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 KERMIT ROOSEVELT IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

The Question Presented is:

Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?

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INTEREST OF *AMICI CURIAE*[1]

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SUMMARY OF ARGUMENT

To resolve this case, this Court must decide how, by whom, and under what circumstances the disqualification imposed by Section Three of the Fourteenth Amendment can be enforced. The first issue is how to understand that question. Some scholars and judges approach it as a matter of whether Section 3 is "self-executing." But the term "self-executing" is imprecise—in particular, it tends to blur together the two very different issues of whether a legal provision has independent legal effect, and whether it provides a mechanism, such as a private cause of action, to recognize that legal effect. Others favor a distinction between the use of a constitutional provision as a "sword" and as a "shield." But this is just a metaphor with no definite content, and it too tends to blur together the two issues noted above.

The correct way to approach the enforcement of Section Three is to ask two questions. First, does Section Three have legal effect in the absence of

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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 or its counsel has made a monetary contribution to its preparation or submission.

federal implementing legislation—that is, does it create or change legal rights, status, or obligations? The answer to this question is yes: the words of Section 3 make that clear, as do comparisons to other constitutional provisions, historical practice, and common sense. Second, does the individual seeking to enforce the disqualification have a proper procedural vehicle for enforcement—one that entitles them to assert the disqualification and that complies with relevant constitutional requirements? The answer to that question depends on the facts and circumstances of a particular case. In this case, the answer is yes: Colorado election law allows electors to test the qualifications of primary candidates, and the procedure by which those qualifications are evaluated complies with federal constitutional requirements. Thus, the issue of former President Trump's status under Section 3 was properly before the Colorado courts.

The sole contrary authority, *Griffin's Case*, dealt with radically different circumstances and is unpersuasive, even self-refuting, on its own terms.

ARGUMENT

INTRODUCTION

One way to address the enforcement of Section Three is to ask whether that constitutional provision is "self-executing." But as this Court has noted, "[t]he label 'self-executing' has on occasion been used to convey different meanings." *Medellín v. Texas*, 552 U.S. 491, 505 n.2 (2008). Cf. Pet. App. 247a n.2 (Samour, J., dissenting) (stating that "I do not think [self-executing] means what [my colleagues in the

majority] think it means.") (alterations in original). In particular, to say that a provision is "not self-executing" usually means simply that it does not, by itself, create a private cause of action or other procedural vehicle for its enforcement. That is the meaning used in *Cale v. City of Covington,* 586 F.2d 311 (4th Cir. 1978), on which the dissent below relied, Pet. App. 261a-62a (Samour, J., dissenting). There is an enormous difference between not creating a private cause of action and lacking legal effect in the absence of implementing legislation. *Cale* itself acknowledges that critical distinction. See 586 F.2d at 313 (distinguishing between "merely … enforc[ing] the prohibitions of the Fourteenth Amendment" and "imply[ing] a cause of action for damages"); *see also* Pet. App. 267a (Samour, J., dissenting) (noting that "there are two distinct senses of self-execution").

Whether Section Three creates a private cause of action or other procedural vehicle is simply not relevant to this case; the litigants here are using Colorado election law as the vehicle by which to present the issue. (Whether that vehicle remains adequate is a relevant question, discussed *infra*.) Thus, avoiding the concept of self-execution promotes clarity of analysis.

Another phrasing asks whether an individual is trying to invoke the constitutional provision as a sword or a shield. See, e.g., Pet. App. 267a-68a (Samour, J., dissenting); Am. Br. for Professor Seth Barrett Tillman 8. This, too, usually amounts to the question of whether a private cause of action exists, as Professor Tillman's main case notes. See *Michigan Corrections Organization v. Michigan Dep't of Corrections*, 774 F.3d 895, 906 (6th Cir. 2014) (noting

that the *Ex parte Young* doctrine "does not supply a right of action by itself," and courts faced with a request for relief must ask whether a "cause of action for that relief exists"). Again, whether Section Three creates a federal cause of action is irrelevant in this case because the electors are using Colorado state election law as their procedural vehicle. The sword/shield metaphor may be evocative, but here it simply confuses the issue. The Constitution is neither weapon nor armor. It is law. The correct way to approach the issue of enforcement is to think in legal terms.

