No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR REPUBLICAN NATIONAL COMMITTEE AND NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE*

Amici Republican National Committee and National Republican Congressional Committee—collectively, National Republican Amici—are political organizations that help their members achieve electoral victories at the local, state, and national level, and who work to ensure a fair and equal electoral process. National Republican Amici have an interest in controlling their primaries and nominating the candidates of their choice. They also have an interest in ensuring that the rules governing elections are lawful and fairly applied. And they have an interest in promoting any of their potential nominees' ballot eligibility and electoral success.

SUMMARY OF ARGUMENT

This case arises from an historically unprecedented attempt to remove a presidential candidate from the ballot based on a reimagining of Section 3 of the Fourteenth Amendment. There have been several similar attempts in recent months. *E.g.*, *Growe v. Simon*, 2023 WL 7392541 (Minn. Nov. 8); *Davis v. Wayne Cnty. Election Comm'n*, 2023 WL 8656163 (Mich. Ct. App. Dec. 14). But the Colorado Supreme Court was the first to take the bait. It should have taken the other path. Given the obvious risk of escalation as political opponents fight to have each other removed from the ballot, even President Trump's most

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* Amici curiae filed this brief more than ten days before the due date. Sup. Ct. R. 37.2. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amici, its members, or its counsel made a monetary contribution to its preparation or submission.

public critics hope that cooler heads prevail. *See, e.g.*, Lessig, *The Supreme Court Must Unanimously Strike Down Trump's Ballot Removal*, Slate (Dec. 20, 2023), perma.cc/Y4LP-PANK; Moyn, *The Supreme Court Should Overturn the Colorado Ruling Unanimously*, N.Y. Times (Dec. 22, 2023), perma.cc/N6GQ-HW48; Feldman, *Alas, Trump Is Still Eligible to Run for Office*, Wash. Post (Aug. 20, 2023), perma.cc/T5DT-V7BV.

The Colorado Supreme Court's decision is historically implausible. According to the court, the Reconstruction Congress in ratifying Section Three of the Fourteenth Amendment gave States—including former Confederate States—the power to independently decide national candidates' qualifications with no congressional permission. Its decision means the Reconstruction Congress gifted *state* officials the power to unilaterally displace the people's ability to select the candidate of their choice for federal office.

The ratifiers of the Fourteenth Amendment did no such thing. They designed the Reconstruction Amendments to weaken the ability of state governments to disrupt the mechanisms of the national government. To conclude otherwise, the Colorado Supreme Court made a slew of legal errors that this Court should reject. First, state courts are the wrong forum for this dispute. The Colorado Supreme Court rewrote the text of Section Three to prohibit not just "*hold[ing]* office" but *running for* it. Second, the court's relief would interfere with political-party primaries, violating Republicans' First Amendment rights. Finally, the court misread the text and history to apply Section Three to

former Presidents, even though the text, history, and tradition make clear Section Three references the Article VI oath of office that Presidents do not take.

National Republican Amici do not take sides in presidential primary battles or endorse particular presidential primary candidates in open elections. But the Colorado Supreme Court's decision threatens massive upheaval to the political process and future national candidates of all parties. As Justice Samour's dissent observes, the Colorado Supreme Court unleashes "potential chaos wrought by an imprudent, unconstitutional, and standardless system in which each state gets to adjudicate Section Three disqualification cases on an ad hoc basis." App.160a ¶348.

With the stakes so high, this Court should grant certiorari and reject the Colorado Supreme Court's reimagination of Section Three.

REASONS FOR GRANTING THE PETITION

I. The questions presented are vital and review cannot wait.

The questions presented are extraordinarily important. The Colorado Supreme Court became the first to remove a candidate for president from the ballot based on a historically implausible reimagining of the Fourteenth Amendment. That decision undermines the people's right to judge who is best to represent them. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794-95 (1995) ("The people are the best judges [of] who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." (cleaned up)).

And it will affect "[c]onfidence in the integrity of our electoral processes," which "is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

This Court's intervention is urgently needed. While the Colorado Supreme Court was the first to remove a candidate from the ballot, several state courts have addressed similar challenges. *E.g.*, *Growe*, 2023 WL 7392541; *Davis*, 2023 WL 8656163. Absent intervention from this Court, similar litigation will be a prominent feature throughout the primary and general elections.[1] And that future litigation will feature arguments that the Colorado Supreme Court's decision should be given preclusive effect on at least some issues. That litigation will cause "chaos in our country" because it "will inevitably lead to the disqualification of President Trump from the presidential primary ballot in less than all fifty states." App.126a ¶274 (Samour, J., dissenting).

