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 AMICUS CURIAE Professor Ilya Somin In Support of Respondent

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Ilya Somin is Professor of Law at George Mason University and the B. Kenneth Simon Chair in Constitutional Studies at the Cato Institute. His research focuses on constitutional law, property law, democratic theory, and federalism. He is the author of *Free to Move: Foot Voting, Migration, and Political Freedom* (Oxford University Press, rev. edition, 2022), *Democracy and Political Ignorance: Why Smaller Government is Smarter* (Stanford University Press, rev. ed. 2016), and *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain* (University of Chicago Press, 2015), His work has appeared in numerous scholarly journals, including the *Yale Law Journal*, *Stanford Law Review*, *Northwestern University Law Review*, *Georgetown Law Journal*, *Texas Law Review,* and others.

Professor Somin has written extensively on democracy, its relationship to judicial review, and constitutional safeguards that protect democratic institutions. Section 3 of the Fourteenth Amendment is one such safeguard, and its significance is underscored by the present case.[2] He is appearing

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

[2] See Ilya Somin, *Section 3 Disqualifications for Democracy Preservation*, LAWFARE, Sept. 6, 2023, available at https://www.lawfaremedia.org/article/section-3-disqualifications-for-democracy-preservation (explaining how

here as he believes that Section 3 is an important safeguard that should not be undercut by constraints that are not part of the text and original meaning. This is important not only today but for any potentially necessary application of Section 3 in the future.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 3 of the Fourteenth Amendment (hereinafter "Section 3") safeguards our republic against the threat posed by public officials who have previously undermined it by engaging in insurrection or giving "aid and comfort" to the enemies of the United States. U.S. Const. Amend. XIV, § 3. Having shown their true colors once, these insurrectionist present and former officials are not permitted a second chance to undermine the republic. As aptly stated by the Colorado Supreme Court, "interpreting Section 3 does not 'turn on standards that defy judicial application,'" but instead entails evaluation based upon "familiar principles of constitutional interpretation." (The court quotes *Zivotofsky v. Clinton*, 566 U.S. 189 at 201 (2012)).

Section 3 states:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the

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Section 3 is part of a class of constitutional rules that protect liberal democratic institutions against would-be officeholders who seek to undermine them).

> United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

By its text, Section 3 does no more nor less than impose a qualification for holding federal or state office that excludes those who have taken a prior oath of office and then participated in an insurrection from holding office afterwards.[3] It is no different from any other legal qualification for becoming President. He or she must be at least 35 years of age, a natural-born U.S. citizen, a U.S. resident for at least 14 years, and one who has not served two prior presidential terms. *See* U.S. Const. Art II, § 1 and Amend. XXII.

Notably, while Petitioner and Petitioner's amici repeatedly comment about the consequences of Mr. Trump's disqualification or the conduct that led to that disqualification, none of the Colorado Supreme Court justices, even those who dissented, disagreed

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[3] *See Cawthorn v. Amalfi*, 35 F.4th 245, 265 (4th Cir. 2022) (Wynn, J., concurring); id. at 275 (Richardson, concurring in the judgment); *New Mexico ex rel White v. Griffin*, 2022 WL 4295619 (N.M. Dist. Sept. 6, 2022), *appeal dismissed and reconsideration denied,* No. S-1-SC-39571 (N.M. Feb. 16, 2023), at *16; *Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1316 (N.D. Ga. 2022).

with the trial court's determination that Mr. Trump engaged in insurrection against the Constitution. Nor did any agree with Mr. Trump's claim that the presidency is exempt from Section 3. *Anderson et al v. Griswold et al*, (D. Colo. 2023).

Further, all acknowledge that Colorado, like every other state, has an obligation under U.S. Const. Art. II, Sec. 1 to regulate the manner their presidential electors are selected. For the most part, Petitioner's amici do not contest that a state has an "important and well-established interest in regulating ballot access and preventing fraudulent or ineligible candidates from being placed on the ballot." *Bullock v. Carter*, 405 U.S. 134, 145 (2005) (which further held that "a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies"). Nor is it generally disputed that a state has a legitimate interest in adopting and following specific statutory processes when judging election disputes that arise under state law. *See Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.).

The key questions before this Court are whether Donald Trump is disqualified under Section 3, and who has the authority to determine that Section 3 is applicable and, therefore, should be applied.