The appropriate first question, then, is whether Section Three has legal effect without congressional action. Does it create or change legal status, rights, or obligations in the absence of federal legislation? The second question is whether a proper mechanism exists to enforce those rights or obligations in this particular case—is there a law that allows these litigants to request a determination of qualification, and is that law constitutional?

I. SECTION THREE HAS INDEPENDENT LEGAL EFFECT.

Once clarified, the first question turns out to be an easy one. Text, constitutional structure, history, and common sense establish that Section Three has legal effect in the absence of federal enforcement legislation.

A. Text.

Considered in isolation, Section Three reads like an operative proposition: an enactment with

immediate independent effect, not a prefatory provision or one that requires activation or implementation. The words of Section Three state an absolute prohibition, not a conditional one: No person who comes within its scope, it declares, shall hold office. It does not say that Congress may specify who shall be barred from office, or that Congress may determine the penalty to be imposed on oath-breaking insurrectionists, or even that Congress may decide that oath-breaking insurrectionists shall be barred from office. It defines the class of people and the penalty, and it imposes that penalty itself. The explicit grant of power to Congress to remove the disability by a two-thirds vote supports this reading: Congress is given the power to remove a disability that the Constitution itself imposes. As this Court has explained, "operative propositions should be given effect as operative propositions … ." *District of Columbia v. Heller*, 554 U.S. 570, 578 n.3 (2008).

B. Constitutional Structure.

The plain-text reading is confirmed by a consideration of other constitutional language. The Constitution contains several different types of provisions. Some grant powers to government actors. Article I, § 8, gives Congress the power to legislate in several areas. Section Five of the Fourteenth Amendment gives Congress the power to enforce other provisions of that Amendment. These lawmaking powers may be exercised, but they need not be, and if they are not, the legal rights and obligations that exist are those created independently by the Constitution or other relevant laws. Congress might, for instance, give individuals a private cause of action against state officials who violate the rights secured by Section One.

See, e.g., 42 U.S.C. § 1983. In the absence of such a federal statute, the rights secured by Section One would still exist, and states could provide remedies for violations. *See, e.g.*, *Health and Hospital Corp. v. Talevski*, 599 U.S. 166, 177 (2023) ("[T]he § 1983 remedy ... is, in all events, *supplementary to any remedy any State might have*." (emphasis added)).

Some constitutional provisions place limits on what government actors can do. For instance, the Fifteenth Amendment prohibits racial discrimination with respect to voting rights. That prohibition operates of its own force; government racial discrimination is unlawful, even though enforcement legislation may be necessary to make the prohibition effective in practice. As Representative Townsend said, "The fifteenth amendment gave to the colored race the right to vote and hold office; but as constitutions are but declarations of rights and duties … it yet remains necessary that there should be appropriate legislation to effect the same." Cong. Globe, 41st Cong., 2nd Sess. 392 (Jan. 12, 1870).

Some constitutional provisions regulate the structure of government by placing limits on who can hold certain positions. Article I provides that "No person shall be a Representative" (§ 2) and "No Person shall be a Senator" (§ 3) unless they meet certain requirements. Article II does the same for the Presidency: "No Person … shall be eligible to the Office of President… ." (§ 1). The Twenty-Second Amendment bars from election to the presidency anyone who has been elected twice. These prohibitions also operate of their own force. A person who does not meet the qualifications is ineligible to hold the office, regardless of whether a challenge to their

qualifications has been decided or whether a challenge is even possible. (George W. Bush and Barack Obama are currently ineligible to be elected president, regardless of whether any law provides a means to obtain a judgment saying so.)

In this taxonomy, Section Three does not resemble a grant of power, except in its provision that Congress may remove the disability. And as noted, that grant of power suggests that in the absence of congressional action, there is something to remove: the disability exists. Congressional action is required to remove the disability, not to create it.