That chaos is unlikely to be limited to a single candidate or election. Once state courts begin purging

[1] The Colorado Supreme Court effectively stayed its decision pending this Court's order, and the upshot of that stay is that President Trump may end up on the primary ballot in Colorado. *See* App.114a ¶257. But if not resolved, this problem will recur in other States and in the general election. Recently, Maine's Secretary of State followed the Colorado Supreme Court's decision and ruled that President Trump "is not qualified to hold the office of President under Section Three of the Fourteenth Amendment" and cannot be on the primary ballot. *In re Challenges of Rosen to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States*, at 1 (Dec. 28, 2023), perma.cc/KDL6-WFWZ.

candidates from the ballot, political opponents will begin picking each other off, harming confidence in our electoral processes. *See, e.g.*, Wilson, *Texas leader wants Biden kicked off state's 2024 ballot over immigration*, Wash. Times (Dec. 20, 2023), perma.cc/V8Y7-TUX6; Dobkin, *Republicans Pull Trigger on Plan to Remove Joe Biden from Ballots*, Newsweek (Dec. 22, 2023), perma.cc/JA8A-WR6D ("Republican lawmakers in three swing states [Arizona, Georgia, and Pennsylvania] have announced their plan to remove President Joe Biden from their state ballots.").

II. The Colorado Supreme Court misread Section Three.

A. Courts are not the appropriate forum for this dispute.

1. Section Three does not apply until after an election.

Section Three cannot be enforced at the ballot stage. It governs only who can "*hold*" office. U.S. Const. amend. XIV, §3 (emphasis added). It does not govern who can "run for" office or "be elected to" anything. To "hold" office means to presently possess it. *See Hold*, Black's Law Dictionary (2d ed. 1910) ("[T]o possess; to occupy; to be in possession and administration of; as to hold office."); *accord Hold*, Webster's American Dictionary of the English Language (1828). And regardless of whether Section Three is self-executing, any "'prophylactic'" extension must come from Congress. *Allen v. Cooper*, 140 S.Ct. 994, 1004 (2020). Former President Trump does not "hold" office by running for or being elected as President, so Section Three does not forbid him from either.

This interpretation is consistent with the rest of the Constitution. The Constitution always uses "hold" to refer to present occupation of the office, not the period of candidacy or election. *See, e.g.*, U.S. Const. art. II, §1 ("He shall hold his Office during the Term of four Years...."); *id.* art. I, §6 ("[N]o Person holding any Office under the United States, shall be a Member of either House...."). Consistent with that understanding of "hold," the last clause of Section Three gives Congress the power to "remove" the disability. *Id.* amend. XIV, §3. So Congress can ultimately seat anyone covered by Section 3. The Twentieth Amendment confirms this understanding. It provides for the Vice President to "act as President" when "the President elect shall have failed to qualify … until a President shall have qualified." *Id.* amend. XX. But if state officials can impose the disability preemptively at the ballot stage, it would render these provisions meaningless in many cases. *See* Harrison & Prakash, *If Trump Is Disqualified, He Can Still Run*, Wall Street J. (Dec. 20, 2023), perma.cc/8EQ9-9VVP.

Historical practice reflects the same understanding. *See Chiafalo v. Washington*, 140 S.Ct. 2316, 2326 (2020) ("'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'"). After Section Three's ratification, several candidates' qualifications were challenged. Hinds' Precedents of the House of Representatives 474-86 (1907) [hereinafter Hinds']. In each case, the challenges were not decided by election officials or judges, and not before the election. Instead, Congress resolved the challenges *after* the candidate

won his election through an evidentiary and deliberative process. *See, e.g.*, 41 Cong. Globe 948-49, 2135, 5443-46, 5195-96 (1869-70).

Even when the challenged candidate was obviously disqualified—such as when he led Confederate troops—the candidate did not implicate Section Three until he sought to "hold" office after the election. *See* Hinds' 478-86. At that time, a formal complaint would be lodged, Congress would hear evidence, and Congress would decide before the person was sworn in. *See, e.g.*, Hinds' 474-86; 41 Cong. Globe 948-49, 2135, 5443-46, 5195-96 (1869-70). Courts did not decide qualification pre-election.