As this Court undertakes the weighty task of reviewing this case, this amicus brief hopes to provide guidance on two specific issues that have been raised repeatedly by Petitioner and Petitioner's amici. The first is whether Mr. Trump had to be convicted of a crime before he could be disqualified under Section 3. The second is whether disqualification in the absence

of such a conviction violates Mr. Trump's right to due process under the Fourteenth Amendment. As will be shown below, the answer to both questions is a resounding, "No."

Part I explains why a criminal conviction is unnecessary for disqualification under Section 3. A criminal conviction is not required under the text and original meaning of the Fourteenth Amendment. In addition, the distinction between civil and criminal proceedings is a fundamental aspect of our legal system. The same events can give rise to both criminal charges and civil liability or (as in this case) disqualification. One is not a prerequisite to the other. Indeed, as demonstrated by the famous case of O.J. Simpson, a person acquitted of a crime may nonetheless be subject to civil liability for the very same events.

If there is no general requirement of a criminal conviction, there can be no requirement of a specific conviction under 18 U.S.C. § 2383, the federal criminal insurrection statute. Conviction under Section 2383 is not and was not designed to be the exclusive mode of enforcing Section 3 disqualification.

Part II explains why disqualification in the absence of a criminal conviction does not violate Mr. Trump's due process rights. The Due Process Clause of the Fourteenth Amendment only applies to situations where a person is deprived of "life, liberty, or property." U.S. Const. Amend. XIV, § 1. Neither life, nor liberty, nor property is lost by virtue of disqualification from various public offices. Even if the Due Process Clause does apply, the civil process

and standard of proof used by the Colorado courts are more than sufficient.

ARGUMENT

I. SECTION 3 DISQUALIFICATION DOES NOT REQUIRE ANY PREVIOUS CRIMINAL CONVICTION, MUCH LESS A CONVICTION EXCLUSIVELY PURSUANT TO 18 USC § 2383

A. A Determination as to Whether an Individual Has Engaged in Insurrection Under Section 3 Does Not Require a Prior Criminal Conviction

Neither the text nor the original meaning of Section 3 requires a preexisting criminal conviction. Nothing in Section 3's text mentions a conviction (or even a criminal charge), much less making it a precondition for disqualification.[4] If Section 3's drafters had wanted to disqualify only individuals who had previously been convicted of specific criminal offenses, they easily could have said so in the text. Instead, Section 3 simply states that it applies to one who has "engaged in insurrection" – not one "convicted for engaging in insurrection." The framers of Section 3

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[4] *See Griffin*, 2022 WL 4295619, at *16; *Worthy v. Barrett*, 63 N.C. 199 (1869); *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631 (La. 1869). 631; *In re Tate*, 63 N.C. 308 (1869); Cong. Research Serv., The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment, Sept. 7, 2022, https://crsreports.congress.gov/product/pdf/LSB/LSB10569 ("Section 3 of the Fourteenth Amendment does not expressly require a criminal conviction, and historically, one was not necessary.").

did no more than create a limitation on who could hold office, eschewing in the body of the text criminal restrictions or the need for any preexisting determination, criminal or otherwise.

When interpreting Section 3, just as any other matter in the Constitution, courts must prefer ordinary meaning over "secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008). Nothing in the text would lead an ordinary citizen in 1868 to assume that Section 3 requires a prior criminal conviction before disqualification can be imposed. To the contrary, the text suggests that anyone who engaged in insurrection is automatically disqualified, regardless of whether they have been convicted of a crime or not. And, of course, disqualification from office is not itself a criminal punishment any more than a person barred from the presidency by virtue of lacking one of the other constitutionally required qualifications undergoes punishment.

