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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* UNITED STATES JUSTICE FOUNDATION & POLICY ISSUES INSTITUTE, INC. IN SUPPORT OF PETITIONER

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MOTION

Amici Curiae United States Justice Foundation and Policy Issues Institute, Inc. request leave of the Court to file to their *amicus* brief, attached (and submitted on January 31, 2024).

Amici submitted their brief on January 31 rather than January 18 because counsel misread the relevant portion of this Court's January 5, 2024 order and interpreted it as if it read as follows:

> Petitioner's brief on the merits, and any amicus curiae briefs … in support of neither party, are to be filed on or before Thursday, January 18, 2024. Respondents' briefs on the merits, and any amicus curiae briefs in support [of either party], are to be filed on or before Wednesday, January 31, 2024.

The Court should accept *amici*'s brief for filing for several reasons. Preliminarily, the error is harmless, made in good faith, and resulted in a delay of just nine court days. *Amici* recognize the extraordinary circumstances of this case where days might be comparable to weeks, but that segues to other reasons why the Court should grant *amici* the leave they request.

Given the far-reaching importance of this case, all parties have drawn significant *amici* support. Much of that support restates arguments the parties already made. These *amici* took a different approach and their eight-page (1,952-word) brief focused narrowly on a jurisdictional issue that was not addressed by any party or other *amici*.

Other important public interests weigh in favor of granting this motion. As stated in their brief, below, *amici* have significant interests in the subject of this

case. Furthermore, the docket in this case will become part of the historical record on this important issue, and *amici*'s argument should not be excluded from that record on the basis of an honest mistake. Additionally, while there is no guarantee that the Court will consider any or all of the *amici* arguments, it should at least have the option to do so. Granting this motion will give the Court that opportunity.

Respectfully submitted,

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

The United States Justice Foundation ("USJF") was founded in 1979 as a nonprofit public interest, legal action organization dedicated to instruct, inform and educate the public on, and to litigate, significant legal issues confronting America. The attorneys who founded USJF sought to advance the original understanding of constitutional jurisprudence in the judicial arena. USJF continues to be involved in public interest litigation, recently as a successful plaintiff seeking government records under the Freedom of Information Act in *Lacy v. U.S. Dep't of State*, No. SA CV 22-1065-DOC, 2023 WL 4317659 (C.D. Cal. May 3, 2023). USJF has a substantial interest in ensuring the proper role of the state and federal judiciary.

Policy Issues Institute ("PII") has worked over the last two decades to educate and inform the public regarding public policy issues that impact the constitutional order upon which our country was founded. PII is primarily focused on promoting robust First Amendment protections for citizens and exposing judicial overreach that contravenes fundamental American principles such as free speech, freedom of the press, and other natural rights bestowed upon the public by our Constitution. PII similarly has a substantial interest in preventing judicial overreach, especially when that overreach has substantial First Amendment implications.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The judgment of the Colorado Supreme Court should be reversed because that court did not have jurisdiction to remove Petitioner, former President Donald J. Trump, from that state's presidential ballot. The Fourteenth Amendment question that court answered is a political question reserved to the American people via the Electoral College.

ARGUMENT

The question in this case is essentially one of qualifications. Is former President Donald J. Trump qualified to serve another term as President given the insurrection clause of the Fourteenth Amendment?[2] The parties and many *amici* have addressed these issues and related questions *ad nauseum*. But before reaching those issues, these *amici* suggest that the Court consider a more fundamental question: Does it (or any other court) have jurisdiction to remove Petitioner from any state's presidential ballot.

Respondents bring this Court into uncharted territory. Throughout our history, there is no comparable case where a court has considered a similar ballot access question concerning an election for President. But this Court has had the opportunity to consider comparable issues for congressional candidates, and those cases are illustrative of reasoning that should apply here.

Under Article I, section 5 of the Constitution, each house of Congress is vested with authority to judge the elections and qualifications of its members.[3] Aside

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[2] U.S. CONST., amend. XIV, § 3.