The Colorado Supreme Court ignored this evidence. It found "no textual evidence" against enforcement of Section 3 at the ballot stage. App.45a-55a ¶¶88-107. But it never acknowledged that the Amendment refers only to "holding" the office and provides a mechanism for Congress to remove that prohibition. Nor did the court acknowledge the Twentieth Amendment. The court's conclusion cannot be squared with this textual evidence.

The court also glossed over the "historical evidence." App.50a ¶97. It never acknowledged the historical practice of Congress acting to determine disqualification or decide the process for determining disqualification. *See, e.g.*, App.143a-45a ¶¶314-18 (Samour, J., dissenting) (explaining Congress's practice of enacting implementing legislation, including the Enforcement Act of 1870).

2. Section Three did not give state officials power to frustrate the federal government or national will.

Historical context severely undermines the lower court's interpretation of Section Three. The Reconstruction Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179 (1980).

Yet the Colorado Supreme Court transformed Section Three into a states'-rights superpower. According to the court, the Reconstruction Congress gave state officials—here, state courts and state election officials—the power to decide the most sensitive political questions about loyalty and legitimacy, and to then decide on that basis who may stand for election to the most important position in the national government. That claim—that the Reconstruction Congress gave States, including former Confederate States, the power to independently decide national candidates' qualifications with no congressional permission—is implausible. *See Yellen v. Confederated Tribes*, 141 S.Ct. 2434, 2448 (2021) (discounting interpretation because of its "highly counterintuitive result").

The Colorado Supreme Court's conclusion that Section Three is "self-executing" goes even further. As the court's supporters explain, "anybody who possesses legal authority" at the state level can decide Section Three qualification not only in a pre-election ballot lawsuit, but also in lawsuits seeking to treat later official actions as void. Baude & Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev.,

at 22-29 (forthcoming). After all, "[t]hose who cannot constitutionally hold office cannot constitutionally exercise government power, so the subjects of that power can challenge their acts as *ultra vires*" and have them nullified. *Id.* at 29.

That is the last thing the Reconstruction Congress would have done. Section Three was enacted when the Reconstruction Congress fought to "enlarge[] the powers of the nation, [and] abridge[] those of the States." Paschal, The Constitution of the United States Defined and Carefully Annotated xxiv (1868). At the time, many state officials still believed that the Confederate States were legitimate and the Union was illegitimate. *See generally* Nicoletti, Secession on Trial: The Treason Prosecution of Jefferson Davis (2017). If Section Three gave a wide range of state officials the power to disqualify any candidates whom—in the state officials' views—engaged in insurrection, then it would have been a self-sabotaging laughingstock. Under the Colorado Supreme Court's theory, however, the Reconstruction Congress gave state officials a secessionist's dream: a new constitutional basis to not only eliminate pro-Union candidates from the ballot, but also nullify acts of such officials, including their enactment or enforcement of federal legislation. *See* Baude & Paulsen, *supra*, at 17-35. The Reconstruction Congress didn't do that.

The imprudence of the state court's approach remains obvious today. Although the Colorado Supreme Court did not "adopt a single, all-encompassing definition" for "engag[ing]" in an "insurrection or rebellion," the court did conclude that the phrase covers a

broad category of activity: "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 actions necessary to accomplish a peaceful transfer of power," but an insurrection "need not involve bloodshed," "be so substantial as to ensure probable success," or be "highly organized at [its] inception." App.86a-87a ¶184. *But see United States v. Greathouse*, 26 F. Cas. 18 (C.C.N.D. Cal. 1863) (Field, J.) (insurrection or rebellion are no less than treason); *accord, e.g.*, 37 Cong. Globe 2173 (1862) (Sen. Howard) (insurrection or rebellion "nothing more nor less than treason"). Given this broad definition, the court's position that a wide range of state officials can independently enforce Section Three would cause anarchy.