In fact, most members of the drafting Thirty-Ninth Congress who supported the Fourteenth Amendment maintained that Section 3 amended the constitutional qualifications for office rather than imposed punishment. Senator Lot M. Morrill of Maine pointed to "an obvious distinction between the penalty which the State affixes to a crime and that disability which the State imposes and has the right to impose against persons whom it does not choose to entrust with

official station."[5] The proposed constitutional ban on office-holding, Senator Waitman Willey agreed, is:

> not . . . penal in its character, it is precautionary. It looks not to the past, but it has reference, as I understand it, wholly to the future. It is a measure of self-defense. It is designed to prevent a repetition of treason by these men, and being a permanent provision of the Constitution, it is intended to operate as a preventive of treason hereafter by holding out to the people of the United States that such will be the penalty of the offense if they dare commit it. It is therefore not a measure of punishment, but a measure of self-defense."[6]

Section 3 disqualification, Morrill, Willey and others maintained, was a matter of fitness for office rather than a sanction for misbehavior.[7]

Moreover, in its implementation, Section 3 in the vast majority of cases would have been either unnecessary or utterly ineffective if interpreted to disqualify only persons convicted of crimes. No one at the time of drafting and ratification in 1866-1868 suggested that persons serving long prison terms were a threat to hold office. For most that would end up being restricted by Section 3, Republicans understood that obtaining convictions, such as for treason, would be next to impossible given the constitutional

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[5] *Congressional Globe*, 39th Cong., 1st Sess., p. 2916.
[6] *Congressional Globe*, 39th Cong., 1st Sess., p. 2918.
[7] *Congressional Globe*, 39th Cong., 1st Sess., p. 3036.

requirement that those so accused be tried in the district where the alleged conduct occurred. For instance, the effort to convict Jefferson Davis of treason in Richmond, Virginia provided evidence that Section 3, if interpreted as requiring preexisting criminal punishment, would be unlikely to disqualify many -- if any -- former Confederates. *See In re Davis*, 7 F. Cas. 63, 90, 92-94, (C.C.D. Va. 1867) (No. 3,621) (describing Davis's argument and the Government's response). This possibility of prior criminal conviction was rendered *de minimis* after President Johnson issued his two broad pardons. (*Andrew Johnson*, 1865 *Amnesty Proclamation*, (May 30, 1865); *Andrew Johnson*, *Proclamation Granting Full Pardon and Amnesty to All Persons Engaged in the Late Rebellion*, (Dec. 25, 1868)).[8]

Near the end of the war, General Ulysses S. Grant permitted Robert E. Lee and the Army of Northern Virginia to surrender under terms that allowed "each officer and man… to return to their homes, *not to be disturbed by United States authority* so long as they observe their paroles and the laws in force where they may reside" (emphasis added). Lee's army—and other Confederate forces who surrendered on similar terms—included many men who could be disqualified under Section 3, because they had previously held public office. This included Lee himself, subject to disqualification by virtue of his previous service as a high-ranking US Army officer (Section 3 disqualifies any insurrectionist who had previously taken an oath as an "officer of the United States," a category that

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[8] . *See* Gerard N. Magliocca, "Amnesty and Section Three of the Fourteenth Amendment," 36 *Const. Comment*. 87, 94-95 (2021).

included commissioned military officers).[9] Certainly, neither the framers nor ratifiers of Section 3 thought that Lee and others like him were exempt from disqualification merely because they were not prosecuted for insurrection -- and likely could not be, given the terms of their surrender.

Instead, when implemented during Reconstruction, it was clear that disqualification under Section 3 could not and did not hinge on a prior criminal conviction. Even though not convicted, broad agreement existed that Jefferson Davis was disqualified from office even after his treason prosecution was abandoned. *See* Brief of Amici Curiae American Historians in Support of Respondents at 27-30. The Reconstruction-era *Worthy* and *Tate* cases involved individuals who had not been charged (let alone convicted) with any crimes. Hundreds of individuals submitted amnesty requests believing that Section 3 applied to them even though none of them were ever convicted of crimes related to their roles in the Civil War.[10] More recently, a 2022 Georgia decision, drawing upon Reconstruction-era history, explicitly rejected a requirement of a prior criminal conviction.[11]

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[9] John Reeves. *The Lost Indictment of Robert E. Lee: The Forgotten Case Against an American Icon*., 2018, discussing the issue in detail, including whether the terms of Lee's parole precluded future prosecution with many arguing it would.

[10] Ron Fein and Gerard Magliocca, "States Can Enforce Section 3 of the 14th Amendment Without Any New Federal Legislation" (Free Speech For People Issue Report 2023) pp. 8, 12.

