No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR FORMER UNITED STATES ATTORNEYS Robert S. Brewer, Jr., Stephen J. Cox, Bobby L. Christine, David Michael Hurst, Jr., Robert G. McCampbell, James McDevitt, R. Andrew Murray, R. Trent Shores, Michael B. Stuart, John "Jay" Town, and Matthew G. Whitaker as *Amici Curiae* Supporting Petitioner

R. TRENT SHORES
Counsel of Record
GERARD M. D'EMILIO
DAVID R. HERBER
GableGotwals
110 North Elgin
Suite 200
Tulsa, Oklahoma 74137
(918) 595-4800
tshores@gablelaw.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Constitution, treaty, statutes, and regulations:

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are former United States Attorneys who took an oath to support and defend the Constitution of the United States and bear true faith and allegiance to the same, and for the purposes of this brief who have experience in evidentiary issues in trial courts. The *amici curiae* do not advocate for or against any particular candidate for office. Rather, the *amici curiae* address a limited scope issue involving the rules of evidence.[2] Specifically:

- Robert S. Brewer, Jr. was appointed by President Donald Trump as United States Attorney for the Southern District of California and served from 2018 to 2021.
- Stephen J. Cox was appointed by Donald Trump as United States Attorney for the Eastern District of Texas and served from 2020 to 2021.
- Bobby L. Christine was appointed by Donald Trump as United States Attorney for the Southern District of

---

[1] No counsel for any party authored this brief in whole or in part, and no other person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici curiae* join this brief solely in their personal capacities. They do not represent or advise the Petitioner in this matter, and they have not been involved in this case apart from joining the briefing as *amici curiae.*

Georgia and served from 2017 to 2021.

- David Michael Hurst, Jr. was appointed by Donald Trump as United States Attorney for the Southern District of Mississippi and served from 2017 to 2021.
- Robert G. McCampbell was appointed by President George W. Bush as United States Attorney for the Western District of Oklahoma and served from 2001 to 2005.
- James A. McDevitt was appointed by President George W. Bush as United States Attorney for the Eastern District of Washington and served from 2001 to 2010.
- R. Andrew Murray was appointed by Donald Trump as United States Attorney for the Western District of North Carolina and served from 2017 to 2021.
- R. Trent Shores was appointed by President Donald Trump as United States Attorney for the Northern District of Oklahoma and served from 2017 to 2021.
- Michael B. Stuart was appointed by President Donald Trump as United States Attorney for the Southern District of West Virginia and served from 2017 to 2021.

- John "Jay" Town was appointed by President Donald Trump as United States Attorney for the Northern District of Alabama and served from 2017 to 2020.
- Matthew G. Whitaker was appointed by President George W. Bush as United States Attorney for the Southern District of Iowa and served from 2004 to 2009. Mr. Whitaker was appointed by President Donald Trump as Acting United States Attorney General and served from November 2018 to February 2019.

SUMMARY OF THE ARGUMENT

On December 22, 2022, the United States House of Representatives' Select Committee to Investigate the January 6th Attack on the United States issued its final report ("the January 6th Report" or "the Report"). The Report blamed former President Donald J. Trump for the events of January 6th, 2021, and recommended he be charged for inciting an insurrection. On December 19, 2023, the Colorado Supreme Court relied on findings and recommendations in the Report to disqualify Mr. Trump from the primary ballot for the 2024 Presidential election. In doing so, that Court violated its own rules of evidence, arbitrarily applied state law, and misapplied the Fourteenth Amendment's Insurrection clause. Collectively, these actions resulted in a violation of the Fourteenth Amendment's Due Process clause. These errors were not harmless. This Court should reverse the decision to disqualify Mr. Trump.

ARGUMENT

I. Colorado's Application of its State Evidentiary Laws Violated the Fourteenth Amendment's Due Process Requirements.

Colorado's application of the Fourteenth Amendment's Insurrection clause violated the same Amendment's Due Process clause. Justice Samour, of the Colorado Supreme Court, accurately framed the issue:

> Even if we are convinced that a candidate committed horrible acts in the past—dare I say, engaged in insurrection—there must be procedural due process before we can declare that individual disqualified from holding public office. Procedural due process is one of the aspects of America's democracy that sets this country apart.

Anderson v. Griswold, 2023 CO 63, ¶ 273 (Samour, J., dissenting) *cert. granted sub nom. Trump v. Anderson*, No. 23-719, 2024 WL 61814 (U.S. Jan. 5, 2024). This Court can also review state court decisions that are based on an arbitrary application of state law. *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) ("'[A]n unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question.'" (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)); *see also Walker v. Martin*, 562 U.S. 307, 320 (2011) ("A state ground, no doubt, may be found inadequate when discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law . . . ." (citations omitted)).