Here are a couple of the possible implications of leaving the enforcement of this broad definition to the States:

- Vice President Harris, President Biden, and their staffs advocated for, marched with, and provided material support to rioters in the wake of George Floyd's death in 2020.[2] These rioters stormed the White House, injuring po-

[2] *E.g.*, Marcus, *Meet the Rioting Criminals Kamala Harris Helped Bail Out of Jail*, The Federalist (Aug. 31, 2020), perma.cc/9S6A-NBBG; Lange & Honeycutt, *Biden staff donate to group that pays bail in riot-torn Minneapolis*, Reuters (May 30, 2020), perma.cc/5FBJ-MTST; @JoeBiden, X (Aug. 28, 2020), perma.cc/GSH6-W9EP.

lice officers and forcing the President, his family, and his staff to shelter in a bunker.[3] They also killed people, took over government buildings, caused extensive property damage, and sought to establish alternative "governments" in the form of so-called "autonomous zones."[4] If a state official believes that President Biden or Vice President Harris aided these efforts, he may eliminate President Biden and Vice President Harris from the ballot. And all their past actions can be nullified as "*ultra vires*." Baude & Paulsen, *supra*, at 29.

- During the last Administration, prominent Democrats publicly directed their supporters to confront Administration officials. As Congresswoman Maxine Waters said, "If you see anybody from that Cabinet in a restaurant, in a department store, at a gasoline station, you get

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[3] *E.g.*, Hoffman, *More than 60 Secret Service officers and agents were injured near the White House this weekend*, CNN (May 31, 2020), perma.cc/5H3J-Q2BD; Leonnig, *Protesters' breach of temporary fences near White House complex prompted Secret Service to move Trump to secure bunker*, Wash. Post (June 3, 2020), perma.cc/E75G-XTJL.

[4] *E.g.*, Holcombe & Boyette, *Seattle police to remove concrete barriers around precinct that was temporarily vacated during George Floyd protests*, CNN (Apr. 3, 2021), perma.cc/KMJ8-VU5U; *Retired St. Louis police captain killed during unrest sparked by George Floyd death*, CBS News (June 3, 2020), perma.cc/69RN-EYAM; Deese, *Vandalism, looting following Floyd death sparks at least $1B in damages nationwide: report*, The Hill (Sept. 16, 2020), perma.cc/T2N4-KC67; Boyd, *Death Toll Rises To An Estimated 30 Victims Since 'Mostly Peaceful Protests' Began*, The Federalist (Aug. 19, 2020), perma.cc/2V7V-NTFP.

out and you create a crowd and you push back on them."[5] Around the same time, many Democrat supporters did confront Administration officials.[6] A Democrat supporter tried to commit a mass murder of Republicans when he attacked a Republican baseball practice before the Congressional Baseball Game, shooting at several sitting Republican members and staff and seriously wounding Representative Steve Scalise.[7] Under the lower court's theory, state officials may disqualify these Democrats or nullify their acts if they determine them to constitute aiding or engaging in an insurrection or rebellion.

- Other examples abound. Recently, left-wing pro-Palestine protesters, after receiving vocal support from elected Democrats, violently

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[5] *E.g.*, *Warmbrodt, Waters scares Democrats with call for all-out war on Trump*, Politico (June 25, 2018), perma.cc/E7XR-JAV4; Boyd, *10 Times Democrats Urged Violence Against Trump and His Supporters*, The Federalist (Jan. 8, 2021), perma.cc/CQ37-F29E.

[6] *E.g.*, Lurie, *Trump Officials Can No Longer Eat Out in Peace*, Mother Jones (June 23, 2018), perma.cc/JJL3-YP3D.

[7] *E.g.*, Keeley, R*ep. Steve Scalise, Shot by Sanders Supporter, Replies to Request for Evidence of 'Bernie Bros' Being Bad: 'I Can Think of an Example'*, Newsweek (Feb. 20, 2020), perma.cc/3D4C-6SPX.

> stormed the White House complex.[8] Just before that, a similar coalition of left-wing pro-Palestine protesters invaded the Capitol complex.[9] State officials could, on the lower court's theory, remove all the previous oath-takers who supported these rioters from ballots and void their official acts.

Just like the events underlying the Colorado Supreme Court's theory, state officials and Americans in general are divided in how to view these events. But letting state officials in their own judgment remove the offenders from the ballot or nullify federal authority is not something a Reconstruction Congress would prescribe.

3. This Court has cautioned against state control over similar election issues.

Even outside the Reconstruction context, this Court has long warned against state control over national election qualifications. "In light of the Framers' evident concern that States would try to undermine

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[8] *Pro-Palestine Protestors Climb Up White House Fence, Attack Secret Service*, Times Now (Nov. 4, 2023), perma.cc/4GCF-H2HM; *Anti-Israel protesters vandalize White House gates, try to scale fence*, Jerusalem Post (Nov. 5, 2023), perma.cc/67GR-UFVP; Vazquez, *Democratic House member accuses Biden of supporting Palestinian 'genocide'*, Wash. Post (Nov. 3, 2023), perma.cc/RZW3-3QJG.