[11] *David Rowan, et.al. v. Marjorie Taylor Greene,* administrative hearings state of Georgia, docket 2222582 (2022) at 13-14 ("Nor does 'engagement' require previous conviction of a criminal

At least eight public officials, ranging from a U.S. Senator to a local postmaster, have been formally adjudicated to be disqualified from public office under the Disqualification Clause since its ratification in 1868. Yet, during Reconstruction, no person disqualified from public office after the Fourteenth Amendment was ratified, no person whom the government attempted to disqualify, no person who sought amnesty under Section 3, and no person amnestied under Section 3 was first convicted of a pertinent offence stemming from disloyal behavior.[12]

A standard element of our legal system is that the same events often give rise to both civil and criminal liability. For example, a person who commits rape, murder, or assault is subject to criminal penalties, and also to civil suits by his or her victims. In such cases, a criminal conviction is *not* a prerequisite to civil liability. Indeed, even an actual *acquittal* on criminal charges does not necessarily preclude civil lawsuits against the perpetrator. Consider O.J. Simpson, who was famously acquitted of criminal charges in the murder of his ex-wife Nicole Brown Simpson, and Ron Goldman, but later lost a civil case filed by the victims' families. See *Rufo v. Simpson*, 103 Cal.Rptr.2d 492

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offense."); see also *Griffin*, 2022 WL 4295619 at *24 ("[N]either the courts nor Congress have ever required a criminal conviction for a person to be disqualified under Section Three.").

[12] See Myles S. Lynch, "Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment," 30 *William & Mary Bill of Rights Journal* 153 (2021), pp. 196-214; Ron Fein and Gerard Magliocca, "States Can Enforce Section 3 of the 14th Amendment Without Any New Federal Legislation" (Free Speech For People Issue Report 2023) pp. 9-10.

(Cal. Ct. App. 2001) (upholding civil judgment against Simpson). The criminal acquittal did not stop Simpson from incurring $33.5 million in civil liability. *Id.* at 493-94. The criminal and civil cases were distinct, and the result of one did not determine that of the other. The same reasoning applies here.

B. If No Criminal Conviction is Required, then a Conviction Under 18 U.S.C. § 2383 Cannot Possibly be Required

Despite this overwhelming historical evidence, Petitioner and a number of Petitioner's amici argue the necessity of an even more specific prerequisite conviction to the point of *reductio ad absurdum*. Their argument is that before Section 3 disqualification can take effect, a finder of fact cannot rely on any pertinent conviction but only a criminal conviction pursuant to 18 USC § 2383. They assert this is required because at the present time it is the one statute that criminalizes insurrection resulting in being "disqualified from holding public office." [Quoting the dissent of Justice Samor, Pet. 127a]. *See* Brief of Former Attorneys General Edwin Meese III, *et. al*., at 24-25 ("This statute looks exactly like what one would expect for legislation implementing Section 3. It defines the elements of the pertinent crimes, sets forth the range of punishments, and commands that any person convicted under it be disqualified from holding an office "under the United States., ,,, The big problem for those advocating for the Colorado decision is that President Trump has not been convicted of violating Section 2383. For that matter, he has never even been

charged with violating Section 2383.")[13] *See* also Brief of U.S. Senator Ted Cruz, et. al., at 7-9

Venturing further down this rabbit hole, the argument continues that since Mr. Trump has never even been charged with a violation of 2383, he is automatically exempted from Section 3 in its entirety. The natural corollary of this argument is that even if Mr. Trump is found guilty of *any* of the many election-related crimes he has been charged with in Washington D.C. or Georgia, Section 3 would still not come into play because conspiring to defraud the United States, conspiring to disenfranchise voters or conspiring and attempting to obstruct an official proceeding are not the right convictions to have before any restrictions to holding office pursuant to Section 3 can be implemented.[14] For a multitude of reasons this § 2383 argument cannot withstand scrutiny. The most fundamental flaw is the lack of any indication that § 2383 was intended to be the exclusive enforcement mechanism for Section 3. Nothing in the text,

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[13] What charges are brought are a matter of prosecutorial discretion. DOJ, for instance, has chosen to bring a number of prosecutions under 18 USC 2384 (seditious conspiracy) which mirrors insurrection. However, DOJ's prosecutorial judgment has no bearing on the application of Section 3 herein, which by its plain text does not require a conviction for any crime -- just a finding that someone "engaged in insurrection or rebellion."

