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 the State of Colorado

BRIEF OF FORMER COLORADO SECRETARY OF STATE MARY ESTILL BUCHANAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Mary Estill Buchanan has been a public servant in Colorado for many years and a tireless advocate for democracy and women in public service. Most relevant here, Buchanan served two terms as Colorado's Secretary of State—from 1974 to 1983. She was the first woman to hold that office in the state's then-98-year existence.

During her tenure as Colorado's Secretary of State, Secretary Buchanan was the only Republican in statewide office, working across the aisle to ensure efficient, effective administration of Colorado's elections. As Secretary, Buchanan advocated for and implemented reforms to improve transparency for elections and public office.

Before being elected Secretary of State, Buchanan served on the Colorado Board of Agriculture and the Colorado Commission on the Status of Women, for which she created and served as chair for the Women in Government Committee to recruit and elect women to serve in public office.

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[1] Pursuant to Supreme Court Rule 37, Secretary Buchanan states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amicus curiae and their counsel made any monetary contribution toward the preparation and submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized that States have "an interest, if not a ***duty***, to protect the integrity of [their] political processes from frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134, 145 (1972) (emphasis added).

To satisfy that duty, the Colorado General Assembly enacted a statutory apparatus, pursuant to its powers under Article II and the Tenth Amendment, to, among other things, safeguard its primary and general elections from candidates who are not qualified to hold office. Colorado's Election Code allows affected voters to challenge the qualifications of any candidate to appear (through their delegates) on the presidential primary election ballot. *See* Colo. Rev. Stat. § 1-4-1204(4). Colorado requires such challenges to be made promptly ("no later than five days after the filing deadline for candidates") and publicly. *Id.*; *see also id.* § 1-1-113. And when a challenge is filed, the Code guarantees "notice," "an opportunity to be heard," and "a hearing" at which the state trial court must "assess the validity of all alleged improprieties" and ultimately "issue findings of fact and conclusions of law." *Id.* §§ 1-4-1204(4), 1-1-113.

Colorado's General Assembly broke no new ground in authorizing its courts to resolve disputes over which candidates may properly appear on the ballot. As the Colorado Supreme Court observed in its decision below, this integral part of the State's electoral process has "deep roots," dating back to the

1890s. Pet. App. at 25a, ¶ 43. Then, as now, state law sets forth clear "procedures for adjudicating controversies" involving "candidate[s] * * * or persons making nominations." *Id.* (citations omitted). And this system has served Coloradans well for more than a hundred years.

Respondents—Colorado voters eligible to vote in the Republican presidential primary—brought this action on September 6, 2023, contending that Petitioner Donald J. Trump is disqualified from public office under Section 3 of the Fourteenth Amendment because he has "taken an oath * * * as an officer of the United States * * * to support the Constitution of the United States" but "engaged in insurrection or rebellion against the same" in connection with the January 6, 2021 attack on the U.S. Capitol. U.S. CONST. amend XIV, § 3. Because of this constitutional disqualification, Respondents sought to enjoin Colorado Secretary of State Jena Griswold from listing Trump on the State's 2024 Republican primary ballot. Both the trial court and the Colorado Supreme Court found that clear and convincing evidence supported the finding that Trump engaged in insurrection. And the Colorado Supreme Court held that Trump was therefore ineligible to appear on the Republican primary ballot in Colorado.[2]

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[2] The Colorado Supreme Court stayed that decision pending this Court's review. Until this Court rules, Donald Trump's name will appear on Colorado's state-run Republican Party primary ballot.

This Court should affirm. The courts below followed the procedures established by the Colorado legislature for resolving disputes about who can appear on a presidential primary ballot. And those procedures were enacted pursuant to the State's broad powers under Article II of the Constitution. The Electors Clause "gives the States far-reaching authority over presidential electors, absent some other constitutional constraint." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020). To ensure that its electors[3] vote only for qualified candidates, Colorado has exercised that authority by providing a robust mechanism to resolve disputes about candidate eligibility. Reversing the Colorado Supreme Court's decision would invade a legal province that the Constitution expressly reserves to the States, upend principles of federalism, and flout practices that are deeply rooted in this Country's history.