[9] Smith, *Hundreds arrested after Pro-Palestinian demonstrators flood Cannon Rotunda, Capitol complex*, Fox 5 D.C. (Oct. 18, 2023), perma.cc/R6AF-XQA2.

the National Government, they could not have intended States to have the power to set qualifications." *Thornton*, 514 U.S. at 810. States cannot even enforce state law to disqualify someone from federal office; those qualifications are set and enforced by the federal government, usually Congress. *Id.* at 810-11. Indeed, in the aftermath of the Civil War, Congress itself judged whether candidates for federal office were disqualified under state law, just like they did for federal law. *See* Hinds' 471.

The notion of state control over who can run for federal office would have been unfamiliar to the ratifiers of the Fourteenth Amendment. At the time, state and local governments did not control who was on the ballot at all. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 226 (2010) (Scalia, J., concurring in the judgment). Parties distributed ballots; state and local governments accepted and counted them. *Id.* An argument that Section Three empowers state and local officials to enforce their views of federal qualifications at the ballot stage would have shocked the ratifiers.

4. Congress has not authorized pre-election enforcement of Section Three in state courts.

The Fourteenth Amendment contemplates a mechanism by which Congress can authorize others to enforce Section Three, but Congress has not done so. Section Five gives Congress "the power to enforce, by appropriate legislation, the provisions of this article," including Section Three. U.S. Const. amend. XIV, §5. That Congress has not exercised that power to author-

ize private plaintiffs to sue or state officials to adjudicate Section Three means that this determination still belongs exclusively to Congress.

The drafters of Section Three understood that it would require implementing legislation. "If this amendment prevails," its principal proponent explained, "[i]t will not execute itself." 39 Cong. Globe 2544 (1866) (Rep. Stevens). Even when Congress wanted Section Three enforced with respect to state offices, it believed that implementing legislation was required. That's why it authorized federal law-enforcement actions to remove such officers. *See* Act of May 31, 1870 (First Ku Klux Klan Act), ch. 114, §§14, 15, 16 Stat. 140, 143.

Just after Section Three was ratified, Chief Justice Chase dismissed a Section Three lawsuit because "legislation by Congress is necessary to give effect to" Section Three. *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869). He said that the removal of disqualified officeholders "can only be provided for by [C]ongress." *Id.* That remains the law today. *See* Blackman & Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. 350 (forthcoming 2024) (manuscript at 404-504), perma.cc/2XLZ-X2RF (defending *Griffin* at length); App.131a-43a ¶¶285-313 (Samour, J., dissenting) (same); *Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978) (explaining that *Griffin* held "that the third section of the Fourteenth Amendment, concerning disqualifications to hold office, was not self-executing absent congressional action" and concluding that "the Congress and Supreme Court of the time were in agreement that affirmative

relief under the [Fourteenth] [A]mendment should come from Congress").

B. Primary ballot cleansing violates National Republican Amici's First Amendment rights.

Enforcing Section Three at the primary stage would violate the First Amendment rights of National Republican Amici and their members and supporters. "Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections." *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). National Republican Amici help carry out this function.

A party's right to select candidates is protected by the First Amendment. *California Democratic Party v. Jones*, 530 U.S. 567, 572-73 (2000). "It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments." *Eu v. San Francisco Cnty. Democratic Cent. Committee*, 489 U.S. 214, 224 (1989). "The ability of the members of the Republican Party to select their own candidate unquestionably implicates an associational freedom." *Jones*, 530 U.S. at 575 (cleaned up). It is "central to the exercise of the right of association." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986).

When a State intrudes "upon the selection of the party's nominee," it violates that First Amendment right. *Jones*, 530 U.S. at 577 n.7; *accord Cousins v. Wigoda*, 419 U.S. 477, 487-88 (1975). Among other things, that means "ballot access must be genuinely

open to all, subject to reasonable requirements," like objective popular-support metrics. *Lubin v. Panish*, 415 U.S. 709, 719 (1974). States must leave it up to a party and its members "to select a 'standard bearer who best represents the party's ideologies and preferences.'" *Eu*, 489 U.S. at 224; *see Republican Party of Connecticut*, 479 U.S. at 216.

