Ariz. L. Rev. 693, 708–14 (2016). States then

began to simplify that process by listing only the presidential candidate's name.

Many ineligible candidates have appeared on the ballot in recent decades, mostly underage candidates. In 1968, Eldridge Cleaver was the Peace and Freedom Party's presidential candidate, just 33 years old, and appeared on the ballot in some states even though he was excluded in California. Michael Zagarell, Linda Jenness, Andrew Pulley, Larry Holmes, Gloria La Riva, Róger Calero, Arrin Hawkins, and Peta Lindsay have all appeared on the ballots of at least some states, into the twenty-first century, despite being underage or not a natural born citizen. (In all these cases, states have excluded ineligible candidates where there is no factual or legal doubt about their ineligibility. A 27-year-old or a Nicaraguan national are indisputably ineligible to be president.) *See* Muller, *Scrutinizing*, 90 Ind. L.J. at 600.

In short, over the years, one can easily and readily find avowedly ineligible candidates who have appeared on the presidential election ballot. If state legislatures have not created rules to exclude ineligible candidates, then those candidates may appear on the ballot (assuming they have met other conditions for ballot access).

It is no response that state officials take an oath to uphold the Constitution and therefore have an independent obligation to enforce the qualifications of presidential candidates. State election officials do not act unless they have authorization, express or implied, under state law or the state constitution to administer federal elections. And in rare instances, federal law places an obligation on state election officials. *See, e.g.*, 3 U.S.C. § 5.

Some tasks are parceled out to different federal or state actors in our constitutional system. And courts have agreed that election officials have no such independent obligation to investigate qualifications. *See, e.g.*, *Growe*, 997 N.W. 2d at 83 ("And there is no state statute that prohibits a major political party from placing on the presidential nomination primary ballot, or sending delegates to the national convention supporting, a candidate who is ineligible to hold office."); *McInnish v. Bennett*, 150 So.3d 1045, 1046 (Ala. 2014) (mem.) (Bolin, J., concurring specially) ("I write specially to note the absence of a *statutory framework* that imposes an affirmative duty upon the Secretary of State to investigate claims such as the one asserted here, as well as a procedure to adjudicate those claims."); *Ankeny*, 916 N.E.2d at 681 ("[W]e note that the Plaintiffs do not cite to any authority recognizing that the Governor has a duty to determine the eligibility of a party's nominee for the presidency."); *see also* Benjamin Gutman, Oregon Department of Justice Memorandum to Secretary of State, Nov. 14, 2023, at 3 ("We conclude that current Oregon law does not require the Secretary to make a determination about a candidate's qualification to hold office as President before putting the candidate's name on the primary ballot . . . .").

The power to review qualifications may reside in state officials or state courts if the state legislature so directs. But it is not a duty inherent in the office of an election administrator to investigate qualifications. Indeed, to do so might usurp the power of the state legislature to select the manner of appointment. *Cf. Moore v. Harper*, 600 U.S. 1, 29 (2023).

A holding to the contrary would be significant. It would suggest that state election officials should be asking for the birth certificates of presidential candidates or holding hearings about the circumstances of their birth—without any authorization from the legislature or a statutorily-created process for investigation. It is a reason to be skeptical of claims that any state election official holds an independent obligation to investigate qualifications, as the consequences of such a claim sweep far beyond Section 3.

III. This Court should be cognizant of other election law issues before addressing the substance of Section 3.

These two threshold issues—states hold the power to judge qualifications of presidential candidates, but they do not need to exercise it—are important details ahead of any holding in this case. Holdings to the contrary would not only be inconsistent with the best understanding of the Constitution, this Court's precedents, and established history. They would also increase instability in elections. A holding that states may not exclude ineligible presidential candidates usurps the legislature's prerogative, invites frivolous candidacies, and sets the state up for potential rejection of electoral votes when Congress convenes to count them. A holding that states are compelled to judge qualifications creates new questions in the many jurisdictions where no such mechanisms exist and threatens a new form of election subversion if administrators pick and choose how to go about discerning eligibility.

But there remain important questions about how Colorado exercised its power to administer elections here. There are independent election law constraints on how

states may enforce qualifications rules. And at least three election law issues loom over Colorado's exercise of power in this case.

A. Are the mechanisms to evaluate the qualifications of presidential candidates adequately tailored to the state's interests such that they do not unduly burden voters' opportunity to associate with the preferred candidate of their choice?

