Nos. 23-696 & 23-___

IN THE

Supreme Court of the United States

COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,

v.

NORMA ANDERSON ET AL.,

DONALD J. TRUMP,

v.

NORMA ANDERSON ET AL.,

On Petition for Writ of Certiorari to the Colorado Supreme Court

BRIEF FOR SENATOR STEVE DAINES & NATIONAL REPUBLICAN SENATORIAL COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae Senator Steve Daines is a member of the Republican Party and represents the people of Montana in the United States Senate. Senator Daines currently serves as the Chairman of the National Republican Senatorial Committee (NRSC). *Amicus curiae* NRSC is a registered "national committee" of the Republican Party, as defined by 52 U.S.C. § 30101(14), and the Republican Party's senatorial campaign committee. Its membership includes all incumbent Republican Members of the United States Senate.

Chairman Daines and NRSC support and seek to uphold the Constitution's guarantee of free and fair elections for all Americans. Chairman Daines and NRSC also support and seek to uphold the rights of all American citizens to vote for, and of political parties to nominate, the candidate of their choice in federal elections. *Amici* therefore have a unique and profound interest in this case, in which the Colorado Supreme Court misapplied the Constitution to impermissibly exclude a candidate for federal office from the ballot in the Republican Party's upcoming primary election.

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[1] *Amici curiae* filed this brief more than ten days before the due date. *See* S. Ct. R. 37.2. No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right of all citizens to participate in free and fair elections and to vote for the candidate of their choice is the Constitution's bedrock guarantee of American democracy. The Colorado Supreme Court's decision barring President Trump from the Republican Party's primary election ballot breaches that guarantee and, if left standing, threatens to thwart the democratic process and the will of the American people in 2024 and beyond. For that reason, *amici* support President Trump's petition for a writ of certiorari and reversal of the Colorado Supreme Court's unconstitutional decision.

Although *amici* agree that the Colorado Supreme Court made multiple constitutional errors, they write to emphasize the importance of the Colorado Supreme Court's error on a threshold question: namely, whether or not section 3 of the Fourteenth Amendment applies, it unquestionably does not allow Colorado to exclude President Trump *from the ballot*, for two separate but reinforcing reasons.

First, the Colorado Supreme Court impermissibly altered the qualifications for the office of President and interfered with Congress's sole prerogative to remove any section 3 disqualification. By its plain text, section 3 identifies a disqualification from *serving* in certain offices, but does not disqualify a covered person from *running* for office. And that textual distinction is particularly important because, unlike certain other disqualifications, section 3 makes that disqualification removable—and it commits the decision of whether and when to remove it exclusively

to Congress. So even if the Colorado Supreme Court were correct that President Trump cannot take office on Inauguration Day, that court had no basis to hold that he cannot run for office on Election Day and also seek removal of any alleged disqualification from Congress if necessary. Indeed, the Twentieth Amendment expressly preserves the right of Presidential candidates to run, and the right of Congress to act, by prescribing an interstitial rule for situations where the President-elect has failed to attain the qualifications for office but can still do so during his Term—the Vice President serves as Acting President unless and until the disqualification is lifted.

The Colorado Supreme Court thus *altered* the qualifications for the office of President: it created a new rule that any section 3 disqualification must be removed by Congress *before* voters and a political party can even have the opportunity to vote for the candidate in their own primary election. But in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), *all nine Justices* agreed that States lack the power under the Constitution to use ballot-access restrictions to alter the qualifications for the office of President. *See id.* at 803-04 (maj. op.); *id.* at 855 n.6, 861-62 (Thomas, J., dissenting). And the Colorado Supreme Court's error is particularly egregious in the context of section 3, because it effectively usurped *Congress's* sole authority to decide when, if at all, to remove any section 3 disqualification. This error is a clear, indisputable, and sufficient basis to reverse the judgment below.

Second, the Colorado Supreme Court ran roughshod over the First Amendment rights of voters and political parties without offering a lawful justification. Indeed, its decision wholly bans voters and a political party from supporting, voting for, and potentially nominating their choice of Presidential candidate in the party's primary election—notwithstanding that it is entirely possible that, by Inauguration Day, President Trump will be qualified to take office even on the Colorado Supreme Court's view of section 3. Of course, voters are free to cast their ballots for an opposing candidate if they do not wish to take the chance that President Trump will be disqualified, but neither the First Amendment nor basic principles of democracy allow the Colorado Supreme Court to make that decision for them.