Removing former President Trump from the ballot violates this right. It denies ballot access to one of the Party's potential candidates. It ruptures the "process[] by which [Republicans] select their nominees" and denies them their "'ability … to select their own candidate.'" *Jones*, 530 U.S. at 572, 575. And it unconstitutionally puts in the hands of the State—rather than the party (and the people)—the right to select a "'standard bearer who best represents the party's ideologies and preferences.'" *Eu*, 489 U.S. at 224. If Republicans cannot nominate the candidate of their choice, then the primary system will no longer be theirs, violating the First Amendment.

C. Section Three does not apply to former Presidents.

1. Presidents do not take an oath "to support" the Constitution.

Section Three applies only to people who previously took a specified "oath": the Article VI oath. U.S. Const. amend. XIV, §3. It refers to not just any oath, but the oath to "support the Constitution." *Id.* When "'a word [or phrase] is obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall v. Hall*, 138 S.Ct. 1118, 1128 (2018). The drafters of Section Three referred to the same oath "to support"

the Constitution everybody already knew. *See* Paschal, *supra*, at xxxviii (Article VI and Section Three cover "precisely the same class of officers"). Thus, it incorporates the same categories of people who take that oath: "a member of Congress," "a member of any State legislature," "an officer of the United States," or "an executive or judicial officer of any State." *Id.*

But Presidents have never taken the Article VI oath. The statute carrying into effect the Article VI Oath Clause confirms that it applies to a wide range of government officials "*except the President*." 5 U.S.C. §3331 (emphasis added). There is "no historical evidence that the President has ever taken a separate oath pursuant to the Article VI Oath or Affirmation Clause." Tillman & Blackman, *Offices and Officers of the Constitution Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. Tex. L. Rev. 349, 423 (2023).

Presidents take a different oath prescribed by Article II. *See* U.S. Const. art. II, §1; *see also Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 415 (1950) ("For the President, a specific oath was set forth in the Constitution itself. Art. II, §1."). In that oath, they do not swear to "support" the Constitution, as Section Three requires. They swear to "preserve, protect, and defend the Constitution." *See* U.S. Const. art. II, §1. Former President Trump has never taken the Article VI oath "to support" the Constitution as used in Section Three, but only the Article II oath. He thus falls outside Section Three's coverage.

The Colorado Supreme Court disagreed because in its view, the presidential oath to "'preserve, protect, and defend the Constitution' … is consistent with the plain meaning of the word 'support.'" App.75a ¶156. But that argument answers the wrong question. The question is not whether the President's commitments can broadly be characterized as "support"; the question is whether the President takes the oath that Section Three references. He does not.

2. The President is not an "officer of the United States" because that phrase never includes the President in the Constitution.

The presidency is also not among those positions whose past oath would subject them to Section Three. Section Three applies only to a "member of Congress," "officer of the United States," "member of any State legislature," or "executive or judicial officer of any State." U.S. Const. amend. XIV, §3. The Colorado Supreme Court determined that the President must be an "officer of the United States." He is not.

When Section Three was ratified, the President was not understood to be an "officer of the United States" for constitutional purposes. Joseph Story wrote that because the Constitution's Impeachment Clause lists the President, Vice President, "and all civil officers (not all other civil officers)," that means that the President and Vice President were "contra-distinguished from, rather than ... included in the description of, civil officers of the United States." 2 Joseph Story, Commentaries on the Constitution of the United States 260 (1833).

Less than a decade after the Fourteenth Amendment's ratification, at least two Senators said the same thing. Senator Newton Booth said that "the President is not an officer of the United States." Congressional Record Containing the Proceedings of the Senate Sitting for the Trial of William Belknap 145 (1876). Senator Boutwell said that "according to the Constitution, as well as upon the judgment of eminent commentators, the President and Vice-President are not civil officers." *Id.* at 130. A contemporaneous treatise confirmed what Justice Story wrote: "It is obvious that ... the President is not regarded as 'an officer of, or under, the United States.'" McKnight, The Electoral System of the United States 346 (1878).