[3] U.S. CONST., art. I, § 5, cl. 1; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783-827 (1995); *see also Greene v. Secretary of State for Ga.*, 52 F.4th 907, 913 (11th Cir. 2022) (Branch, J., concurring);

from the most basic qualifications—age, citizenship, and residency[4]—courts have little authority to evaluate the qualifications of Members of Congress.[5] But even with respect to these basic qualifications, judicial power is limited because once an election is held, adjudication of the result (or related qualification questions) is reserved to Congress.[6]

Prior to the 2022 election, there were several Fourteenth Amendment challenges to the qualifications of congressional candidates.[7] *Amici* are not aware of any that were successful. More to the point of their argument here, none of the cases determined the scope of this judicial power as applied to congressional elections.

Nonetheless, even if courts have jurisdiction to consider the Fourteenth Amendment as applied to congressional elections, the scope of their authority as applied to presidential elections must be different.

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but see Powell v. McCormack, 395 U.S. 486, 522 (1969) (Congress does not have authority to "exclude" members who are otherwise qualified).

[4] U.S. CONST., art. I, § 2, cl. 2 (House of Representatives); U.S. CONST., art. I, § 3, cl. 3 (Senate).

[5] *See Cawthorn v. Amalfi*, 35 F.4th 245, 262-65 (4th Cir. 2022) (Wynn, J., concurring) (discussing the scope of judicial authority).

[6] *Cf. Morgan v. U.S.*, 801 F.2d 445 (D.C. Cir. 1986); *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000).

[7] *See, e.g., Greene*, 52 F.4th 907 (request to enjoin state court proceedings denied as moot when state court refused to remove candidate from ballot); *Cawthorne*, 35 F.4th 245 (district court enjoined state court proceedings based on Amnesty Act of 1872; circuit court reversed after the election without reaching applicable issues).

At the time of ratification, the Fourteenth Amendment had an obvious local purpose. It is logical that, at that time, there might have been widespread local support to elect Confederate officials to Congress or choose them as presidential electors. The insurrection clause would prevent this.

These concerns do not apply to the presidency because (1) presidents are elected from each of the 50 states rather than individual states or localities, and (2) an insurrection or rebellion, by definition, is not representative of the country at large. Indeed, it is implausible that the United States might have elected a southern insurrectionist to the presidency in 1868.[8] Had that happened, it might call into question everything we modernly understand about the Confederate insurrection. On this point, there is a high degree of truth to the notion that the victors write the history books.

To this end, the best answer to the jurisidictional question in this case is that the Fourteenth Amendment question, as applied to candidates for President, is reserved to the American people. If a majority of the Electoral College chooses Petitioner as the next President of the United States, it would be impossible to conclude (as a matter of law) that he participated in an insurrection

[8] It would be more than 100 years after the Civil War before a southerner was directly elected to the presidency when Jimmy Carter of Georgia was elected in 1976 (Woodrow Wilson, elected in 1912, was born in Virginia but was Governor of New Jersey immediately before he was elected President; Truman was from Missouri, a contested border state in the Civil War, but was first elected Vice President and ascended to the presidency upon Roosevelt's death; Eisenhower was born in Texas but moved to Kansas as child, gained national prominence for his military service rather than state politics, and was President of Columbia University immediately prior to becoming President; Lyndon Johnson of Texas first ascended to the presidency upon Kennedy's death).

or rebellion even if a (potentially large) minority of the country strongly believes otherwise. Popular or not, the American people have the right to make that choice.

When this Court evaluated the balance of power over questions relating to congressional membership in *U.S. Term Limits*, 514 U.S. 779, and *Powell*, 395 U.S. 486, it considered an extensive historical record. The Court's reasoning in those cases supports *amici*'s contention that the American people have similar authority over presidential elections and are best positioned to evaluate whether Petitioner is qualified to serve again as President.

Powell went deep into British history and considered John Wilkes, a member of Parliament who served a 22-month prison sentence for behavior that was considered seditious at the time.[9] Wilkes was repeatedly reelected to the House of Commons (perhaps because of his history), but Parliament refused to seat him.[10] Then, after twelve years, Parliament changed course: It expunged its prior resolutions of expulsion and resolved that its prior actions were "subversive of the rights of the whole body of electors of this kingdom."[11] If the people who elected Wilkes wanted him to represent them, then he should have been allowed to do so.