Section Three does resemble the prohibitions of the Bill of Rights and Section One of the Fourteenth Amendment. "Congress shall make no law…" and "No state shall make or enforce any law…" (Amendment 14, § 1) are grammatically very similar to "No person shall be a Senator or Representative…" (Amendment 14, § 3).

Section Three also resembles the qualifications of Articles I and II and the Twenty-Second Amendment—indeed, it is essentially identical. "No person shall be a Representative" (Article I, § 2), "No Person shall be a Senator" (Article I § 3), "No Person … shall be eligible to the Office of President" (Article II, § 1) and "No person shall be elected to the office of the President" (Amendment 22) have exactly the same form as Section Three's "No person shall be a Senator or Representative … or hold any office" (Amendment 14, § 3).

Any textual argument that Section Three is inoperative in the absence of congressional legislation

would apply in basically the same way to the qualifications of Articles I and II and in exactly the same way to the prohibitions of the First and Fourteenth Amendments. But in those contexts the argument is obviously wrong. It is just as wrong with respect to Section Three.

Section Five of the Fourteenth Amendment, which grants Congress the power to enforce the other sections, does not alter this conclusion. First, as a textual matter, Section Five is a grant of power, like the necessary and proper clause or the enforcement clause of the Thirteen Amendment. In the absence of congressional use of those powers, the legal relations that exist are those created by whatever other laws are operative. A failure to legislate means that there is no federal legislation; it does not repeal other laws, much less constitutional provisions.

Second, any argument that the mere existence of Section Five renders Section Three inoperative in the absence of federal legislation would apply just as strongly to the provisions of Section One: the citizenship, privileges or immunities, due process, and equal protection clauses. It would apply as well to other amendments with enforcement clauses, like the Thirteenth, Fifteenth, and Nineteenth Amendments. But it is obvious, and this Court has repeatedly said, that those sections and Amendments have legal effect regardless of whether Congress legislates. The purpose behind Section Five was to *increase* the effect of the Fourteenth Amendment by giving Congress the power to legislate in response to practical concerns or particular circumstances. It was not to neutralize the amendment in the absence of legislation.

Nor does the enactment of Section Five legislation to enforce Section Three, which Congress passed in 1870, imply that Section Three has no effect without federal legislation. The 1870 Enforcement Act, 16 Stat. 140, specified a procedural mechanism for enforcement and imposed criminal penalties for knowing violations of Section Three. Enforcement acts of this kind are common methods by which Congress sets out procedures and remedies. They do not imply that the underlying constitutional rule is inoperative in their absence: the Voting Rights Act of 1965 does not mean that without federal legislation racial discrimination in voting is allowed. See *Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966) ("States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution.").

Indeed, the 1870 Enforcement Act did not purport to impose the disqualification itself.[2] Rather, it

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[2] Amici Former Attorneys General suggest that the current criminal prohibition on insurrection, 18 U.S.C. § 2383, which includes a ban from holding office as a penalty, originated as part of the Enforcement Act of 1870. See Amicus Brief for Former Attorneys General at 24. That is not true. As discussed *infra*, the criminal ban on insurrection, including the disqualification penalty, existed before the 1870 Act and before Section Three, as part of the Second Confiscation Act of 1862. Respondent Colorado Republican State Central Committee makes the same mistake, see Resp. Br. 21-22 (asserting that Congress "adopted the now-repealed Enforcement Act of 1870, penalizing the crime of insurrection with disqualification.") The word "insurrection" does not appear in the Enforcement Act. The Second Confiscation Act is also different from Section Three in that it applies to all insurrectionists, not just those who broke oaths to support the Constitution. If the broad pre-existing penalty of disqualification for insurrection implies anything about Section Three, it is that the drafters thought that federal legislation imposing

directed district attorneys to remove by writ of quo warranto "any person [who] shall hold office, except as a member of Congress or of some State legislature, contrary to the provisions" of Section Three—recognizing that Section Three imposed the disqualification on its own. Enforcement Act of 1870, 16 Stat. 140-146 (1870), § 14. Enabling legislation was required to establish a procedure for removing people who were disqualified, but the disqualification was accomplished by Section Three on its own. The Congressional debates over the Enforcement Act demonstrate this very clearly. As Senator Lyman Trumbull, the Act's sponsor, put it, "This section disqualifies nobody. It is the Fourteenth Amendment that prevents a person from holding office." Cong. Globe, 41st Cong., 1st Sess. 626 (Apr. 8, 1869).