Procedural due process does not present a "constitutional constraint" that would prevent Colorado from exercising its Article II authority in the way it did here. For one thing, this Court has never recognized appearing on a ballot as a protected life, liberty, or property interest. *See infra* at Section II.A. But even assuming it is, the Colorado trial court afforded Trump process well above the constitutional

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[3] While Colorado's Election Code defines "elector" as someone "legally qualified to vote" in the state, Colo. Rev. Stat. § 1-1-104(12), this brief refers to these individuals as "voters" and uses the term "elector" only in its Article II meaning—that is, those appointed by the States to cast their allotted votes for President in the Electoral College.

requirements this Court has consistently articulated since before the Fourteenth Amendment was ratified. *E.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

Colorado law provided a robust procedure requiring notice and an opportunity to be heard. And Trump cannot dispute that the trial court here gave him ample procedural protections. Respondents' 115-page petition gave a detailed recitation of the facts, putting Trump on notice of the factual bases for their claim that he is disqualified under Section 3 of the Fourteenth Amendment to appear on Colorado's Republican primary ballot. *See* Verified Pet. Under C.R.S. § 1-4-1204, § 1-1-113, § 13-51-105, and C.R.C.P. 57(a), *Anderson v. Griswold*, No. 2023CV32577, at *13–79 (Denver Dist. Ct. Sept. 6, 2023). Trump waived service and responded the next day, establishing that he was on notice. Notice of Filing of Notice of Removal to the U.S. Dist. Ct. for the Dist. of Colo., *Anderson v. Griswold*, No. 2023CV32577 (Denver Dist. Ct. Sept. 7, 2023). After ensuring proper notice of the claims brought against him, the trial court gave Trump weeks to identify witnesses. Minute Order, *Anderson v. Griswold*, No. 2023CV32577 (Denver Dist. Ct. Sept. 22, 2023). The trial court also ordered Respondents to disclose their witnesses to Trump to facilitate pre-hearing depositions, although Trump chose not to avail himself of this additional opportunity for cross examination. *Id.* Ultimately, the trial court held a five-day trial, where the court heard from fifteen witnesses and admitted nearly 100 exhibits. Pet. App. 12a–13a, 43a. Trump was permitted the opportunity to cross-examine all witnesses at the hearing and

permitted broad leeway to submit evidence, consistent with Colorado's evidentiary code, which the trial court applied to decide the admissibility of evidence. Trump could have testified on his own behalf, but he chose not to. *Id*. 77a–83a. The trial court found that Respondents established—by clear and convincing evidence—that Trump had engaged in insurrection within the meaning of Section 3 of the Fourteenth Amendment. *See id*. 243a, 276a–77a ¶¶ 209, 298. And it memorialized its conclusions in a written order that ran 100 pages, permitting thorough appellate review. *See id.* 184a–284a.

By any measure, the process afforded Trump satisfies the Due Process Clause. Requiring more than the ample procedures provided Trump in this case would create dangerous precedent untethered to the text of the Constitution, this Court's procedural due process jurisprudence, and common sense. And it would invite innumerable challenges in scenarios involving more serious deprivations of life, liberty, or property than being disqualified from appearing on a state-printed primary ballot, radically unsettling due process jurisprudence and creating deep confusion in courts nationwide. This Court should affirm.

ARGUMENT

I. STATES HAVE BROAD AUTHORITY TO REGULATE APPOINTMENT OF PRESIDENTIAL ELECTORS

The Constitution gives States broad authority over the appointment of presidential electors. The Colorado General Assembly exercised that authority, in part, by codifying procedures for resolving election

disputes in state-run primary elections. Here, Colorado's judiciary, including its Supreme Court, followed those procedures in determining that Trump could not appear on the 2024 Colorado Republican presidential primary ballot.

A. The Constitution gives States considerable discretion over regulating state-run presidential primary ballots

"It is surely no coincidence that the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995). For presidential elections, the Electors Clause provides that "[e]ach State shall appoint" electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2.

This Court has "long understood" that States have virtually plenary authority to "set qualifications for their Presidential electors" under this Clause. *U.S. Term Limits*, 514 U.S. at 861 (Thomas, J., dissenting); *see also Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 126 (1981) (allowing Wisconsin to run an open primary regardless of national Democratic party opposition).

In fact, more than a century ago, the Court recognized that Article II "convey[s] the broadest power of determination" to the States. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *see Ray v. Blair*, 343 U.S. 214, 227 (1952) (recognizing "state's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose"); *see also Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist,

C.J., concurring) (reiterating that Art II, § 1, cl.2 gives "broad[] power" to the States and "'leaves it to the[ir] legislature[s] exclusively to define the method' of appointment" (quoting *McPherson*, 146 U.S. at 27)). In fact, all functions of the Electoral College are performed in the States by the States before ballots are transmitted to Congress for counting. *Burroughs v. United States*, 290 U.S. 534, 544 (1934).

A State's appointment power is, of course, "subject to possible constitutional limitations," *Ray*, 343 U.S. at 227—for instance, to preserve equal protection under the Fourteenth Amendment and associational rights under the First Amendment. And Congress may also supervise electors via "appropriate legislation" aimed to "preserve the purity of presidential and vice presidential elections," so long as it does not "interfere with the power of a state to appoint electors or the manner in which their appointment" is made. *Burroughs*, 290 U.S. at 544–45. But "otherwise the power and jurisdiction of the state" over presidential electoral balloting "is exclusive." *McPherson*, 146 U.S. at 35.