If left uncorrected, the Colorado Supreme Court's decision will unleash electoral chaos in the fast-approaching 2024 elections. It is virtually certain to lead to an untenable patchwork of state-court rulings on whether President Trump appears on the ballot, disenfranchising millions of voters in states that follow its lead. Even worse, it threatens to decide the outcome of the 2024 election by stripping the American people of the right to elect the President and transferring that right to state courts.

The Constitution, the American people, and our American democracy deserve better. The Court should grant review, reverse the decision below, and uphold the right of the American people to nominate and vote for the Presidential candidate of their choice. Indeed, given the exigency of timing and the clarity of the error below, the Court should consider summary

reversal on the narrow grounds that *U.S. Term Limits* forecloses a State from excluding a Presidential candidate from the ballot based on the mere possibility that any alleged section 3 disqualification will not be removed by Congress before Inauguration Day. Alternatively, the Court may wish to consider immediately vacating and remanding, because the Colorado Supreme Court does not appear to have fully understood the federal constitutional implications of its holding that state law purports to allow it to apply section 3 to deny ballot access. *Cf. Bush v. Palm Beach Canvassing Cnty. Bd.*, 531 U.S. 70, 78 (2000) (per curiam).

ARGUMENT

I. THE COLORADO SUPREME COURT ERRED BY MODIFYING THE QUALIFICATIONS FOR THE OFFICE OF PRESIDENT

A. The Constitution Prohibits States From Altering The Qualifications For The Office Of President

States—including state courts—lack authority to "alter or add to" the Constitution's qualifications for federal offices, including especially the office of President. *U.S. Term Limits*, 514 U.S. at 796. In *U.S. Term Limits*, this Court held on a 5-4 vote that States lack authority to alter the qualifications for those representing them in Congress. *See id.* at 783. The Court, moreover, *unanimously* agreed that States may not alter the qualifications for the office of President.

For its part, the majority in *U.S. Term Limits* pointed out that the Framers "'create[d] an entirely

new National Government with *a National Executive*, National Judiciary, and a National Legislature,'" thereby "creating a direct link between the National Government and the people of the United States." *Id.* at 803 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964)) (emphasis added). Thus, quoting Justice Story, the majority reasoned that States "'have just as much right, and no more, to prescribe new qualifications for a representative, *as they have for a president*'"—which is to say, none. *Id.* (quoting 1 Story § 627) (emphasis added); *see also id.* at 803-04 ("'It is no original prerogative of state power to appoint a representative, a senator, or president for the union.'") (quoting 1 Story § 627).

Notably, the dissent *agreed*. Although it concluded that "the people of a single State" have authority to "prescribe qualifications for their own representatives in Congress," it repeatedly acknowledged that "the people of a single State may not prescribe qualifications for the President of the United States." *Id.* at 855 n.6 (Thomas, J., dissenting); *see also id.* at 861-62 (noting that States have no reserved power "to set qualifications for the office of President").

This conclusion is manifest in our system of government. "'[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them.'" *Id.* at 802 (maj op.) (quoting 1 Story § 627). And at the very least, "the selection of the President, like the operation of the Bank of the United States, is not up to the people *of any single State*." *Id.* at 855 n.6 (Thomas, J., dissenting) (emphasis added). Were the

law otherwise, individual States could adopt different qualifications for the office of a President who represents the Nation as a whole—including qualifications that *conflict* with the qualifications adopted in other States. Thus, for instance, each State could adopt a qualification requiring the President to be a resident of that State. In that scenario, *no President could ever be elected* because no candidate could receive a majority of votes in the Electoral College. *See* U.S. Const. amend. XII.

Even short of that, *any* State-altered qualification erases nationwide uniformity in the qualifications for the office of President and opens the door to States imposing their political preferences on the country as a whole (such as by enacting a "qualification" that a President have previously served in the federal government). Allowing States to alter or add to the qualifications for the office of President would be "contrary to the 'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.'" *U.S. Term Limits*, 514 U.S. at 783 (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

B. Section 3 Imposes A Qualification On Holding Office, Not Running For Office

Section 3 states that "No person" under a section 3 disqualification "shall *be*" a holder of any of the enumerated federal offices. U.S. Const. amend. XIV, § 3 (emphasis added). Section 3 thus identifies a disqualification on who may *serve* in certain federal offices, not on who may be a *candidate* for, or otherwise *seek*, those offices. *Id.*