C. History.

The immediate post-ratification history supports the view that Section Three has independent legal effect. Soon after the ratification of the Fourteenth Amendment, Congress enacted amnesty bills.[3] These

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disqualification was *not sufficient*, not that they thought it was *necessary*.

[3] *See, e.g.*, *An Act to Relieve Certain Persons therein named from Legal and Political Disabilities imposed by the Fourteenth Amendment of the Constitution of the United States, and for other Purposes*, 16 Stat. 632 (Apr. 1, 1870); *An Act to Relieve Certain Persons therein from the Legal and Political Disabilities imposed by the Fourteenth Amendment of the Constitution of the United States, and for other Purposes*, 16 Stat. 614-30 (Mar. 7, 1870); *An Act to Remove Political Disabilities of Certain Persons therein named*, 16 Stat. 613 (Dec. 18, 1869); *An Act to Relieve Certain Persons therein named from the Legal and Political Disabilities imposed by the Fourteenth Amendment of the Constitution of the United States, and for other Purposes*, 16 Stat. 607-13 (Dec. 14,

acts specified in their titles that they were acts "to relieve certain persons … from legal and political disabilities imposed by the Fourteenth Amendment." There was no enforcement legislation in place, so the enactment of these bills suggests that Congress (and the former Confederates who sought the bills) believed that the disability existed without legislation—that, as the bills declared, it was "imposed by the Fourteenth Amendment."

This belief was expressed by other government officials. Secretary of War J.M. Schofield wrote to General Ulysses S. Grant in 1868, discussing the effect of the then-pending Fourteenth Amendment. Upon ratification, Schofield wrote, Section Three's effect "will be at once to remove from office all persons who are disqualified by that amendment." Schofield, J.M., to General U.S. Grant, May 15, 1868, The Evansville Journal (June 4, 1868), at 1. "When the Constitutional Amendment takes effect," he continued, "a large number of important offices must become vacant." *Id*. Examples could be multiplied. For instance, future Justice John Marshall Harlan wrote a letter on December 1, 1868, supporting an amnesty petition submitted by Kentuckian Philip Lee. Since there was no act of Congress enforcing Section Three in Kentucky, Harlan evidently believed that Section Three had effect without enforcement legislation. See Gerard Magliocca, John Marshall Harlan on Section Three of the Fourteenth Amendment, available at

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1869); *An Act to Relieve Certain Persons of All Political Disabilities imposed by the Fourteenth Article of the Amendments to the Constitution of the United States*, 15 Stat. 436 (1868).

https://balkin.blogspot.com, citing Cong. Globe, 40th Cong., 3d Sess. 1263 (Feb. 16, 1869) (Jan. 25, 2024).

And it was borne out by the practice of states: state courts decided whether people were disqualified with no hint that the absence of federal legislation mattered. See *Worthy v. Barrett*, 63 N.C. 199, 200 (1869); *In re Tate*, 63 N.C. 308 (1869); *State ex rel Downes v. Towne*, 21 La. Ann. 490 (1869). Like Congress in its pre-Enforcement Act amnesty bills, States referred in their pre-Enforcement Act constitutions to persons "disqualified … by the Constitution of the United States," recognizing both that the disability existed before federal enforcement legislation and that it was imposed by the Constitution, not legislation. See S.C. Const. of 1868, art VIII, § 2; Texas Const. of 1869, art. VI, § 1.