All states manifest this constitutional authority, in part, through their election laws administering presidential primary and general elections. And state courts and state officials regularly assess presidential qualifications—or lack thereof—during the primary elections. *See, e.g.*, *Farrar v. Obama*, OSAH-SECSTATE-CE-1215136-60-MALIHI (Ga. Office of State Admin. Hearings Feb. 3, 2012); *Joyce v. Cruz*, 16 SOEB GP 526 (Ill. State Bd. of Elections Jan. 28, 2016); Transcript of Proceeding at 23, Challenge to Marco Rubio, Case No. 2016-2 (Ind. Election Comm'n

Feb. 19, 2016), https://perma.cc/T5RL-26P4; *Williams v. Cruz*, OAL Nos. STE 5016-16, STE 5018-16 (N.J. Office of Admin. Law Apr. 13, 2016); *Elliot v. Cruz*, 137 A.3d 646, 658 (Pa. Commw. Ct. 2016), *aff'd*, 134 A.3d 51 (Pa. 2016).

Here, Colorado's legislature limited participation in its state-run presidential primary to only "***qualified*** candidate[s]" and their delegates. Colo. Rev. Stat. §§ 1-4-1203(2)(a) (emphasis added). And Colorado's legislature established a procedure authorizing primary voters in Colorado to challenge the entitlement of a candidate who is ***not*** qualified to participate in the state-run primary. *Id.* § 1-1-113. This statutory regime fits squarely within Colorado's exclusive authority to direct the "Manner" in which its electors ultimately are appointed. *See* U.S. CONST. art. II, § 1, cl. 2. And Colorado's robust electoral process has served its citizens well, with the overwhelming majority of Coloradans (including Republicans) believing in the State's electoral processes and agreeing elections in the State produce "fair and accurate" results. American Politics Research Lab, Univ. Colo Boulder, Colorado Political Climate Survey 2022 Report, at 6.

Colorado's undisputed authority to regulate its presidential electors ***after*** they are appointed and ***after*** they have voted logically extends to Colorado's authority to regulate the "Manner" in which state-run primary elections are administered. *See Ray*, 343 U.S. at 228 (explaining States can require electors to pledge support to a political party's nominee); *Chiafalo*, 140 S. Ct. at 2324–28 (concluding States may penalize electors for breaking such a pledge); *id.*

at 2333–35 (Thomas, J., concurring) (agreeing States have such authority, derived from the Constitution's structure and the Tenth Amendment).

Colorado's goal of protecting the integrity of how its electoral votes are cast is most effectively achieved on the front end, through the ballot-access laws in its election code. After all, electors are agents of the State that appoints them, their "sole function" being "to cast, certify, and transmit the vote of the state for president and vice-president of the nation." *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890). Evaluating candidate qualifications when deciding who appears on the state-administered primary ballot is a reasonable way for Colorado to ensure that its voters, and ultimately its presidential electors, will not vote for a candidate ineligible to hold the office of President.[4] And it allows a State to prevent dilution of its electoral votes and influence.

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[4] This is also why Colorado has a substantial interest in regulating who appears on official, state-provided ***primary*** ballots—because those candidates may ultimately appear on the ballots in the general election. And Colorado law does not allow its state officials to list on the ballot (***any*** ballot, for the primary or general election) candidates who have been determined, under the process set forth by the Colorado Election Code, to be unqualified for the office they seek. Unlike the electoral systems in other states, the Colorado Election Code does not allow political parties to unilaterally designate which candidates appear on a presidential primary ballot. Nor does Colorado permit state officials to overlook the placement of a disqualified candidate on a ballot, whether for the primary or general election. Instead, the Colorado Election Code expressly allows eligible voters, such as Respondents, to challenge a candidate's qualifications. Colo. Rev. Stat. §§ 1-1-113(1), 1-4-

This Court's precedent also supports Colorado's right to ensure its electoral votes are cast only for constitutionally eligible candidates. For instance, this Court has routinely upheld state laws excluding candidates from a primary ballot unless they demonstrate significant support. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot * * * *"); *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) ("The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot * * * *").

If a State can prevent a candidate from appearing on a primary ballot because that candidate or their party lacks sufficient support, the State can also prevent a candidate from appearing on a ballot because he or she is constitutionally disqualified from holding office. Indeed, Justice Gorsuch, while serving as a Judge for the Tenth Circuit, recognized in a case originating in Colorado that "a state's legitimate interest in protecting the integrity and practical functioning of the political process ***permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming***

1204(4). And once such a challenge is brought, "the power to resolve issues regarding candidate eligibility resides with the courts," with Colorado officials bound by the judicial determination as to candidate eligibility. *Hanlen v. Gessler*, 2014 CO 24, ¶ 44. That is what happened here.

office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (emphasis added).

Concluding otherwise would severely restrict the well-established authority of the States to regulate elections. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) (recognizing that States enjoy broad power over elections and that "there must be a substantial regulation of elections if they are to be fair and honest"); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections * * * *").