This court has held that states do not have the right to exclude a candidate from federal office if they are otherwise qualified under the United States Constitution. While the Elections Clause grants States authority to regulate election procedures, they do not grant a "license to exclude classes of candidates from federal office." *U.S. Term Limits, Inc. v.*

Thornton, 514 U.S. 779, 832–33 (1995). "The Framers feared that the diverse interests of the States would undermine the National [Government], and thus they adopted provisions intended to minimize the possibility of state interference with federal elections." *Id.* at 808. Here, Colorado in misapplying its rules of evidence arbitrarily restricted a candidate from running for federal office. That is a question of Constitutional concern for this Court.

While other briefs will properly address additional problems with Colorado's ruling, this brief addresses a discrete issue: *what evidence may a state court consider to disqualify a candidate from federal office?* Because Colorado's application of its own rules of evidence was not supported by law, it was a violation of Mr. Trump's due process rights. Finally, a state's exclusion of a candidate from office based on inadmissible evidence (that was in this case produced by the candidate's political opposition) is an issue necessitating this Court's review.

II. The Colorado Courts Erred in Their Application of Colorado Rule of Evidence 803(8).

Both the Colorado District Court ("the trial court") and the Colorado Supreme Court (collectively, "Colorado" or "the Colorado courts") errantly admitted the January 6th Report as admissible hearsay evidence under Colorado Rule of Evidence 803(8) ("Rule 803(8)").[3] In so doing, the Colorado courts

[3] Because Colorado's evidentiary rules are based on the Federal Rules of Evidence, Colorado courts regularly rely on

engaged in legal error when determining the Report was appropriately reliable and trustworthy so as to qualify as a public record under Rule 803(8).

A. Standard of Review

The Colorado Supreme Court reviewed the trial court's evidentiary ruling for an abuse of discretion. *Anderson*, 2023 CO 63, ¶ 163. But a trial court abuses its discretion when it "misapplies the law or when its ruling is manifestly arbitrary, unreasonable, or unfair." *People v. Baker*, 2021 CO 29, ¶ 29, 485 P.3d 1100, 1106; *accord United States v. Muñoz*, 812 F.3d 809, 817 (10th Cir. 2016). Put differently, "[a]n error of law is per se an abuse of discretion." *United States v. Ellis*, 23 F.4th 1228, 1238 (10th Cir. 2022) (quoting *United States v. Lopez-Avila*, 665 F.3d 1216, 1219 (10th Cir. 2011)).

Here, because the trial court misapplied Rule 803(8) and extant caselaw interpreting the public record exception, it *per se* abused its discretion and committed reversible error.[4]

---

federal jurisprudence for guidance. *See, e.g.*, *Anderson v. Griswold*, 2023 CO 63, ¶ 165, *cert. granted sub nom. Trump v. Anderson*, No. 23-719, 2024 WL 61814 (U.S. Jan. 5, 2024); *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1125 n.3 (Colo. 1982).

[4] To be sure, Colorado courts have suggested *de novo* review applies to applications and interpretations of evidentiary law. *See, e.g.*, *People v. Dominguez*, 2019 COA 78, ¶¶ 13–14, 454 P.3d 364, 368 (citing E-*470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 23 (Colo. 2000)). This Court, then, could review *de novo* the Colorado Supreme Court's decision because it turns on an erroneous application of Rule 803(8). Regardless, even under abuse-of-discretion review, Petitioner is entitled to reversal for the reasons outlined *infra* .

B. The *Beech-Barry* Four Part Analysis

Rule 803 provides the following are not excluded as hearsay:

> Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.

This Court has endorsed a four-part test to detect a lack of trustworthiness of a government record pursuant to 803(8), *see Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168 n.11 (1988), and the approach was analyzed in depth by the District Court for the District of Columbia in *Barry v. Trustees of International Ass'n Full-Time Salaried Officers & Employees of Outside Local Unions & District Counsel's (Iron Workers) Pension Plan. See* 467 F. Supp. 2d 91, 96 (D.D.C. 2006). Upon drafting the rule, "[t]he Advisory Committee proposed a nonexclusive list of four factors it thought would be helpful in passing on the trustworthiness question: (1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation." *Beech*, 488 U.S. at 168 n.11 (citation omitted).