Amici Former Attorneys General point to statements by Members of Congress that they claim reflect an understanding that Section Three had no independent legal effect. See Former Attorneys General Amicus Br. 21-23 (asserting that John Bingham "raised a concern that Section Three would be unenforceable without additional action by Congress"). But they make the common mistake of confusing the absence of a particular enforcement mechanism for the absence of legal effect. Bingham's concern was about practical enforcement, not legal effect. It was raised with respect to a different version of Section Three, which would have banned "all persons who voluntarily adhered to the late insurrection," from voting for Representatives or presidential and vice-presidential electors until 1870. Cong. Globe, 39th Cong., 1st Sess. 2542 (Mar. 7, 1866). Bingham did not say that declaring

disenfranchisement would have no legal effect—and if that had been his concern, the simple and obvious solution would have been for Congress to specify that it did. He said that a broad disenfranchisement provision would be "incapable of execution," *id*. at 2543, because it would require "a registry law for congressional districts," *id.,* and an inquiry into how states appointed their electors. These were practical problems of implementation; they had nothing to do with any idea that a constitutional provision would lack legal effect.

Likewise, when Thaddeus Stevens responded that Section Three "will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do," Cong. Globe, 39th Cong., 1st Sess. 2544 (May 10, 1866), he meant that there was no mechanism for enforcement, not that the provision had no legal effect. (He too was discussing the earlier version of Section Three.)

In this regard, Section Three is just like Section One—as Stevens indicated when he said that "if this amendment prevails, you must legislate to carry out many parts of it." *Id.* Neither section provides a private right of action, but each declares constitutional rules that are operative without federal legislation. In each case, states may provide mechanisms for enforcement, which is what Colorado has done here. *See Talevski*, 599 U.S. at 177 ("[T]he § 1983 remedy ... is, in all events, *supplementary to any remedy any State might have*." (emphasis added)).

Griffin's Case, which is perhaps the only exception to otherwise uniform practice, is discussed *infra*.

D. Common Sense.

Pulling back from the details of contemporaneous practice, a broader view of the historical context makes plain that it would have been absurd for Congress to draft a Section Three that had no effect without enforcement legislation. The debates and drafting history of the Fourteenth Amendment reveal a pervasive purpose to place certain issues beyond the reach of ordinary politics, to take them out of the hands of oppositional president Andrew Johnson—who was pardoning Confederates—and future Congresses that might be controlled by representatives of the former Confederacy. For instance, the Civil Rights Act of 1866 bestowed birthright citizenship and a variety of rights, including equality with respect to rights of contract, property, and inheritance and "full and equal benefit of all laws for the security of person and property." See *An Act to Protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication*, (Apr. 9, 1866). But Congress did not believe that ordinary legislation was enough. "We may pass laws here today," said Representative Giles Hotchkiss of New York, "and the next Congress may wipe them out. Where is your guarantee then?" Cong. Globe, 39th Cong., 1st Sess. 1095 (Feb. 28, 1866).

Representative James Garfield raised the same concern. "The civil rights bill is now a part of the law of the land," he said. "But every gentleman knows that it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party comes

into power." What was the solution? "It is precisely for that reason," Garfield continued, "that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution … ." Cong. Globe, 39th Cong., 1st Sess. 2462 (May 8, 1866). Representative John Broomall of Pennsylvania likewise asked, "why should we put a provision in the Constitution which is already contained in an act of Congress?" He answered: "to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people." Cong. Globe, 39th Cong., 1st Sess. 2498 (May 9, 1866).

The Fourteenth Amendment thus constitutionalized many of the provisions of the Civil Rights Act of 1866 precisely in order to take those issues *away* from Congress. As with civil rights and citizenship, so too with disqualification. Republicans in Congress knew they could not rely on a federal statute that President Johnson could vitiate by pardons and that a future Congress might repeal. Putting a similar disqualification in the Constitution, effective on its own and beyond the power of a bare majority to alter, would be a sensible response. Putting in a disqualification that was ineffective without congressional action would make no sense at all.