To be sure, States may not impose additional qualifications beyond those set forth in the Federal Constitution. *U.S. Term Limits*, 514 U.S. at 838. But requiring a candidate to be constitutionally eligible to hold office is not an additional qualification. As this Court has recognized, Section 3 of the Fourteenth Amendment is "part of the text of the Constitution" and thus does not represent an "add[ed] qualification [beyond] those that appear in the Constitution." *Id.* at 787 n.2. Given States' broad and well-established power to set state-run primary election procedures to adjudicate candidates' qualifications, there can be no meaningful dispute that they also have power, consistent with those election procedures, as Justice Gorsuch wrote, "to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F. App'x at 948.

B. State regulation of presidential elections is deeply rooted in the Nation's history

This Court has emphasized the "great weight" that "[l]ong settled and established practice" may have in gleaning "a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929). And the Court has "found historical practice particularly pertinent when it comes to the Elections and Electors Clauses." *Moore v. Harper*, 600 U.S. 1, 32 (2023) (citing *Chiafalo*, 140 S. Ct. at 2325–27, and *Smiley v. Holm*, 285 U.S. 355, 369 (1932)).

Here, two particularly relevant practices are deeply rooted in this country's history. First, States have long regulated elections, including the appointment of presidential electors. And second, an unquestioned, inherent component of that State regulatory power has been States' authority to control ballots and ballot access.

"In the Nation's earliest elections, state legislatures mostly picked the electors * * * *" *Chiafalo*, 140 S. Ct. at 2321. State legislatures did not abdicate that role when the popular vote evolved as the principal mechanism for choosing electors. Instead, "State election laws evolved to reinforce that development, ensuring that a State's electors would vote the same way as its citizens," with States enacting laws in the early twentieth century that required presidential electors to vote for the candidate chosen by the State's voters. *Id.* at 2328.

This Court has consistently recognized the constitutionality of this historical practice. In the first case to directly address States' power to appoint

electors, *Green*, 134 U.S. at 377, this Court affirmed that the States, not the federal government, hold power to regulate presidential elections. As the Court observed in *Green*:

> Congress has never undertaken to interfere with the manner of appointing electors, or, where * * * the mode of appointment prescribed by the law of the state is election by the people, to regulate the conduct of such election * * * * but has left these matters to the control of the states.

Id. at 380. *Green* confirmed that States' power over elections must be construed broadly. That power, this Court stated, was "unaffected by anything in the Constitution and laws of the United States." *Id.*

Two years later, in 1892, this Court surveyed the first four presidential elections in this country and concluded that "from the formation of the government until now the practical construction of [the Electors Clause] has conceded ***plenary power***" to the states "in the matter of the appointment of electors." *McPherson*, 146 U.S. at 35 (emphasis added). "In short," the Court observed, "the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States." *Id.* States' considerable authority to appoint presidential electors is thus deeply rooted in this country's history.

A long-established corollary is States' authority to regulate ballots and ballot access, as an integral dimension of their power to appoint electors. The

States "had uniformly adopted paper ballots" by the Constitutional Convention. Mark R. Brown, *Ballot Fees as Impermissible Qualifications for Federal Office*, 54 AM. U. L. REV. 1283, 1287 (2005); *see also Burson v. Freeman*, 504 U.S. 191, 200 (1992) ("Within 20 years of the formation of the Union, most States had incorporated the paper ballot into their electoral system."). But those ballots were not provided by the States. *Brown*, *supra*, at 1287. By the mid-nineteenth century, "political parties began to produce their own ballots for voters." *Burson*, 504 U.S. at 200. This practice, however, led to fraud and concerns about voter intimidation. *Id.* at 200–02.

To address these concerns, in 1888, three governments—the municipal government of Louisville, Kentucky, and the state governments of New York and Massachusetts—adopted the Australian system. *Id.* at 202. The Australian system's "most famous feature" was the use of an official, state-provided ballot. *Id.* And "[b]y 1896," less than 30 years after the Fourteenth Amendment was ratified, "almost 90 percent of the States had adopted the Australian system. This accounted for 92 percent of the national electorate." *Id.* at 204–05.

Thus, within just two decades of the Fourteenth Amendment's ratification, States began directly regulating ballots and ballot access. And adopting an electoral system with an official ballot led States to implement formal processes to resolve disputes about those ballots—including the qualifications of the candidates who appeared on them. *E.g.*, Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 25 (2011).

Adopting a "pre-printed official ballot necessitated a procedure for determining whose names could be listed." Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts*, *1886–1915*, 100 COLUM. L. REV. 873, 884 (2000). One such State process for resolving disputes about which candidates are qualified (or disqualified) from appearing on the state-approved ballots is Colorado's Election Code. Colorado's process fits well within the long traditions of State electoral regulation.