State power over the manner of administering a presidential primary is not unlimited. This Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992) establish a "flexible standard" to review whether state restrictions on ballot access are unduly burdensome. *Burdick*, 504 U.S. at 434. Courts examine how strong the state's interests are and compare those interests to the severity of the burden placed upon candidates and voters. Without delving into a full evaluation on the merits, this brief only notes that laws restricting ballot access, including laws that scrutinize the qualifications of presidential candidates, must survive the *Anderson-Burdick* test.

This Court has held that the state's interest in regulating presidential elections is actually weaker than in other types of elections:

> Furthermore, in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the

> votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.

Anderson, 460 U.S. at 795. And as noted earlier, states have routinely permitted unqualified candidates to appear on the ballot.

That said, states like Colorado, which bind their presidential electors to vote for the presidential and vice-presidential candidates they pledge to support, may have a stronger interest than other states. *See* Colo. Rev. Stat. § 1-4-304(5). And states undoubtedly have a legitimate interest in preventing confusion among voters by excluding marginal—or unqualified—candidates. *See Williams v. Rhodes*, 393 U.S. 23, 33 (1968); *Hassan v. Colorado*, 495 F. App'x 947, 948–49 (10th Cir. 2012) (unpublished opinion).

Balanced against the state's interest is the magnitude of the burden of the law. Scrutiny of the qualifications of presidential candidates can take different forms and impose different burdens. Laws that require presidential candidates to affirm under penalty of perjury that they are eligible to serve in office appear to be minimally intrusive. *Cf. Hassan*, 495 F. App'x at 948–49. Laws that require candidates to produce a copy of a birth certificate to demonstrate that they are a natural born citizen and meet the age requirement are slightly more

burdensome. *See* Muller, *Weaponizing*, 48 Fla. St. U. L. Rev. at 127–28 n.430. Rules in a presidential primary that empower a state court to hold a five-day hearing to scrutinize eligibility are more burdensome still, particularly for non-residents who are simultaneously campaigning in other states.

This Court should carefully weigh the state's interest against the magnitude of the burden placed upon candidates before adjudicating the qualifications of presidential candidates. *Cf.* Neil Gorsuch & Michael Guzman, *Will the Gentleman Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 Hofstra L. Rev. 341, 375 (1991) ("Another theory of the right to vote, however, requires not only equal treatment, but also the opportunity to express one's preference for a particular candidate. . . . But, that said, the breadth of a right to vote for a particular individual under this view is not altogether clear.").

B. Does an adjudication of a qualification that Congress might alleviate in the future constitute an additional (and impermissible) qualification for federal office?

Additionally, and more challenging, there is the issue of additional qualifications. One unsettled issue with respect to Section 3 of the Fourteenth Amendment is whether exclusion from the ballot at this time, well ahead of Inauguration Day, functions as an additional qualification for a presidential candidate.

States may not add qualifications to presidential candidates. *See Chiafalo*, 140 S.Ct. at 2324 n.4; *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). Section 3

provides that "Congress may by a vote of two-thirds of each House, remove such disability." A candidate who is ineligible today could be eligible by January 20, 2025. And Section 3 provides that a person may not "hold any office," but says nothing about eligibility to run as a candidate for office.

The state's power to direct the manner of appointment surely extends to regulate candidacies for presidential office and ballot access rules. And, as this brief has argued, that power extends to judging the qualifications of presidential candidates and excluding ineligible candidates from the ballot. But if a state judges qualifications prematurely, it could inadvertently add qualifications for candidates for office. That is, if a state requires that a candidate demonstrate he is eligible *today*, that may impose an additional qualification if the candidate is, or could be, eligible by Inauguration Day or sometime during the four-year presidential term of office.

This places states in a hard position. On the one hand, if a state may not judge the qualifications of a candidate based on the best information they have at hand today, the state risks its electoral votes being rejected in Congress. *See, e.g.*, Zoe Tillman, *Trump's Presidential Run Faces Legal Challenges Over His Role in Jan. 6 'Insurrection,'* Bloomberg, Nov. 16, 2022, https://www.bloomberg.com/news/articles/2022-11-16/donald-trump-s-candidacy-risks-ballot-challenges-over-jan-6-insurrection-role ("Asked if Congress could refuse to certify a Trump electoral win on Section 3 grounds, Wasserman Schultz said she didn't know if lawmakers 'would be in a position to do that but it certainly wouldn't be something that should be ruled out.'"). On the other hand, if a state prematurely excludes a candidate from the ballot, the

candidate might later become eligible, and the state has functionally disqualified an eligible candidate.