E. *Griffin's Case.*

Opponents of the idea that Section Three has legal effect on its own do have one case to point to: *Griffin's*

Case.[4] In 1866, Hugh Sheffey was appointed to the circuit court of Rockbridge County, Virginia. His appointment was valid under then-existing law. Sheffey had served in the Virginia House of Delegates before the Civil War, taking an oath to support the Constitution, and then participated in the insurrection as a Confederate legislator. When the Fourteenth Amendment was ratified in 1868, Sheffey fell within the scope of Section Three. He continued to hear cases regardless and in September 1868 presided over the trial of Caesar Griffin. Griffin was convicted of shooting with intent to kill. Griffin filed a habeas petition, arguing that his conviction was invalid because Sheffey was not a judge, having been disqualified by Section Three.

Chief Justice Salmon Chase, acting as circuit justice, ruled that the petition should be denied. Section Three did not, he said, unseat by its own force all sitting officeholders who fell within its scope:

> For in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcement of decisions, more

[4] This section discusses *Griffin's Case* relatively briefly. For a more thorough critique, see, e.g., William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024).

> or less formal, are indispensable; and these can only be provided for by congress.

In re Griffin, 11 F. Cas. 7, *26 (C.C.D. Va. 1869).

To some extent, this is accurate. Before a particular individual can be declared to be disqualified, some kind of procedure is necessary. And it may even be that a habeas petition is not the proper procedure. But it does not follow that the needed procedure can only be provided by Congress. As discussed below, state courts and state legislatures play an active role in the enforcement of constitutional rules.

Chase may have referred only to Congress because of the unique circumstances of the case. Virginia, according to the First Reconstruction Act of March 2, 1867, had "no legal state government[]." When *Griffin's Case* was decided, Virgina was the First Military District, and its governing authority was the United States Army. Circumstances today are obviously different; states can and do provide procedures to decide qualification under Section Three.

If we look for support for a reading of Section Three as inactive that is not tied to the unique context of the case, Chase's opinion offers very little. His primary rationale was that reading Section Three to have immediate effect would cause chaos: "No sentence, no judgment, no decree, no acknowledgment of a deed, no record of a deed, no sheriff's or commissioner's sale—in short no official act—is of the least validity." *Id.* at *25.

This is, again, a rationale limited to a particular context: the context of applying Section Three to a *sitting officer* in order to invalidate *past official acts* via *collateral review*. That is not the context of this case, where the question is whether former president Trump is eligible to hold office in the future. But the rationale also fails on its own terms. As Chase noted later in the opinion, an official act by someone not qualified to hold the office may be upheld as the act of a de facto officer, "exercising the office with the color, but without the substance of right." *Id.* at *27. In a strange aside, Chase went on to say that: "This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in the opinion that a person convicted by a judge de facto acting under color of office, though not de jure … can not be properly discharged upon habeas corpus." *Id*. Thus, a unanimous Supreme Court apparently endorsed an alternate ground for decision that not only made Chase's reading of Section Three unnecessary but also took away the threat of chaos that Chase used to motivate that reading.[5]

Not only did Chase undermine his own reasoning; he based it on faulty factual premises. He asserted

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[5] In a case dealing with the validity of official acts by Confederate governments—also lacking in de jure authority—the Supreme Court did, in fact endorse the de facto officer theory. See *Texas v. White*, 740 US 700, 731-32. (1868) (holding that the Court would recognize the validity of official acts "without investigating the legal title … to the executive office."). The author of the opinion was Chief Justice Chase. Chase also ruled, as circuit justice in another case, that Section Three *did* have independent legal effect. See *Case of Davis*, 7 F. Cas. 63 (C.C.D. Va. 1871).

that persons holding office in Virginia who were disqualified by Section Three "were not regarded by Congress, or by the military authority, in March, 1869, as having been already removed from office." *Id.* Chase based this assertion on the fact that Congress, in February 1869, adopted a joint resolution directing the military to remove from office all persons who could not take the so-called Ironclad Oath. That group included people who were disqualified by Section Three, and so, Chase reasoned, Congress and the military must have thought they still held office.