[14] Clearly, it makes no sense that 18 USC § 2383 would allow a Section 3 disqualification, but 18 USC § 2384 (Seditious Conspiracy) or 2385 (Advocating the Overthrow of the Government) would not.

legislative history, or public understanding of the statute and Section 3 indicates any such thing.

Given that criminal punishment and disqualification serve different purposes – one punitive and the other protecting our political institutions against disloyal officeholders – it makes no sense to assume that one is a prerequisite to the other. It is far more logical to conclude that the two are complementary. Conviction under Section 2383 may be a sufficient prerequisite for disqualification under Section 3, but not a necessary one.

The claim that Section 2383 is the exclusive enforcement mechanism for Section 3 hinges on the mistaken belief that 2383 was enacted pursuant to the ratification of the 14th Amendment, including Section 3, in order to be the enforcement arm for Section 3. See Amici Curiae Brief of Former Attorneys General Edwin Meese III, *et. al*., at 24 (making this claim). Yet, before 2383 was passed or Section 3 was ratified, the Confiscation Act of 1862 ("the Second Confiscation Act") had already provided that any person who "incite[s] … or engage[s} in any rebellion of insurrection … shall be forever incapable and disqualified to hold office under the United States," and it was § 2 of the Second Confiscation Act that was the true precursor to 2383.[15] Thus, if 2383 temporally

[15] The most extensive discussion of the provision appears in *United States v. Greathouse*, 166 U.S. 601 (1897), an 1863 case presided over by Supreme Court Justice Stephen Field. Applying the Second Confiscation Act, the Court convicted the defendants for preparing an armed vessel and setting sail to attack United States ships in the Pacific on the Confederacy's behalf, despite never actually carrying out an attack. For a more detailed discussion of the history and text of 18 U.S.C. § 2383, *see* Norman

followed anything, it was the Confiscation Act of 1862, which was passed six years before Section 3 was ratified and four years before it was even drafted.

Nor is there a textual fit between Section 3 and § 2383. First, Section 3 is a constraint applied only to those who had already sworn a previous oath, carrying no criminal penalty but rather only a civil limitation as to whether one could hold office in the future. Section 2383, on the other hand, broadly applies to anyone guilty of engaging in insurrection or rebellion rather than just those who had previously undertaken an oath of office. It also imposes criminal sanctions that significantly can result in fines, imprisonment for a maximum of 10 years, or both. Certainly, unlike Section 3 which for a given prior officeholder might never even come into play, a felony conviction would affect that individual's rights in a wide range of areas.

Finally, Section 3's disqualification covers both state and federal offices, while 2383's disqualification language only applies to federal offices -- a rather significant fact when considering the history of enforceability of Section 3 by the States. Additionally, Section 3 expressly allows Congress to remove the disability, while any relief from 2383 is vested in the courts or in the President's pardon power, as is true for most other federal statutes that punish criminal

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Eisen, Noah Bookbinder, Donald Ayer, Joshua Stanton, E. Danya Perry, Debra Perlin, and Kayvan Farchadi, *Trump on Trial: A Model Prosecution Memo for Federal Election Interference Crimes Second Edition*, Just Security (July 2023), https://www.justsecurity.org/wp-content/uploads/2023/07/model-prosecution-memo-january-6th-election-interference-just-security-july-2023.pdf.

conduct. Finally, and perhaps most importantly, of all of the individuals adjudicated to be disqualified under Section 3, not one was convicted of insurrection or rebellion under 18 USC § 2383 nor any of its predecessors.

Some of Petitioner's amici argue that a conviction under Section 2383 is also required by virtue of the last sentence of Section 3, which states that "Congress by a vote of two-thirds of each House" may remove an insurrectionist's disqualification. However, this sentence merely empowers Congress to remove a disqualification. It says nothing about how to determine whether a current or former public official can be disqualified in the first place.