It is worth noting, as a matter of historical practice, that states have excluded candidates who could never become eligible during the term of office, such as a Nicaraguan national or a 27-year-old candidate. But states have gone farther. Consider again the example of 33-year-old Eldridge Cleaver, who would turn 35 within the four-year presidential term of office. The Twentieth Amendment provides, "If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified . . . ." In theory, an ineligible candidate could simply stand aside as the vice president acts as president until the president qualifies for office. Nevertheless, California kept Cleaver off the ballot in 1968. *Accord Lindsay*, 750 F.3d at 1065 ("The Twentieth Amendment addresses such contingencies. Nothing in its text or history suggests that it precludes state authorities from excluding a candidate with a known ineligibility from the presidential ballot.").

To Professor Muller's knowledge, this issue of premature adjudication of qualifications for presidential candidates is not seriously contemplated in any historical judicial opinions. *Cf. Greene*, 52 F.4th at 915 (Branch, J., concurring) ("Instead, the State Defendants, acting under the Challenge Statute, forced Rep. Greene to defend her eligibility under § 3 to even appear on the ballot pursuant to a voter challenge to her candidacy—thereby imposing a qualification for office that conflicts with the constitutional mechanism contained in § 3."). The practice of states is of limited precedential value. *Cf.* George

Washington McCrary, *A Treatise on the American Law of Elections* § 346 (4th ed. 1897) (describing, in non-presidential election contexts, inconsistent practices in states examining restrictions for candidates holding office, and Congress's approach in congressional elections). Professor Muller's thoughts on this topic are hesitant and tentative. But it is an important threshold issue that should be addressed before reaching the merits of any Section 3 claim.

C. Does any decision that defers to Congress distinguish Congress's power to enact enabling legislation under Section 5 of the Fourteenth Amendment, its power to refuse to count electoral votes under the Twelfth Amendment and 3 U.S.C. § 15, and its power to determine whether a president has "failed to qualify under Section 3 of the Twentieth Amendment?

One issue in this case is whether Section 3 of the Fourteenth Amendment may be implemented without congressional legislation. *See Anderson*, 2023 WL 8770111, at *19. But congressional implementation of Section 3 can take different forms. And without some precision about the contours of whether and how Congress may implement Section 3, any judicial decision risks creating a crisis after the presidential election.

A decision deferring to Congress over qualifications might mean different things in different contexts. In 1873, for instance, Congress refused to count electoral votes cast for Horace Greeley, a candidate who died before the presidential electors met. Three electors in Georgia voted for Greeley, and Congress did not count

them. *See* Muller, *Regularly Given*, 55 Ga. L. Rev. at 1538 n.42.

It is possible that members of Congress attempt to refuse to count votes cast for a putatively ineligible candidate as not "regularly given." *See* 3 U.S.C. § 15(d)(2)(B)(ii)(II); *see also* Tillman, *supra* (quoting member of Congress entertaining possibility of refusing to count electoral votes). If that candidate appeared to have a majority of electoral votes entering the joint session of Congress, and Congress refused to count votes cast for that candidate, no candidate would have a majority of electoral votes. *See* 3 U.S.C. § 15(e)(2). The election would then be thrown to the House of Representatives for a contingent election among the top three vote-getters in the Electoral College. U.S. Const. amend. XII.

It is also possible that if Congress counts electoral votes, a challenge could arise that the president elect has "failed to qualify" under the Twentieth Amendment and that the vice president elect should act as president. *See* U.S. Const. amend. XX, § 3. There is no mechanism in law to determine whether a president elect has failed to qualify, but some scholars have suggested it is "self-executing." *See, e.g.*, William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. __ (forthcoming 2024), at 23. *available at* https://akhilamar.com/wp-content/uploads/2023/08/The-Sweep-and-Force-of-Section-Three.pdf. It is not clear how this provision would be enforced—for instance, should the Chief Justice of the United States step aside and refuse to administer the oath of office at noon on January 20, 2025 to a candidate deemed not qualified? *See* U.S. Const. art. II, § 1, cl. 8; U.S. Const. amend. XX, § 1.

Any decision that purports to leave to Congress some decision-making authority over this area must be precise. Open-ended deference to Congress risks statements used out of context to manufacture an election crisis in the months to come.

CONCLUSION

Election law issues pervade this case. This Court's decision has the potential to affect an array of election administration in a variety of contexts, presidential and beyond. *Amicus* respectfully submits that states hold the power to adjudicate the qualifications of presidential candidates. Judging qualifications may take place only after the state legislature has created a mechanism to do so. But state law on this topic remains subject to other legal constraints, and this Court should carefully articulate what those constraints look like.

Respectfully submitted.

HEATHER GEBELIN HACKER
Counsel of Record
HACKER STEPHENS LLP
108 Wild Basin Rd., Suite 250
Austin, Texas 78746
heather@hackerstephens.com
(512) 399-3022

Counsel for Amicus Curiae

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