For one thing, this argument is a non sequitur. The fact that some people who were subject to Section Three fell within a larger group of people barred from office on a different ground does not mean that Section Three had no independent effect. For another, it conflates legal and factual removal. It is one thing for the Constitution to take away a person's legal status as an officeholder and another for the U.S. Army to remove them from the building. But most strikingly, it is simply not true that the military regarded such officeholding as valid: *The Baltimore Sun* reported on January 12, 1869, that "[r]emovals from office under the fourteenth amendment continued with rapidity" and "[a]bout one hundred officers of courts have been removed in the last three weeks"—again, without any federal enforcement legislation. See Gerard Magliocca, *Another Error in* Griffin's Case*, available at* Balkinization: Another Error in Griffin's Case, https://balkin.blogspot.com/ (Jan. 12, 2024).

Perhaps because it is virtually the only legal text to embrace the idea that Section Three is inoperative without legislation, supporters of that idea paint *Griffin's Case* in glowing colors. A dissenting justice

below called it the "fountainhead," "wellspring," and "jumping-off point for any Section Three analysis." Pet. App. 254a, 255a (Samour, J., dissenting). Respondent Colorado Republican Party describes *Griffin* as "the definitive word on Section Three." Colo. Respondents Br. 18.

These characterizations are simply wrong. *Griffin* is outnumbered by decisions that did apply Section Three without federal legislation, such as *Worthy*, 63 N.C. 199 and *In re Tate,* 63 N.C. 308. *Griffin* was also criticized in newspapers at the time: the *Milwaukee Sentinel* complained that according to Chase's view, "a future Democratic Congress … has only to repeal all laws for the enforcement of the amendment, and it is absolutely null." The Fourteenth Amendment—Chase's Decision, *Milwaukee Sentinel*, May 17, 1869, p.1.; see also Justice Chase and the Fourteenth Amendment, *The Bangor* (Me.) *Daily Whig and Courier*, June 7, 1869, p.3.

If *Griffin's Case* shows us anything, it is that the sword/shield framing does not clarify analysis. *Griffin's Case* is an example of using the Fourteenth Amendment as a shield. Caesar Griffin was not initiating a suit to recover damages; he was trying to resist what he claimed was unconstitutional government action. He had been tried before and sentenced by someone he claimed was not a judge, presumably a deprivation of his liberty without due process of law. He was defending against incarceration, not asserting a private cause of action. If that falls on the "sword" side of the distinction, so does any defendant's argument that a state law under which they are prosecuted violates the Fourteenth Amendment.

In sum, there is no good reason to think that Section Three lacks independent legal effect. Even the bad reasons would likewise nullify parts of the Constitution that everyone agrees have independent effect. And the sole authority for this proposition addresses a very different context, misstates relevant facts, and explicitly discredits its own primary rationale.

II. SECTION THREE'S DISQUALIFICATION CAN (AND LIKELY MUST) BE GIVEN EFFECT IN STATE COURT PROCEEDINGS.

Since Section Three does have legal effect, Trump is disqualified if he comes within its scope.[6] The next question is whether any such disqualification can be given effect in a state-court proceeding.

Section Five provides that Congress may enforce the other provisions of the Fourteenth Amendment. That gives a particular power to Congress. But it does not prevent states from recognizing and enforcing those provisions in the absence of federal legislation. That state courts will follow the Constitution is one of the fundamental axioms of our constitutional system, expressed in the Supremacy Clause mandate that "the Judges in every state shall be bound" by the Constitution. U.S. Const. art. VI. As this Court has

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[6] The dissent below appears to agree with this point. See Pet. App. 246a (Samour, J., dissenting) ("I agree that Section Three bars from public office anyone who, having previously taken an oath as an officer of the United States to support the federal Constitution, engages in insurrection."). That the dissent believes this statement is consistent with the characterization of Section Three as non-self-executing shows how that label confuses matters.

stated, that language "charges state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

State legislatures may provide mechanisms to enforce federal rights. *See, e.g.*, *Talevski*, 599 U.S. at 177 ("[T]he § 1983 remedy ... is, in all events, *supplementary to any remedy any State might have*.") (emphasis added)). State courts may, indeed must, heed and give effect to the rules of the federal Constitution. Federal law "may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Howlett*, 496 U.S. at 372–73. The next question, then, is whether Colorado has provided such mechanisms.