Wilkes' struggle had a significant impact on the American colonies where he was viewed as a "a popular hero and a martyr to the struggle for liberty."[12] It was from this historical context that *Powell* concluded that

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[9] *U.S. Term Limits*, 514 U.S. at 789-90, discussing *Powell*, 395 U.S. at 528.

[10] *Powell*, 395 U.S. at 528.

[11] *Id*.

[12] *Id*. at 530.

congressional authority to expel members did not include the authority to exclude members.[13]

Twenty-six years later, *U.S. Term Limits* applied this reasoning to prohibit states from imposing term limits on Members of Congress.[14] In so doing, this Court reaffirmed *Powell*'s recognition that a "fundamental principle of our representative democracy" is "that the people should choose whom they please to govern them."[15]

John Wilkes' story shows how perspective can blur the line between criminal and martyr. It can be a difficult question. But immediately after the Civil War, the line between criminal and martyr was so clear that the Fourteenth Amendment made it through our Constitution's rigorous amendment process.

This relates back the Fourteenth Amendment's inherent purpose and the perceived or actual need to prevent Confederate insurrectionists from gaining positions of power within the federal government. At that time, there was an objective way to evaluate whether someone engaged in an insurrection—*i.e.*, the Confederate secession—and a real possibility that southern states would send insurrectionists to Congress.

Today, on the facts of this case, the line between criminal and martyr has blurred again. There are, without doubt, intense views on both sides where opinions are presented as facts. Without an objective test to evaluate whether Petitioner engaged in an insurrection or rebellion that might compare to the circumstances of 1868, courts should apply the insur-

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[13] *Powell*, 395 U.S. at 508-12.

[14] U.S. Term Limits, 514 U.S. at 789-93.

[15] *Id*. at 793, quoting *Powell* at 547.

rection clause carefully and narrowly. The Colorado Supreme Court did not do that. On this point, it bears repetition that Petitioner has not been charged with (let alone convicted of) insurrection under 28 U.S.C. § 2383.

Given uncertainty about the meaning of insurrection, the fundamental principle "that the people should choose whom they please to govern them" should control. This is especially true with respect to choosing a President because localized concerns relating to former Confederate states do not apply. Here, every citizen will have the opportunity to vote for a President, and if they chose Petitioner to govern them, then Petitioner should be allowed to govern.[16]

The citizens' right to choose who governs them helps demonstrate that the issue in this case is a political question both as a matter of common sense and as a matter of law.[17]

The political question doctrine includes questions that are reserved to a coordinate political department.[18] Here, the Constitution commits the selection of President to the Electoral College.[19] This was the reason why courts dismissed citizenship challenges to President Obama's presidency, and it is the reason why the District of New Hampshire dismissed a Fourteenth

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[16] Impeachment would be exclusive means to contest the President's qualification for office. U.S. Const., art. II, § 4.

[17] *See, e.g., Coleman v. Miller*, 307 U.S. 433 (federal courts will not adjudicate political questions).

[18] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

[19] *Kerchner v. Obama*, 669 F.Supp. 2d 477, 483, n. 5 (D.N.J. 2009).

Amendment challenge to Petitioner's candidacy.[20] Because voters choose the Electoral College, *amici*'s argument that choosing the President is reserved to the American public is an argument that choosing the President is reserved to the Electoral College.

CONCLUSION

Colorado courts did not have jurisdiction to evaluate whether the Fourteenth Amendment disqualifies Petitioner from serving another term as President. That question is reserved to American voters. This Court should reverse the Colorado Supreme Court's judgment.

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[20] *Castro v. New Hampshire Secretary of State*, __ F.Supp.3d __, 2023 WL 7110390 (D.N.H. Oct. 27, 2023) (Courts across the country have reached the same conclusion, based on similar reasoning."); *Kerchner*, 669 F.Supp.2d 477.)