In short, for most of the history of the Republic, States have exercised control over the candidates who appear on official, state-administered ballots based on the States' textually-committed and judicially-reinforced constitutional authority. Courts, including members of this Court, have long reiterated that States may exercise this authority to exclude candidates who are not constitutionally qualified to hold the office they seek. *E.g.*, *Hassan*, 495 F. App'x at 948.[5] That historical practice is entitled to "great weight" in assessing Colorado's exercise of such authority here. *The Pocket Veto Case*, 279 U.S. at 689. And it weighs in favor of affirming Colorado's application of its well-established election code to

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[5] *See also Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 215 (Ct. App. 2010) (citing *Cleaver v. Jordan*, 393 U.S. 810 (1968), in which this Court declined certiorari after California excluded a constitutionally disqualified candidate); *In re Garst*, 294 N.Y.S.2d 33, 34 (Sup. Ct.) (New York excluded constitutionally disqualified candidate), *aff'd sub nom. Garst v. Lomenzo*, 294 N.Y.S.2d 990 (App. Div.), *aff'd*, 242 N.E.2d 482 (N.Y. 1968).

determine that Trump is disqualified from appearing on its state-administered primary ballot.

II. TRUMP RECEIVED MORE THAN ADEQUATE PROCESS

Trump received far more than adequate procedural due process here. Of course, in his merits brief, Trump does not assert he was deprived of procedural due process. Nor did he do so below.[6] But certain amici have raised questions about the sufficiency of the process afforded Trump in the proceedings before the Colorado courts. *See* Brief of Judicial Watch, Inc., and Allied Educational Foundation, as Amici Curiae in Support of Petitioner. Those concerns are unfounded, and procedural due process is no basis for disturbing the decision of the Colorado Supreme Court.

First, Trump cannot point to any case suggesting that he has a property or liberty interest, cognizable under the Due Process Clause, in appearing on Colorado's presidential primary ballot.

Second, even if Trump could raise a procedural due process argument, he received (more than) sufficient process before Colorado's trial and appellate courts.

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[6] The question of the process Trump received is thus not properly before this Court. *Leonard v. Texas*, 580 U.S. 1178 (2017) (Thomas, J., concurring in denial of certiorari) (observing this Court does not consider due process arguments that were not sufficiently raised so as to the give the courts below an opportunity to address them in the first instance).

A. Trump Has Identified No Interest Cognizable Under the Due Process Clause in Appearing on Colorado's Primary Ballot

Even if he had preserved such an argument, Trump cannot satisfy the threshold prerequisite for a procedural due process claim: the existence of an interest protected under the Fourteenth Amendment. This Court need not proceed any further to reject any such claim. *See Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128–29 (2011).

A petitioner contending his procedural due process rights have been violated must identify "a protected interest in life, liberty, or property" that a State has interfered with and articulate why the process he was provided was "inadequate." *Reed v. Goertz*, 598 U.S. 230, 236 (2023).

Any argument that Trump was deprived of due process falters at the first hurdle because Trump has failed to demonstrate that he has a protected interest under the Fourteenth Amendment in appearing on Colorado's presidential primary ballot. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972). Over a century ago, this Court held that public office is not a property right. *Taylor v. Beckham*, 178 U.S. 548, 577 (1900) ("[T]he nature of the relation of a public officer to the public is inconsistent with either a property or a contract right."). And public office does not implicate any

liberty interest. *Cf. Wilkinson v. Austin*, 545 U.S. 209, 222 (2005) (protected liberty interests are "generally * * * limited to freedom from restraint"); *see also Clements v. Fashing*, 457 U.S. 957, 963 (1982) ("Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972))).[7] The Court has since reaffirmed these principles. *See Snowden v. Hughes*, 321 U.S. 1, 7 (1944) (reaffirming *Taylor*'s holding that "an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause").

True, these cases concerned state office—not federal office. But this distinction makes no difference here. Trump, through his delegates, seeks to appear on the Colorado Republican presidential primary ballot—a state-created ballot. And he seeks to run for,

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[7] One group of amici question whether "disqualification under Section Three [may be] a form of punishment" rather than an "affirmative criteria for holding office," which they suggest may necessitate additional procedural safeguards. *See* Brief of the Secretaries of State of Missouri, Alabama, Arkansas, Idaho, Kansas, Montana, Ohio, Tennessee, and West Virginia, as Amici Curiae in Support of Neither Party, at 21 n.7. Of course, Trump had robust procedural safeguards here, as explained below. But notably, at least one drafter of Section Three answered the question these amici pose in the negative, observing that reversible disqualification under that provision was "no punishment to any man, no deprivation of property, no deprivation of any right whatever except the right to hold office." Cong. Globe, 39th Cong., 1st Sess. 2901 (1866) (statement of Sen. John Sherman).

and ultimately hold, the office of the Presidency—an office created under the Constitution. *See* U.S. CONST. art. II, § 1, cl. 1. But "[p]roperty interests, of course, are not created by the Constitution." *Roth*, 408 U.S. at 577; *see also Cornett v. Sheldon*, 894 F. Supp. 715, 726 (S.D.N.Y. 1995) (no property interest in federal office). They must instead come from "existing rules or understandings that stem from an independent source such as state law." *Roth*, 408 U.S. at 577. Trump cannot point to an independent source for a protected interest in being a candidate for the office of the Presidency because none exists.