III. COLORADO ELECTION LAW ALLOWS ELECTORS TO TEST THE QUALIFICATIONS OF PRIMARY CANDIDATES.

There is, again, nothing unusual about state courts giving effect to the rules of the federal Constitution. In some areas, states are the primary actors, and in exercising their authority they may and usually must take into account the requirements of the federal Constitution.

Here, the federal Constitution gives States the authority to appoint electors "in such manner as the legislature … may direct." U.S. Const. art. I, § 1, cl. 2. This authority includes the power generally to regulate ballot access and specifically to allow on the ballot only candidates who are constitutionally

qualified to hold the office they seek. See, e.g., *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.), *cert. denied*, 569 U.S. 1018 (2013) ("a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office"); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (per curiam) (affirming Illinois's exclusion of a thirty-one-year-old candidate from the presidential ballot); *Lindsay v. Bowen*, 750 F.3d 1061, 1063–65 (9th Cir. 2014) (upholding exclusion of a 27-year-old from the presidential primary ballot); *Elliott v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016) (adjudicating the merits of challenge to presidential primary candidate Ted Cruz's constitutional eligibility), *aff'd*, 63 Pa. 212 (2016).

It is true, of course, that the federal Constitution places limits on the sort of procedures state courts can use. But the procedures followed by the District Court, which included a five-day trial featuring fifteen witnesses subject to direct and cross examination and ninety-six exhibits, and which required the electors to meet a clear and convincing evidence standard, satisfy federal constitutional requirements. See Pet. App. 74a.

V. POLICY CONCERNS DO NOT JUSTIFY SETTING ASIDE CONSTITUTIONAL RULES—ESPECIALLY WHEN THE CONSTITUTION PROVIDES A POLITICAL SOLUTION ANYWAY.

This case presents a question of great national importance—whether the leading candidate of the Republican Party is eligible to hold the office of president. Much of the commentary and many of the arguments presented to this Court assert that the danger of public disapproval, tit-for-tat retaliation by other states, or a general pro-democracy principle support a judicial refusal to enforce Section Three, leaving such an important decision to the political process. See, e.g., Am. Br. for Former Attorneys General at 27-29. But these arguments misunderstand how the Constitution works, both in general and in this specific case.

First, it is the responsibility of courts to enforce the Constitution, not to pick and choose among its provisions based on assessments of their wisdom or the consequences of enforcement. See, e.g., *Heller*, 554 U.S. at 634 ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.") As *Heller* explained, the rules placed in the Constitution are "the very *product* of an interest balancing by the people," which judges should not conduct anew. *Id.* at 635.

But second, the drafters of the Fourteenth Amendment *did* decide to leave the eligibility of persons subject to Section Three up to the political process. They provided that Congress could, by a two-thirds vote, remove the disability. If people believe

that Trump should not be subject to the disability, they can make those arguments to Congress, and members of Congress can be held responsible for their votes through the democratic process. That was the process followed in the Reconstruction Era, when individuals applied to Congress for relief and Congress eventually enacted broad amnesty. That process should be allowed to operate now as well. Section Three provides an unusual instance in which we need not choose between a rule laid down long ago and a current democratic assessment of costs and benefits. We have both, because that is what the Constitution provides. All we need do is recognize the structure the drafters designed. The higher law of the Constitution imposes a disability, but Congress can remove it through ordinary politics.

CONCLUSION

Rather than rely on the murky concept of self-execution or misleading metaphors about swords and shields, the proper way to analyze this case is to ask a series of ordinary legal questions. Does Section Three have legal effect in the absence of federal legislation? Can a state court recognize the effect of Section Three by determining whether a candidate is qualified to hold the office they seek? Does Colorado election law provide a vehicle to make that determination? Does that vehicle comply with the federal constitution?

The answer to each of these questions is yes, and this Court should hold that the issue of President Trump's eligibility was properly before the Colorado courts. Weighing the consequences of disqualification is not the role of a court, especially where, as here, the

Constitution explicitly remits that issue to the political process. This Court should affirm.

January 30, 2024 Respectfully submitted,

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