More recently, two future Justices came to similar conclusions. Future-Justice Scalia wrote that "when the word 'officer' is used in the Constitution, it invariably refers to someone other than the President or Vice President." Memorandum from Antonin Scalia, Re: Applicability of 3 C.F.R. Part 100, OLC, at 2 (Dec. 19, 1974), perma.cc/GQA4-PJNN. And future-Chief Justice Rehnquist wrote that "statutes which refer to 'officers' or 'officials' of the United States are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive." Memorandum from William H. Rehnquist, Re: Closing of Government Offices, OLC, at 3 (Apr. 1, 1969), perma.cc/P229-BAKL. One scholar who was initially hopeful about Section Three disqualification concluded that it would not work because the President is not an "officer of the United States." *See* Calabresi, *Donald Trump Should be on the Ballot and*

Should Lose, Volokh Conspiracy (Sept. 16, 2023), perma.cc/LP5Y-MJ97.

Each of the four other constitutional uses of the phrase "officer of the United States" confirm the President's exclusion:

- ***Article VI Oath Clause.*** Article VI requires an oath of "all executive and judicial Officers … of the United States." U.S. Const. art. VI. Presidents do not take the Article VI Oath. *See* Tillman & Blackman, *supra*, at 423. Indeed, the statute carrying into effect the Article VI Oath Clause confirms that it applies to a wide range of government officials "except the President." 5 U.S.C. §3331.
- ***Commissions Clause.*** Article II assigns the President the duty to "commission all the officers of the United States." U.S. Const. art. II, §3. But "[t]he President has never commissioned himself." Tillman & Blackman, *supra*, at 412. Nor have Presidents received commissions from their predecessors. *See id.* That unbroken practice would be unconstitutional if "all the officers of the United States" included the President.
- ***Appointments Clause.*** Article II assigns the President the power to "appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all* other *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, §2

(emphases added). Because the President does not appoint himself, the phrase "all other Officers of the United States" does not include him. And his "[a]ppointment[]" is not otherwise provided for because the President is not "[a]ppoint[ed]" at all—he is elected. *See id.* amend. XII; *id.* art. II.

- ***Impeachments Clause.*** Last, Article II describes the impeachment process for the "President, Vice President, and *all civil officers of the United States*," U.S. Const. art. II, §4. (emphasis added). The first two items are superfluous if "all" of the "officers of the United States" included the President. *But see* Scalia & Garner, *Reading Law* 174 (2012) ("If possible, every word ... is to be given effect."). And because the last category does not contain the word "other," it is not a catch-all clause that also comprehends the first two categories, but a distinct third category. Again, that's because the President is never a constitutional "officer of the United States."

Precedent supports this conclusion. The President is commonly referred to as a "department" or "branch," not as an "Officer of the United States." *See, e.g.*, *State of Mississippi v. Johnson*, 71 U.S. 475, 500 (1866) ("the President is the executive department"); *Trump v. Mazars USA, LLP*, 140 S.Ct. 2019, 2034 (2020) ("The President is the only person who alone composes a branch of government."). This Court's precedent has long assumed that the President is not an "Officer of the United States." *See, e.g.*, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 497-98 (2010) ("The

people do not vote for the 'Officers of the United States.'"); *accord United States v. Mouat*, 124 U.S. 303, 307 (1888).

The Colorado Supreme Court ignored this evidence. First, the court thought excluding the President was "absurd." App.54a ¶106. But the Fourteenth Amendment's ratifiers had no reason to include Presidents. At the time, all former Presidents had previously taken the Article VI oath. Moreover, only one former President had joined the Confederacy, but he was dead. *See* John Tyler, White House Historical Ass'n, perma.cc/23RJ-AWWJ.

Second, the court focused almost entirely on the word "officer," not the phrase "officer of the United States." *See* App.70a-72a ¶¶145-50. But phrases often have meanings that are not captured by the definitions of their individual words. *See, e.g.*, *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1826-27 (2020) (Kavanaugh, J., dissenting) ("This Court has often emphasized the importance of sticking to the ordinary meaning *of a phrase*, rather than the meaning of words in the phrase."); *FCC v. AT&T Inc.*, 562 U.S. 397, 406 (2011) ("two words together may assume a more particular meaning than those words in isolation"). The phrase "officer of the United States" is used four times in the Constitution, and all four times it does not cover the President.

* * *

Finally, if this Court has any doubt concerning Section Three's application, it should resolve such

doubt against disqualification. As the Attorney General wrote in 1867, "[t]hose who are expressly brought within its operation [of Section Three] cannot be saved from its operation." The Reconstruction Acts, 12 Op. Att'y Gen. 141, 160 (1867). But "[w]here, from the generality of terms of description, or for any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the law." *Id.*

CONCLUSION

This Court should grant certiorari.

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