In a bizarre twist of logic, some amici argue that this tail wags the dog. They state that since this last sentence of Section 3 empowers Congress, that empowerment extends to the sentences before it that do not mention Congress at all. This is the rabbit hole they go down to argue that Congress has exclusive enforcement authority and that conviction pursuant to an unrelated statute, Section 2383, is required for disqualification under Section 3. However, the far more logical and correct conclusion is that the drafters knew precisely what they were doing. They deliberately gave Congress exclusive authority to remove a disqualification but did *not* grant exclusive authority when it came to imposing it in the first place.[16]

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[16] William Baude and Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024), at 81-82 & n.288 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 ("

Simply put, the purpose of this last sentence of Section 3 was to give Congress the power to remove disqualifications in situations where they deem an insurrectionist has been rehabilitated or such removal otherwise benefits the public interest. Indeed, after the Civil War, Congress often did just that: it exercised its authority to remove disqualifications from former Confederates and, in difficult cases, carefully weighed whether the national interest justified an exemption. Congress can do the same thing with Mr. Trump. But unless and until they choose to do so, he remains disqualified.

II. THE COLORADO COURTS DID NOT VIOLATE MR. TRUMP'S DUE PROCESS RIGHTS

The Colorado Supreme Court found that the district court, based upon its review of the evidence, reasonably concluded that "an insurrection as used in Section 3 of the Fourteenth Amendment is (1) a public use of force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States." Appendix at 85a (quoting *Anderson v. Griswold*, 2023 Colo Dist. LEXIS 362, *91 at ¶ 240.) The Colorado Supreme Court then found that the evidence before the district court "sufficiently established that the events of January 6 constituted a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the action necessary to

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[A] prosecution under Section 2383 of Title 18 is neither a prerequisite to nor preclusive of the self-executing application of Section Three….").

accomplish the peaceful transfer of power. . . ." Appendix at 87a. These actions were enough to trigger Section 3's disqualification provision.

Before reaching these conclusions, the Colorado Supreme Court had to determine that Section 3 was enforceable by States pursuant to a state-law cause of action, which it so found. Pet. App. 14a, 45a-55a. However, the mere fact that Section 3 is enforceable through a state-law cause of action does not mean that due process can be denied in the determination of whether a given individual is subject to Section 3. The Colorado Supreme Court merely determined that a cause of action to implement Section 3 could be brought, so long as Mr. Trump was provided with adequate process.

Petitioner and Petitioner's amici have asserted four separate violations of Mr. Trump's due process during the course of the Colorado proceedings. The Colorado Supreme Court rejected Mr. Trump's assertion that expedited consideration of the section 1-1-113 claims violated his due process. Pet. App. 41a–45a. (Addressed in the Brief on the Merits for Anderson Respondents at 8-9 and fn. 3). Secondly, it has been argued that the entire proceeding violated Mr. Trump's First Amendment rights (Addressed in the Brief on the Merits for Anderson Respondents at 31-33), Discussed below will be the two remaining assertions that Mr. Trump's due process was violated: 1) that the Colorado court employed an inappropriate civil standard of proof in their determinations; and 2) that Mr. Trump was denied due process due to the inappropriate nature of the proof that was permitted to be presented. Implicit in these contentions is the

assumption that criminal standards of proof must be used, and that the absence of a criminal conviction (or similar proceeding) violates due process.

A. The Due Process Clauses of the Fifth and Fourteenth Amendments do not apply to Section 3 Disqualification.

There is no constitutional due process issue in this case, and, thus, there cannot be any constitutional requirement that a criminal standard of proof be followed. The Due Process Clauses of the Fifth and Fourteenth Amendments only provide a guarantee of due process before a person can be deprived of "life, liberty, or property." U.S. Const. Amend. V; U.S. Const. Amend. XIV, §1.

Disqualification under Section 3 does not threaten any of these. Loss of eligibility for holding various public offices obviously does not threaten anyone's life or property rights. It is not a threat to liberty either. No one claims that the Twenty-Second Amendment deprives former presidents' "liberty" merely because they become ineligible for the presidency if they have already served two terms. U.S. Const. Amend. XXII. While it has been argued that there is an infringement on voters' due process rights, disenfranchisement is also not at issue here. No right to vote is being taken away. If a court rules that someone is ineligible to run because they are below the age of 35 or not a natural born citizen, voters nevertheless retain their right to vote. If former President Barack Obama were to attempt to run for president, and a court ruled him ineligible because he has already served two terms in office, once again there is no disenfranchisement or abridgement of the right to vote -- no matter how many

people would like to vote for him. The right to vote is a right to vote for any legally eligible candidate, not a right to vote for those barred from office by the Constitution.