The Fourteenth Amendment does not recognize any protected interest in public office. And because public office is the interest here, Trump cannot claim a due process violation.

B. Colorado Provided Trump Due Process

Even if Trump could present a due process challenge to this Court, any such challenge would fail because he received sufficient process.

"For more than a century [and a half] the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes*, 407 U.S. at 80 (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)). Procedural due process thus requires notice and an opportunity to be heard. Trump received both.

i. Trump Received Ample Notice

First, notice: To satisfy the Due Process Clause, notice must be given that is "reasonably calculated,

under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). It "must be of such nature as reasonable to convey the required information * * * and it must afford a reasonable time for those interested to make their appearance." *Id.* (citations omitted).

Trump undeniably received notice of the underlying action. Respondents began these proceedings on September 6, 2023, with a 115-page petition. *See* Verified Pet. Under C.R.S. § 1-4-1204, § 1-1-113, § 13-51-105, and C.R.C.P. 57(a), *Anderson v. Griswold*, No. 2023CV32577 (Denver Dist. Ct. Sept. 6, 2023). As Colorado's Election Code required, that petition was verified—sworn under oath, which provides protection against factually baseless claims. Colo. Rev. Stat. § 1-1-113(1). And as Colorado's Code expressly required, it provide "notice * * * of [the] alleged impropriety" in the proposed candidate appearing on the state's primary ballot. *Id.* § 1-14-1204. Consistent with that requirement, Respondents set out in detail over those 115 pages the factual basis for their challenge: Trump's repeated use of inflammatory and violent rhetoric leading to January 6, 2021; his refusal to accept the results of the 2020 presidential election; and his direct participation in and inducement of the events that unfolded on January 6, 2021. *Id.* at 13–79. Respondents then set forth their legal claim: that Trump is disqualified from holding the office of the Presidency under Section 3 of the Fourteenth Amendment. Specifically, Respondents alleged that Trump was an "officer of the

United States"; that the January 6, 2021, attack on the United States Capitol constituted an "insurrection"; that Trump "engaged in" that insurrection; and that he is consequently disqualified from holding the office of the Presidency. *Id.* at 82–100. Respondents' detailed, sworn petition apprised Trump in full of the issues to be adjudicated. *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999) ("A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful."); *see also* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1280 (1975) ("It is likewise fundamental that notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it.").

And just one day later—on September 7, 2023—Trump appeared in the action. His immediate appearance[8] conclusively shows he was "informed that the matter [was] pending" and was able to "choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314.

Trump also received notice of the trial. The district court held a status conference on September 18, 2023 at which counsel for Trump appeared and set a five-day trial to begin on October 30, 2023. *See* Minute Order, *Anderson v. Griswold*, No. 2023CV32577 (Denver Dist. Ct. Sept. 18, 2023). As discussed more fully in the next section, Trump received ample notice not only of the time of the trial but of the topics to be

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[8] Trump waived service. *See* Notice of Service of All Defendants (filed Sept. 14, 2023).

addressed and the witnesses who would testify. *See Fuentes*, 407 U.S. at 81 ("If the right to notice and a trial is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented."). In short, by any measure, Trump received constitutionally sufficient notice.

ii. Trump Had an Opportunity to Be Heard

Colorado also provided Trump with a robust opportunity to present his case and challenge the evidence presented against him—process more robust than many types of civil proceedings. The trial court held a five-day trial that included fifteen witnesses, hours of video evidence, and documentary evidence included in nearly one hundred exhibits that more than satisfied what Due Process requires. Trump's counsel participated in full—admitting documents, presenting witnesses, cross-examining Respondents' witnesses, challenging the admissibility of evidence under Colorado's evidentiary rules, and having ample opportunity to present his contentions regarding the legal significance (or insignificance) of the evidence the trial court admitted.

The Fourteenth Amendment requires only "some kind of hearing." *Bd. of Regents of State Colls.*, 408 U.S. at 570 n.7. "Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). Instead, the Constitution requires only that "'an opportunity * * * granted at a meaningful time and in a meaningful manner,' 'for a hearing appropriate to the nature of the case.'" *Id.*

(cleaned up) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) and *Mullane*, 339 U.S. at 313). Ultimately, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *see also Boddie*, 401 U.S. at 378 ("The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.").

This Court has identified three factors to consider when evaluating what process is due: "the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (citing *Mathews*, 424 U.S. at 334–35). Considering these factors shows Trump received sufficient process.