Moreover, unlike certain disqualifications from federal office, the Constitution creates a mechanism for removal of any section 3 disqualification. Section 3 vests plenary authority over that mechanism in Congress: "But Congress may by a vote of two-thirds of each House, remove such disability." *Id.* Section 3 places no limitation on *when* Congress may exercise that authority. *See id.* Thus, for instance, Congress enacted separate Amnesty Acts removing section 3 disqualifications 7 years and 33 years after the Civil War gave rise to those disqualifications. *See* Act of May 22, 1872, ch. 193, 17 Stat. 142 (1872); Act of June 6, 1898, ch. 389, 30 Stat. 432 (1898).

The Twentieth Amendment expressly contemplates and addresses the possibility that a President-elect could be disqualified from office on Inauguration Day. It directs: "If a President shall not have been chosen before the time fixed for the beginning of his term, *or if the President elect shall have failed to qualify*, then the Vice President elect shall act as President *until a President shall have qualified*." U.S. Const. amend. XX, § 3 (emphases added). Thus, for example, if a President-elect has not "been fourteen years a resident within the United States" on Inauguration Day, *id.* art. II, § 1, cl. 5, the Vice President elect "shall act as President," *id.* amend. XX § 3, until the President-elect satisfies the residency requirement. So, too, if a President-elect "shall have failed to qualify" to take office on Inauguration Day due to an alleged section 3 disqualification, he can later so "qualif[y]," *id.*, when Congress "remove[s] such disability," *id.* amend. XIV, § 3.

Read together, section 3 and the Twentieth Amendment reinforce that even if section 3 identifies a disqualification from *serving* as President, it identifies no disqualification from *seeking* or even *being elected to* the office of President. They also reinforce that Congress alone decides when, if at all, to remove any section 3 disqualification from a President-elect. Congress may, but need not, remove any section 3 disqualification from a Presidential candidate before he is elected. *See id.* amend. XIV, § 3; *id.* amend. XX, § 3. It may also do so before or after the President-elect's term begins. *See id.* amend. XIV, § 3; *id.* amend. XX, § 3. In the latter scenario, the Vice President-elect serves as President until Congress removes the President-elect's disqualification or the term expires. *See id.* amend. XIV, § 3; *id.* amend. XX, § 3.

C. The Colorado Supreme Court Improperly Altered Section 3 And The Qualifications For The Office Of President

The Colorado Supreme Court erred when it twisted section 3 to alter the Constitution's qualifications for the office of President. In particular, based on its premise that President Trump "is disqualified from holding the office of President under" section 3, it reached the erroneous conclusion that the Secretary of State "may not list President Trump's name on the 2024 presidential primary ballot, nor may she count any write-in votes cast for him." *Anderson v. Griswold*, No. 23SA300, 2023 WL 8770111, at *51 ¶ 257 (Colo. Dec. 19, 2023).

The Colorado Supreme Court seemed to suggest that it was merely enforcing a section 3 disqualification against President Trump, *see id.* at *12 ¶ 55, *51 ¶ 257, but that suggestion is plainly incorrect. The Constitution prohibits States from "alter[ing] or add[ing] to" the Constitution's qualifications for the office of President. *U.S. Term Limits*, 514 U.S. at 796. This prohibition means that States may not "in any manner change" those qualifications. *Id.* at 799 (citing G. McCrary, American Law of Elections § 322 (4th ed. 1897)). And this prohibition on States "alter[ing]" the qualifications for federal office, *id.* at 796, extends to altering the *time* for satisfying the Constitution's qualifications. For example, Article I's Qualifications Clause directs that "No Person shall be a Representative . . . who shall not, *when elected*, be an Inhabitant of that State in which he shall be chosen." U.S. Const. art. I, § 2, cl. 2 (emphasis added). Accordingly, States lack authority to require candidates for Congress to inhabit the State *before* being elected. *See, e.g.*, *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 589-90 (5th Cir. 2006); *Schaefer v. Townsend*, 215 F.3d 1031, 1037 (9th Cir. 2000). So, too, do States lack authority to alter the time for satisfying the qualifications for the office of President. *See, e.g.*, U.S. Const. art. II, § 1, cl. 5.