It is true that the Supreme Court has held that a degree of constitutional due process is required for deprivation of some types of government benefits, particularly those that provide essential needs, such as welfare benefits for the poor. *See*, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that due process protections apply to termination of welfare benefits). However, in such cases, the Court reasoned, a crucial factor is that "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate." Id. at 264.

Mr. Trump faces no "desperate" situation. Eligibility for the presidency is not an essential need. If Mr. Trump is no longer eligible for the presidency and various other public offices, he will not starve or become homeless. Even when it comes to the deprivation of vital welfare benefits for the poor, this Court has held that due process requires only an administrative hearing, not a "judicial or *quasi*-judicial trial." *Id*. at 266. Certainly, any such requirement was easily met by the five-day trial with fifteen witnesses and extensive pre-trial motions practice held by the Colorado court in this case.[17] Even

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[17] The district court held a status conference on September 18, 2023, (at which counsel for Trump appeared), and set a five-day

if due process protections apply here, disqualification from public office, no matter how powerful, should not be held to a higher standard of proof than is required for deprivation of government benefits that provide recipients vital necessities.

B. The Colorado Courts Used the Appropriate Standard of Proof

Even assuming that the Due Process Clause does apply, the Colorado courts used a more than adequate standard of proof. Generally, civil actions, such as these disqualification proceedings, require a determination by a preponderance of the evidence. See, *e.g.*, *Griffin*, 2022 WL 4295619 at *24. This standard of proof reflects that disqualification itself is not a criminal penalty that could deprive a person of their life, liberty, or property, but rather that it is merely a restriction on who can hold public office in the United States. See *Sandlin*, 21 La. Ann. at 632-33 (Section 3 suit was brought "not to inflict punishment or to impose penalties or disabilities," but "to inquire legally into [defendant's] right to hold … office"). By contrast, violations of Section 3 carry no criminal penalty. The sole sanction is disqualification from holding public office. And because Section 3 challenges are asserted through civil and administrative channels, including through state laws permitting voters to challenge candidate qualifications, these claims are subject to the lower 'preponderance of the evidence standard,' *i.e.*, the more likely than not evidentiary standard.

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trial to begin on October 30, 2023. See Minute Order, Anderson v. Griswold, No. 2023CV32577 (Denver Dist. Ct. Sept. 18, 2023).

Nevertheless, Amicus Curiae State of Kansas at 6-11 argues for a higher standard. In their view, "Section 3 is penal in nature." This is because "[t]he severity of the loss potentially imposed by Section 3 cannot be overstated." Brief at 6-7. However, such a test cannot stand as a basis for whether a higher standard of proof is necessary. Clearly, there are frequently situations where the consequences of civil liability can be grave, such as when defendants end up paying enormous damages that may even force them into bankruptcy. However, this does not change the standard of proof, and certainly does not require application of the criminal standard of proof beyond a reasonable doubt.

Further, in order to be on a ballot in some states, a candidate, including candidates for President of the United States, must meet multiple state election requirements and deadlines. In some states, including Colorado, that means the candidate must be qualified to hold the office he or she is running for. Pet. App. 18a, 20a-27a, 29a-31a. For instance, most States would generally deny ballot access to a candidate for President under the age of 35 years or who was not born an American citizen. Does that make the limitation penal for someone who is 34 or is not a "natural born" citizen?

A state has an interest in assuring that its voters do not waste their votes on someone ineligible to hold office. *Hassan,* 495 F. App'x at 948. Similarly, there is no requirement that a candidate's failure to meet other restrictions must be proven beyond a reasonable doubt. If, for example, there is a controversy over the accuracy of the candidate's birth certificate, indicating

his age or place of birth, or over whether the certificate has been altered or forged, state courts can surely apply the civil standard of preponderance of evidence.