First, as set out above, Trump has no cognizable interest in appearing on Colorado's ballot. *See supra* Section II.A. But even if he did, that interest is much less substantial than others this Court has found may be impaired through procedures less robust than those Trump enjoyed here.[9]

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[9] For example, "[a] criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified." *Degen v. United States*, 517 U.S. 820, 825 (1996). Here, the trial court

Second, the procedures used by the trial court minimized the risk of any erroneous deprivation. The court held a five-day trial and heard thirty-six hours of testimony from fifteen witnesses. And well before the trial, the court took great pains to provide Trump with an opportunity to be heard "in a meaningful manner." *Armstrong*, 380 U.S. at 552.

The trial court afforded Trump seventeen days to identify fact witnesses and twenty-one days to identify expert witnesses. *See* Joint App. Vol. I at JA2; Minute Order, *Anderson v. Griswold*, No. 2023CV32577 (Denver Dist. Ct. Sept. 22, 2023). Trump had the opportunity to testify on his own behalf. He chose not to. The trial court ordered Respondents to identify their fact witnesses and to detail the anticipated subjects of their testimony "so that parties can make a request for depositions." *Id.*

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ordered Respondents to provide Trump a written description of the testimony their witnesses would provide, "fulsome" reports for their experts, and contemplated Trump could depose their fact witnesses, although he did not do so. Joint App. Vol. I at JA2; Minute Order, *Anderson v. Griswold*, No. 2023CV32577 (Denver Dist. Ct. Sept. 22, 2023). And here, Respondents bore the burden of proof, not Trump, while noncitizens typically bear the burden of proof in immigration proceedings, *e.g.*, 8 U.S.C. § 1229(c)(4)(A), even though this Court has repeatedly observed that the right "'to stay and live and work in this land of freedom'" is "a right that ranks high among the interests of the individual," *Landon*, 459 U.S. at 34 (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)). And of course, civil forfeiture proceedings that may deprive individuals of enormous amounts of valuable property typically require only proof by a preponderance of the evidence—lower than the "clear and convincing" standard Trump enjoyed here. *E.g.*, *Dowling v. United States*, 493 U.S. 342, 349 (1990).

Again, Trump chose not to avail himself of that opportunity.

Twelve days before the trial, the trial court provided a list of nine topics for the parties to address. *See* Topics for the Oct. 30, 2023 Hr'g, *Anderson v. Griswold*, No. 2023CV32577 (Denver Dist. Ct. Oct. 18, 2023). In other words, Trump had an even greater opportunity to take advantage of the hearing Colorado gave him because the trial court identified its precise areas of concern. The parties filed a joint response in which Trump proposed three additional topics. *See* Joint Resp. to the Ct.'s Topics for the Oct. 30, 2023, Hr'g, *Anderson v. Griswold*, No. 2023CV32577 (Denver Dist. Ct. Oct. 20, 2023). Although the court did not expressly rule on Trump's proposal, those topics were addressed in briefing, at trial, and in the final order. And Trump also had the opportunity to brief all relevant legal issues before trial.

After these considerable pre-trial procedures, the court began the five-day trial on October 30, 2023. Respondents called eight witnesses; Trump called seven. Pet. App. 43a. The trial court even offered to hear additional witnesses outside the five-day trial if any were unavailable during the trial period. See Pet. App. at 199a n.6. Trump had the opportunity to cross-examine Respondents' witnesses. Pet. App. 43a. Nearly 100 exhibits were admitted. *Id.* During the trial, the trial court applied the Colorado Rules of Evidence. *E.g.*, *id.* at 43a. The trial court gave him eighteen hours, but he took only twelve, confirming he had no evidence to offer that he had not already put before the Court. Pet. App. 198a n.6. The trial

court then permitted the parties—including Trump—nearly two weeks to prepare closing arguments based on the evidence adduced. *Id.* at 14a.

After considering closing arguments, the court issued a comprehensive, 102-page order setting forth its findings of fact and conclusions of law—which permitted thorough appellate review. *See id.* at 184a. In that order, the trial court found that Respondents had proved their case by clear and convincing evidence—*id.* at 243a, ¶ 209—a burden of proof that exceeds the burden in most civil cases. And notably, Trump ***won*** before the district court.

Amicus is unaware of any case where this Court found that a party who won at trial—like Trump did here—was nonetheless deprived of the opportunity to be heard.