The Colorado Supreme Court's decision altered the qualifications for the office of President in contravention of these rules. The plain "text" of Section 3, *U.S. Term Limits*, 514 U.S. at 787 n.2, makes clear that its disqualification applies only to *serving* in one of the enumerated offices, not to *seeking* them, *see* U.S. Const. amend. XIV, § 3. But by

invoking section 3 to exclude President Trump from the Republican Party's primary election ballot, the Colorado Supreme Court extended any section 3 disability beyond "be[ing]" President to also merely running for President. *Compare* U.S. Const. amend. XIV, § 3, *with Anderson*, 2023 WL 8770111, at *51 ¶ 257. And it also altered the time for satisfying section 3, demanding that even a candidate in a party's primary election be free from any section 3 disqualification as of the date of a pre-election state-court judgment. *See Anderson*, 2023 WL 8770111, at *51 ¶ 257.

Moreover, the Colorado Supreme Court's modification of section 3 improperly interferes with Congress's authority to decide when, if at all, to remove any section 3 disqualification from a President-elect. The Colorado Supreme Court effectively read state law to require Congress to exercise that authority before the Colorado court issued judgment in this case, *see id.*, or at least by Colorado's January 5, 2024 statutory deadline for the Secretary to certify the names of candidates to be placed on the presidential primary ballot, *see id.* at *8 ¶ 39. It therefore left no room for placing President Trump on the primary election ballot if Congress were to remove any section 3 disqualification today or at some other point between now and the primary election. *See id.* at *51, ¶ 257. And it likewise thwarted Congress's prerogative to wait until after Election Day to remove any section 3 disqualification from a President-elect. *See id.*

This result is error, pure and simple. Congress can choose to remove any section 3 disability before

Election Day, before Inauguration Day, or even during a President-elect's term. *See* U.S. Const. amend. XIV, § 3; *see also id.* amend. XX, § 3. Either the current Congress or the Congress set to take office on January 3, 2025, *see id.* amend. 20, § 1, has sole authority to decide when, if at all, to address a 2024 President-elect's section 3 disqualification. And either this Congress or the next may have a variety of political and institutional reasons for choosing to address the question at one time or another. As just one example, Congress may choose to await the outcome of the 2024 election before deciding whether to take action. As another, the current Congress may prefer to leave the question to the next Congress, which will count the results of the 2024 Electoral College. *See* 3 U.S.C. § 15.

To date, Congress has not taken up the question whether President Trump is under a section 3 disqualification—and it may never do so. Whether and when to do so belongs to Congress alone, not the Colorado Supreme Court. Yet the Colorado Supreme Court transformed Congress's decision not to act by the date of the state-court judgment into a new, unmet qualification for President Trump even to be a candidate and to receive votes in the Republican Party's upcoming primary election. The Colorado Supreme Court's decision contravenes the Constitution, and the Court should grant certiorari and summarily reverse pursuant to the unanimous reasoning of *U.S. Term Limits*.

D. The Colorado Supreme Court Misconstrued The Constitution And This Court's Precedents

1. The Colorado Supreme Court offered no persuasive basis for its erroneous treatment of the Constitution and Congress's section 3 authority. It first noted that this Court has reserved the question whether section 3 prescribes a "qualification" for federal office. *See Anderson*, 2023 WL 8770111, *14 ¶ 65 (citing *U.S. Term Limits*, 514 U.S. at 787 n.2 and *Powell*, 395 U.S. at 520 n.41); *but see id.* (acknowledging that regardless of the answer to that question, the Constitution precludes States from imposing "*additional* qualifications for [federal] office") (citing *U.S. Term Limits*, 514 U.S. at 787 n.2) (emphasis original). That is a red herring, because the Colorado Supreme Court's judgment is premised on section 3 prescribing a qualification: the linchpin of its holding was its premise that "President Trump is *disqualified* from holding the office of President under Section Three." *Id.* at *51 ¶ 257 (emphasis added). And if the Colorado Supreme Court is correct on that point, then it erred when it "alter[ed]" that qualification by accelerating the timeline for satisfying it. *U.S. Term Limits*, 514 U.S. at 787 n.2. Conversely, of course, if the Colorado Supreme Court is not correct that section 3 imposes a qualification on the office of President, then its premise that "President Trump is disqualified," *Anderson*, 2023 WL 8770111 ¶ 257, fails and its entire holding collapses. Thus, on the Colorado Supreme Court's own reasoning, this Court's reservation of that question has no bearing on the outcome here: either way, reversal is warranted.