Significantly, "Congressional reports are not entitled to an additional presumption of trustworthiness or reliability . . . simply by virtue of having been produced by Congress. To the contrary, a number of cases . . . have declined to admit Congressional reports under Rule 803(8)(C)." *Barry*, 467 F. Supp. 2d at 98 (citations omitted). According to the *Barry* Court, a search for problematic motivations behind Congressional reports must consider "(1) whether the findings and conclusions in a Congressional report are the product of serious investigation rather than political grandstanding, and, relatedly, (2) whether members of the minority party refused to join in the report or otherwise noted their dissent." *Id.* at 100.

C. Analysis.

Colorado applied the *Beech-Barry* factors and determined the Report was admissible. *Anderson*, 2023 CO 63, ¶¶ 165-75. This constituted legal error and fundamentally impacted Appellant's right to a fair trial. The Court should reverse and remand for further proceedings based on the Colorado Court's erroneous admission of and reliance on hearsay evidence.

1. Colorado's Findings

The trial court admitted thirty-one findings from the January 6th Report over a hearsay objection because it found they met the "public records" exception under Rule 803(8). *Id.* ¶ 162. The trial court held, and the Colorado Supreme Court agreed, that the first three factors "weighed strongly in favor of

reliability." *Id.* ¶¶ 165-66, 170. The primary factor considered was "the fourth factor: possible motivation problems." *Id.* ¶ 166 (citations omitted).

The Colorado Supreme Court found no abuse of discretion in accepting Mr. Heaphy's testimony concerning the mental dispositions of the Committee's members. *Id.* ¶ 167. It further endorsed the trial court's reasoning that House Republicans' refusal to participate in the Committee supported the Report's trustworthiness. *Id.* ¶ 169. It held that, since no *Barry* factor is dispositive, the report's timeliness, committee's expertise, and quantity of witnesses overcame any problems with the committee's underlying motivation bias. *Id.* ¶ 170.

2. <u>As a matter of law, the Report does not bear the requisite indicia of trustworthiness and reliability to render it an admissible "public record" per Rule 803(8).</u>

a. While the Colorado Courts Rightly Recognized the Committee's Report Suffered from Potential "Motivation Problems," They Minimized Those Problems and Reached the Wrong Conclusion.

Courts are noticeably wary of Congressional reports, recognizing that political motivations undercut their reliability. *See, e.g.*, *Anderson v. City of New York*, 657 F. Supp. 1571, 1579 (S.D.N.Y. 1987) (quoting *Knight Pub. Co. v. U.S. Dept. of Justice,* 631 F. Supp. 1175, 1178 (W.D.N.C. 1986) ("[C]ongressional committee hearings are oft time conducted in a circus atmosphere, with a gracious plenty of posturing by the politicians for T.V. publicity

in large part for benefit of constituents back home. . . ."); *Pearce v. E.F. Hutton Grp., Inc.*, 653 F. Supp. 810, 814 (D.D.C. 1987) ("Given the obviously political nature of Congress, it is questionable whether any report by a committee or subcommittee of that body could be admitted under rule 803(8)(C) against a private party."); *see also*, *Barry*, 467 F. Supp. at 98-99 (collecting cases). When courts have considered congressional reports "those courts focused on (1) whether the findings and conclusions in a Congressional report are the product of serious investigation rather than political grandstanding, and, relatedly, (2) whether members of the minority party refused to join in the report or otherwise noted their dissent." *Barry*, 467 F. Supp. at 100.

The *Barry* Court determined a congressional report was rendered untrustworthy for purposes of Rule 803(8) where the report was based on "a strongly partisan foundation." *Id.* at 101. It acknowledged the reality that Congress's political nature means its investigations are likely to veer into partisan "grandstanding," as opposed to honest fact-finding investigations resembling a judicial process. *Id.* at 98-99 ("This consideration of party-line voting reflects both the reality of the political process and the intuitive notion that reports that are truly reliable on a methodological and procedural level are less likely to provoke bitter divisions than those that have politics, rather than policy or truth-seeking, as their ultimate objective."). While not dispositive, a lack of partisan agreement indicates that a report is a product on partisan considerations rather than true fact-finding, and such reports do not justify admission as judicial evidence. *Id.* at 99. The *Barry* Court further indicated that, when evaluating the fourth factor,

"courts should be wary of ***any*** motivation problems." *Id.* (emphasis added).