This Court has held that "the process necessary to ensure 'fundamental fairness'" does not require that "the procedures used to guard against an erroneous deprivation * * * be so comprehensive as to preclude any possibility of error." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320–21 (1985) (alteration in original) (quoting *Mackey v. Montrym*, 443 U.S. 1, 13 (1979)). But here, Trump had weeks to identify witnesses; the opportunity to provide input on the issues to be addressed at the trial; and eighteen hours in which to present his case (although he used just two thirds of the time allotted to him). *E.g.*, Joint App Vol. 1 at JA12; Topics for the Oct. 30, 2023 Hearing, *Anderson v. Griswold*, No. 2023CV32577 (Denver Dist. Ct. Oct. 18, 2023); Pet. App. 198a n.6. He had the protections of cross-examination and a

higher-than-normal evidentiary standard. And even though due process does not require "a hearing on the merits," *Boddie*, 401 U.S. at 378, that is what Trump received. These procedures were, in fact, "so comprehensive as to preclude any possibility of error," *Walters*, 473 U.S. at 320–21—which is above and beyond what is needed to satisfy due process.

Third and finally, Colorado has a strong—indeed, overriding—interest in using these procedures rather than additional or different procedures. As explained above, the Colorado legislature established a process for resolving disputes about candidate eligibility in exercise of its constitutional authority to protect the integrity of its electoral system. That is the procedure that was used here.[10] And this procedure is part of the "comprehensive * * * election code[]" that Colorado enacted to regulate "the registration and qualifications of voters, the selection and eligibility of candidates, [and] the voting process itself." *Celebrezze*, 460 U.S. at 788. Requiring Colorado to use

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[10] If anything, the trial court here afforded Trump even greater procedural protections. To the extent that doing so led the trial court to deviate from the precise statutory deadlines contemplated by §§ 1-4-1204(4) and 1-1-113, that is not unusual. In fact, Colorado courts have always understood these provisions to permit the flexibility necessary to implement procedures appropriate to the nature of the challenge. *See, e.g.*, *Kuhn v. Williams*, 2018 CO 30, ¶¶ 14–15 (hearing held seven days after verified petition filed); *Griswold v. Peters*, No. 22-cv-30007, 2022 Colo. Dist. LEXIS 703 *1–2 (Mesa Cnty. Dist. Ct. May 10, 2022) (hearing held three months after verified petition filed).

more or different procedures would usurp the constitutional role of the Colorado legislature.[11]

The factors this Court has identified as relevant to whether a petitioner's rights to due process have been violated all show that "the specific dictates of due process" were not only easily met, but far exceeded, in this case. *Mathews*, 424 U.S. at 335.

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"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333 (quoting *Armstrong*, 380 U.S. at 552). Trump received that opportunity. Due process is thus no basis for disturbing the decision of the Colorado Supreme Court.[12]

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[11] Demanding additional process in this context would also be ahistorical. Sweeping civil discovery, particularly pretrial discovery, did not exist in 1868 when the Fourteenth Amendment was ratified. Stephen N. Subrin, *Fishing Expedition Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 694 (1998) ("Historically, discovery had been extremely limited in both England and the United States."). In fact, this Court displayed "antagonism" to discovery as recently as 1911. John H. Beisner, *"The Centre Cannot Hold"— The Need for Effective Reform of the U.S. Civil Discovery Process*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, at 6 (citing *Carpender v. Winn*, 221 U.S. 533, 540 (1911)). Therefore, any argument that Trump was constitutionally entitled to more discovery would not be grounded in the text or history of the Due Process Clause.

[12] If this Court concludes that Trump preserved a procedural due process argument, that he was entitled to procedural process in the first instance, ***and*** that the process below was inadequate, reversal would still not be appropriate.

CONCLUSION

As this Court has explained, "procedural due process rules[] are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions." *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) (quoting *Mathews*, 424 U.S. at 344). The central premise of the Due Process Clause is that the rules don't change based on how popular or unpopular, or how powerful or powerless, a party to a proceeding may be.

Despite this, Trump seeks a different set of rules. He suggests that, because he was formerly the President, again seeks the Presidency, and has the support of many voters nationally, he is entitled to enhanced treatment. But Trump has never articulated any legal basis for that contention or what amount of process would be sufficient. He argues that the generally applicable rules for deciding disputes about the eligibility of candidates to appear on Colorado's ballot—rules that have functioned well and without question for more than a century—should not apply to him. Such a contention is fundamentally at odds with the Due Process Clause and the rule of law.

Colorado's legislature exercised its unquestioned constitutional authority by enacting its Elections Code, which includes a robust judicial procedure for challenging candidate eligibility. The trial court properly implemented that procedure and provided

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The only appropriate remedy would be a remand for further proceedings.

Trump protections far beyond those demanded by the Due Process Clause by any qualitative or quantitative measure. Trump received detailed notice of the allegations against him. He knew precisely the evidence Respondents intended to present and had a full opportunity to cross examine all witnesses who testified against him. He ultimately had a five-day trial (which he initially won) before a neutral decisionmaker with the additional protection of a clear-and-convincing burden of proof. The trial court issued an exhaustive order that provided for full appellate review. The Due Process Clause provides no basis for this Court to reverse the decision of the Colorado Supreme Court.

Respectfully submitted.

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