The Colorado Supreme Court next reasoned that "nothing in the U.S. Constitution expressly *precludes* states from limiting access to the presidential ballot to" candidates "who are constitutionally qualified to hold the office of President." *Id.* at *12 ¶ 53 (emphasis original). But that is plainly wrong. The Constitution *does* preclude States from "alter[ing] or add[ing] to" the qualifications for the office of President, including by extending those qualifications to candidates in a manner that accelerates the timeline for satisfying them. *U.S. Term Limits*, 514 U.S. at 796; *see id.* at 799 (may not "in any manner change" the qualifications). This preclusion parallels the preclusion on State alterations of the time for satisfying the residency requirement in Article I's Qualifications Clause. *See, e.g.*, *Tex. Democratic Party*, 459 F.3d at 589-90; *Schaefer*, 215 F.3d at 1037. And the Colorado Supreme Court also missed the plain import of the fact that section 3 vests plenary authority in Congress to decide whether and when to remove any disqualification it imposes on a Presidential candidate or President-elect. In fact, the Colorado Supreme Court noted that authority only in two quotations but *never* discussed it, much less reconciled it with the decision to preemptively exclude President Trump from the Republican Party's primary election ballot. *See Anderson*, 2023 WL 8770111 at *6 ¶ 26, *31 ¶ 151.

The Colorado Supreme Court likewise devoted just a few sentences to the Twentieth Amendment and deemed it inapplicable because "[b]y its express language," it "applies post-election." *Id.* at *25 ¶ 119. But that is entirely the point: the Twentieth Amendment addresses what happens in any period

between Inauguration Day and an unqualified President-elect becoming qualified to take office. *See* U.S. Const. amend. XX, § 3. It therefore underscores that state courts do not police Presidential qualifications by denying ballot access to candidates who *might* be disqualified come Inauguration Day depending on intervening events. *See id.* Just as the Twentieth Amendment confirms that a State cannot block from the ballot a Presidential candidate who may not have satisfied the 14-year residency requirement until the day after Inauguration Day, it confirms that a state cannot block from the ballot a Presidential candidate who may well have any alleged section 3 disqualification removed *before* Inauguration Day (or even Election Day). And the Twentieth Amendment's silence "about who determines in the first instance whether the President and Vice President are qualified to hold office," *Anderson*, 2023 WL 8770111 at *25 ¶ 119, does not authorize state courts to alter those qualifications, *see, e.g.*, *U.S. Term Limits*, 514 U.S. at 783, 796.

The Colorado Supreme Court cited prior judicial decisions excluding Presidential candidates from the ballot due to failure to satisfy the Constitution's qualifications for office, *Anderson*, 2023 WL 8770111 at *12 ¶ 54, but each one is plainly distinguishable. None approved of *altering* a qualification rather than merely *enforcing* it. In two of the cases, the candidate was *categorically* disqualified from holding the office of President on a ground that could not be removed by the end of the Presidential term. *See Hassan v. Colorado*, 495 F. App'x 947, 948-49 (10th Cir. 2012) (Gorsuch, J.) (candidate was not "a natural born Citizen," U.S. Const. art. II, § 1, cl. 5); *Lindsay v.*

Bowen, 750 F.3d 1061, 1065 (9th Cir. 2014) (candidate was only 27 years old and thus would not attain 35 years of age at any point during the Presidential term at issue, U.S. Const. art. II, § 1, cl. 5). And the third offered no attempt at developed reasoning and did not address section 3 in any event. *See Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972). Thus, *none* of these cases supports the Colorado Supreme Court's modification of the qualifications for the office of President or vitiation of Congress's plenary authority to remove any Section 3 disqualification.

2. Finally, the Colorado Supreme Court did not address whether state law even purports to authorize it to deny ballot access to President Trump in light of the fact that doing so constitutes an alteration of the qualifications for the office of President. The majority instead thought that it would be a "wrongful act" under the Colorado Election Code for the Secretary to place President Trump on the Republican Party's primary election ballot. *Anderson*, 2023 WL 8770111 at *3 ¶ 5, *11-12 ¶¶ 50-56, *51 ¶ 257. Even that state-law question divided the court 4-3. *Compare id.*, *with id.* at *51 ¶ 258 (Boatright, C.J., dissenting); *id.* at *66 ¶ 330 (Samour, J., dissenting); *id.* at *71 ¶ 353 (Berkenkotter, J, dissenting). And the majority analyzed it without considering whether it was impermissibly altering the qualifications for the office of President and without addressing section 3's commitment of disqualification-removal authority to Congress. *Id.* at *3, ¶ 5, *11-12 ¶¶ 50-56, *51 ¶ 257.