Consequently, courts do not look at the four factors as a balancing test, but rather as a threshold inquiry for trustworthiness and reliability. "The rule permits the introduction into evidence of the factual findings of an objective government investigation." *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1199 (11th Cir. 1986). *Baker* held that a congressional subcommittee report "was properly omitted from evidence" because the "report did not contain the factual findings necessary to an objective investigation, but consisted of the rather heated conclusions of a politically motivated hearing." *Id.* at 1199 (citing *Bright v. Firestone Tire & Rubber Co.,* 756 F.2d 19, 22–23 (6th Cir.1984)).[5]

Where the motivation of a congressional report is tainted, it is not afforded the same credibility of an apolitical government body. *See Pearce v. E.F. Hutton Grp., Inc.*, 653 F. Supp. 810, 813-14 (D.D.C. 1987) ("[I]t is significant that the public agency which made these findings is an independent regulatory commission . . . operating under stringent procedural guidelines on a public record. . . . *That circumstance provides an element of trustworthiness which might not be present with respect to a public record generated by a person or body lacking these characteristics*.

---

[5] The trial court ignored this entire line of cases and instead held "the idea that any amount of political bias would render the January 6th Report untrustworthy for the purposes of C.R.E. 803(8) is incompatible with the case law surrounding the admissibility of Congressional reports." *Anderson v. Griswold*, No. 2023CV32577, 2023 WL 8006216, at *5 (Colo.Dist.Ct. Nov. 17, 2023).

(quoting *United States v. Am. Tel. & Tel. Co.*, 498 F. Supp. 353, 366 (D.D.C. 1980))).

Colorado's analysis was not only incomplete—it was wrong. While it relied on *Barry* it failed to address its most poignant and relevant guidance: (1) whether the report was politically-motivated grandstanding and (2) whether it ignored members of the minority party. Further, Colorado misapplied the *Beech-Barry* analysis. Instead of asking the threshold question of whether the report contained the requisite indicia of trustworthiness under Rule 803(8), Colorado instead balanced whether the motivation issues were outweighed by the report's punctuality and thoroughness. This was contrary to the legal authority Colorado itself relied on.

Specifically, the Colorado courts' findings regarding the Report's reliability and requisite trustworthiness were not supported by the law or evidence. *First*, while it acknowledged the minority generally chose not to participate after the Speaker rejected a number of the minority's member recommendations, Colorado determined that, since it was the minority's own choice, the report was still reliable. *Anderson*, ¶¶ 169–70. However, the proper legal analysis is not whether both parties *had a choice* to participate, but whether the report was "partisan" or the "heated conclusions of a politically motivated hearing." *See, e.g.*, *Barry*, 467 F. Supp. at 100; *Baker*, 793 F.2d at 1199. The evidence was clear that this was a heated subject, and the two parties had decided not to cooperate in a mutual fact-finding mission.

Second, while the courts found the committee's membership represented contrasting and diverse viewpoints because the committee included two Republicans, that appearance of bipartisanship was

illusory. The committee Republicans did not share the view of the majority of their party and had both previously joined the majority in voting to impeach former President Trump. And while the report may ultimately have been unanimous, the committee was also uniform in the political positions its members held on this topic. The question before the Colorado courts was not whether the Report's positives outweighed its negatives, but rather whether the Report was the product of a bipartisan fact-finding mission as opposed to the product of the political process investigating a highly polarized topic that was bound up in partisan disagreement.

Simply put, the January 6th Report lacked the hallmarks of an admissible congressional/government report and should have been excluded as hearsay.

CONCLUSION

We do not cast judgment on the opinions and beliefs held by the members of the January 6 Committee—or whether those beliefs are right or wrong. Politicians are entitled to have opinions, and they are entitled to advocate for their positions and the positions communicated to them by their constituents. Americans should expect as much from their representatives. But majority parties in Congress are tasked with advancing an agenda, and advancing that agenda does not always ensure that opposing views are heard or advocated for. Many courts have acknowledged this reality and recognized that Congressional reports should be viewed with skepticism when it comes to proving the truth of a matter in a judicial proceeding. Colorado misunderstood this separation of roles when it admitted the Committee's Report into evidence.

The report was hearsay and not entitled to any exception. It was the product of a politically charged inquiry that did not possess the traditional safeguards of a fact-finding committee. At bottom, it is not the objective, dispassionate outcome of a neutral investigative process Rule 803(8) contemplates as an exception to the hearsay rule. Moreover, the decision based on inadmissible hearsay to exclude Mr. Trump as a candidate for federal office was a violation of the Fourteenth Amendment's Due Process clause.

The Court should reverse the Colorado Supreme Court's decision and remand for further proceedings.

Respectfully submitted,

R. TRENT SHORES
Counsel of Record
GERARD M. D'EMILIO
DAVID R. HERBER
GableGotwals
110 North Elgin
Suite 200
Tulsa, Oklahoma 74137
(918) 595-4800
tshores@gablelaw.com
Counsel for *Amici Curiae*

January 2024