Many of the drafters of Section 3 recognized that disqualification is not penal in nature. Senator Lyman Trumbull rejected a penal reading of Section 3: "[W]ho ever heard of such a proposition that a bill excluding men from office is a bill of pains and penalties and punishment?" Senator Trumbull stated that the Constitution "declares that no one but a native-born citizen of the United States shall be President . . . Does, then, every person living in this land who does not happen to have been born within its jurisdiction undergo pains and penalties and punishment all his life, because by the Constitution he is ineligible to the Presidency?" Senator John Henderson elaborated on the distinction between barring someone from office and imposing criminal sanctions. He insisted, "this is an act fixing the qualifications of officers and not an act for the punishment of crime." Punishment, Henderson continued, involved "life, liberty, or property." "Office," by comparison, was "a creature of Government." "It has never been regarded in the American courts as a punishment," he observed, "when conventions and Legislatures deprived incumbents of their offices."[18]

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[18] *Congressional Globe*, 39th Cong., 1st Sess., p. 3036. See *Congressional Globe*, 39th Cong., 1st Sess., pp. 2499 (Broomall) ("It is not a punishment, it is as a means of future security, that this provision is asked to be incorporated in the Constitution."2901-02 (Senator Lyman Trumbull of Illinois) ("I rose merely to repel the idea that it was imposing pains and penalties to deprive a man from holding office").

Finally, instead of using the standard of proof generally deemed sufficient for almost all civil matters, the Colorado district court applied a higher standard of proof and "found by clear and convincing evidence that President Trump engaged in insurrection as those terms are used in Section Three." App. 8-9a (¶3).[19] Under the appropriate Colorado standard of review, the Colorado Supreme Court then found that the district court did not err in concluding that the events at the U.S. Capitol on January 6, 2021, constituted an "insurrection." The Colorado Supreme Court also determined that the district court did not err in concluding that Mr. Trump "engaged in" that insurrection through his personal actions.

C. Mr. Trump was Not Deprived of Due Process by the Evidence Presented to the District Court

A group of Former U.S. Attorneys, albeit none from Colorado, argue that Colorado misapplied its own rules of evidence and thereby "arbitrarily restricted a candidate – Mr. Trump -- from running for office." This led them to conclude that "Colorado's application of its state evidentiary laws violated the Fourteenth Amendment's due process requirements." Brief for Former United States Attorneys at 6-11, (See also

[19] This was the standard that Mr. Trump argued for. See the court's ruling at JA1315. See also Intervenor Trump Brief Regarding Standard of Proof, *Anderson v. Griswold*, No. 2023CV32577 (Denver Dist. Ct. Oct. 25, 2023) and Response to Intervenor Trump Brief Regarding Standard of Proof, *Anderson v. Griswold*, No. 2023CV32577 (Denver Dist. Ct. Oct. 27, 2023).

Brief of Landmark Legal Foundation at 3, Brief of Condemned USA at 15; and Brief for Petitioner at 17).

However, noticeably missing from these discussions is that the appropriate standard for the review of evidence is abuse of discretion. The Colorado Supreme Court found that the district court did not abuse its discretion in, for instance, admitting into evidence portions of Congress's January 6 report. Notably, when Mr. Trump made some of these objections before the Colorado Supreme Court in his Brief at 44-47, the Colorado Supreme Court considered Mr. Trump's argument and found that the trial court didn't abuse its discretion in admitting 31 findings from the report. *Anderson* at paras 162-75. And while Mr. Trump attacked the entire report, he only directly challenged 11 of the findings, which means that much of the argument by Petitioner's amici was never preserved by Mr. Trump. The Colorado Supreme Court did reject 9 of the challenges he made, while it accepted 2 (though finding both of those to be harmless error). *Anderson*, Paras 171-73. Finally, most of the cases cited by these amici themselves turn on abuse of discretion, the standard appropriately used by the Colorado Supreme Court.[20]

These findings should be respected. Repeatedly, this Court "has held that state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S.

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[20] If the GOP had any contrary evidence to support a minority report with the opposite conclusion, they would certainly have had their own shadow committee and come to their own minority report conclusions. They didn't. The fact is that there is no contrary evidence and thus no contrary report.

684, 691 (1975) especially when the issue is evidentiary admissibility under state law. Under well-established federalist principles, "the highest court of the state is the final arbiter of what is state law." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940). Indeed, there has been a long line of Supreme Court cases holding that "[s]tate courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise." *Moore v. Harper*, 600 U.S. 1, 37 (2023).

Petitioner and Petitioner's amici might object to the conclusion of the Colorado Supreme Court for political reasons, but legally it is well grounded.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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