The majority therefore never addressed whether Colorado law is even "susceptible" to the

interpretation that it authorizes state courts to invoke section 3 to exclude candidates for federal office from a party's primary election ballot based on alleged disqualifications that Congress may remove in the future. *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018) (discussing constitutional avoidance canon). Its opinion thus leaves "considerable uncertainty" as to whether the Colorado Supreme Court properly considered state law in light of the federal-constitutional implications. *Palm Beach Canvassing Bd.*, 531 U.S. at 78. Accordingly, although the Court should summarily reverse based on *U.S. Term Limits*, it at minimum should grant certiorari, vacate, and remand the case for a proper consideration of the state-law question. *See id.*

3. Either of these proposed dispositions would remedy the Colorado Supreme Court's constitutional errors in holding that President Trump cannot appear on the ballot or receive write-in votes in the Republican Party's primary election. Either disposition would eliminate the risk of the Colorado Supreme Court's decision touching off a patchwork of conflicting state-court ballot-access rulings across the country. Either disposition would also disentangle the courts from the political thicket of adjudicating any section 3 disputes unless and until they become ripe and justiciable, if at all, after Election Day. And either disposition would rightfully return section 3 disqualification questions to Congress, preserving Congress's plenary authority over the substance and timing of section 3 disqualification-removal decisions.

II. THE COLORADO SUPREME COURT VIOLATED THE FIRST AMENDMENT

"It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). The First Amendment extends robust protection to "the freedom to join together in" political parties in "furtherance of common political beliefs." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

Accordingly, "[t]he ability of the members of the Republican Party to select their own candidate unquestionably implicates an associational freedom" protected by the First Amendment. *Id.* at 575 (cleaned up). Indeed, "[r]epresentative democracy in any populous unit of government is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Id.* at 574. In fact, "[i]n no area" is this fundamental First Amendment right "more important than in the [party's] process of selecting its nominee" for office. *Id.* at 575.

After all, that process "often determines the party's positions on the most significant public policy issues of the day" and in all events anoints the nominee as "the party's ambassador to the general electorate in winning it over to the party's views." *Id.* In other words, "[t]he moment of choosing the party's nominee . . . is the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Id.* (cleaned up).

This Court's cases thus "vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences." *Id.* (cleaned up). This Court therefore has not hesitated to declare unconstitutional laws that interfere with the right of voters and their political party to select their own nominees for office. This includes laws requiring parties to conduct "an open presidential preference primary," "blanket primary," *id.* at 576-77, or closed primary, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986), a law requiring party delegates to vote at the national convention in accordance with the results of the primary election, *see Democratic Party of U.S. v. Wis. ex rel La Follette*, 450 U.S. 107, 125-26 (1981), and a law banning political parties from endorsing candidates in primary elections, *see Eu*, 489 U.S. at 216, 224-25.

As in such prior cases, the Colorado Supreme Court's decision unconstitutionally "suffocates" the First Amendment rights of the Republican Party and its voters. *Id.* at 224. It holds that state law totally "ban[s]" Republican voters participating in the Republican Party's Colorado primary election from voting to nominate President Trump either on the ballot or through a write-in vote, even though he may well be qualified to take office on Inauguration Day. *Id.*; *see also Anderson*, 2023 WL 8770111 at *51 ¶ 257. It thus construes state law to interfere with the Republican Party's "candidate-selection process" in Colorado, by preventing voters from "select[ing]" President Trump as the "standard bearer who best represents the party's ideologies and preferences" in

the State. *Cal. Democratic Party*, 530 U.S. at 568, 575. In these ways, the decision achieves the Colorado Supreme Court's unconstitutional "intended outcome of changing the part[y's] message" and candidate. *Id.* at 568.

Such burdens on the Republican Party also extend beyond Colorado. The Colorado Supreme Court's decision constitutes a "substantial intrusion into the associational freedom of members of the National" Republican Party outside Colorado. *Democratic Party of U.S.*, 450 U.S. at 126. Indeed, it construes state law to infringe the right of the national Republican Party and Republican voters across the country to select a single nationwide "standard bearer" and "ambassador to the general electorate in winning it over to the party's views" in the 2024 Presidential election. *Cal. Democratic Party*, 530 U.S. at 575; *see also Growe v. Simon*, No. A23-1354, 2023 WL 7392541, *1 (Minn. Nov. 8, 2023) (declining to exclude President Trump from the ballot in the Republican Party primary election, which "is an internal party election to serve internal party purposes").

These burdens on bedrock First Amendment rights are "severe." *Cal. Democratic Party*, 530 U.S. at 582. Indeed, these are "heavier burden[s] on" voters' and "a political party's associational freedom" than the burdens this Court has determined are severe in prior cases. *Id.*

The Colorado Supreme Court, however, made no effort to justify these burdens on First Amendment rights as "narrowly tailored to serve a compelling state interest." *Id.* Instead, it reasoned that States may limit "presidential primary ballot access to only

qualified candidates." *Anderson*, 2023 WL 8770111 at *16 ¶ 78. The Colorado Supreme Court may well have been correct if the disqualification at issue were one that could not be resolved during the next Presidential term of office, such as a candidate who is not "a natural born Citizen" of the United States. U.S. Const. art. II, § 1, cl. 5; *see Hassan*, 495 F. App'x at 948-49. But it is not correct for any section 3 disqualification, which Congress has the plenary authority to remove at the time of its choosing. *See* U.S. Const. amend. XIV, § 3. The Colorado Supreme Court provided no explanation of what interest the State has in preventing citizens from voting for a candidate whose alleged disqualification is subject to Congressional removal, let alone one sufficient to overcome the voters' compelling First Amendment right to cast their ballots for the Presidential candidate of their choice. That failure is especially glaring here: the Colorado Supreme Court cannot justify its disenfranchisement of voters when it is impossible to know whether the alleged section 3 disqualification will be in place on Inauguration Day, much less throughout the next Presidential term.

Moreover, none of the four cases the Colorado Supreme Court cited supports its view that the Constitution permits limiting "primary ballot access" to candidates it concludes are free of a section 3 disqualification as of the date of its judgment. One of those cases disapproved on First Amendment grounds a Connecticut law prohibiting independent voters from voting in Republican primaries. *See Tashjian*, 479 U.S. at 210-11 (cited at *Anderson*, 2023 WL 8770111 at *16 ¶ 75). Another enjoined enforcement of a ballot-access deadline on First Amendment

grounds. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983) (cited at *Anderson*, 2023 WL 8770111 at *16 ¶ 76). The third addressed a prohibition on write-in voting, not ballot access. *See Burdick v. Takushi*, 504 U.S. 428 (1992) (cited at *Anderson*, 2023 WL 8770111 at *16 ¶ 76).

The final case, *Timmons v. Twin Cities Area New Party* (cited at *Anderson*, 2023 WL 8770111 at *16 ¶¶ 73, 75, 77), concerned an access rule for the *general* election ballot, *see* 520 U.S. 351 (1997), which involves a different "juncture" in the election process than "[t]he moment of choosing the party's nominee" through a primary election, *Cal. Democratic Party*, 530 U.S. at 575. Even then, *Timmons* did not ban a candidate from appearing on the general election ballot; instead, it upheld a ban on a political party *redundantly* placing on the ballot a candidate who already appeared as another party's nominee. *See* 520 U.S. at 363. The party and its members therefore retained the right and opportunity to "campaign for, endorse, and vote for their preferred candidate," *id.*—rights the Colorado Supreme Court has denied the Republican Party and its members in the upcoming Republican Party primary election, *see Anderson*, 2023 WL 8770111 at *51 ¶ 257. Finally, to the extent *Timmons* made passing reference to denial of ballot access to candidates "ineligible for office," it mentioned only eligibility for *state* elected office, not section 3 or any qualifications for *federal* office that may be removed by Congress during the President-elect's term of office, 520 U.S. at 359 & n.8 (cited at *Anderson*, 2023 WL 8770111 at *16 ¶ 75). *Timmons* therefore provides no basis for the Colorado Supreme Court's exclusion of President Trump from the

Republican Party's primary election ballot in violation of the right of "the members of the Republican Party to select their own candidate" for President. *Cal. Democratic Party*, 530 U.S. at 575.

CONCLUSION

The Court should grant certiorari and either summarily reverse or GVR in light of *U.S. Term Limits* and the First Amendment.

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