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 PROFESSOR EDWARD J. LARSON AS AMICUS CURIAE SUPPORTING THE ANDERSON RESPONDENTS

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STATEMENT OF INTEREST[1]

Amicus Edward J. Larson, Ph.D, holds the Hugh and Hazel Darling Chair in Law and is University Professor of History at Pepperdine University.[2] Professor Larson has authored or co-authored fourteen books, along with over one hundred published articles. He one of the few people to have given serious academic study to the original public meaning of the Twentieth Amendment to the United

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus or his counsel made a monetary contribution intended to fund the brief 's preparation or submission.

[2] Titles and institutional affiliations are included for information purposes only.

States Constitution. *See* Edward J. Larson, *The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment*, 2012 Utah L.R. 707 (2012). And he is a recipient of the Pulitzer Prize in history for a book on legal history addressing the same period as the framing of the Twentieth Amendment.

Professor Larson writes to provide the Court with the benefit of his expertise on the Twentieth Amendment and to counter the interpretation of that provision that certain of Petitioner's amici have offered in this case, which holds that the amendment deprives states of their constitutionally established power over their own elections. That novel view comports with neither the text of the Twentieth Amendment nor its underlying history and should be rejected by this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Twentieth Amendment is a lame duck amendment—both literally and figuratively. Its central animating purpose was to eliminate the "lame duck session" of the outgoing Congress that previously had occurred entirely after a new Congress had been elected, by moving up to January 3 the date on which the terms of newly elected senators and representative begin and the new Congress assembles. U.S. Const. amend. XX, § 1; *see* Larson, *supra* at 710-711, 725. As a secondary purpose, section 1 of the Amendment also moves up to January 20 the date on which the terms of the president and vice president begin. U.S. Const. amend. XX, § 1. And while this case has brought the amendment a certain level of public attention for its tertiary purpose—providing rules governing what happens if a president elect dies or fails to

qualify before taking office or if a president has not been chosen by January 20—the Twentieth Amendment has otherwise enjoyed a long period of happy obscurity.

While something like the Twentieth Amendment had been discussed in Congress since the early days of the Republic, the idea gained little traction until the legendary Republican senator George W. Norris of Kansas took up the cause in the 1920s. Larson, *supra* at 718-725. Even then, while the amendment repeatedly passed the Senate during the 1920s and 1930s, various versions of this provision languished in the House until 1932. *See* S. Rep. No. 72-26 at 1-2 (1932). Once passed by both houses of Congress, the states ratified the amendment over virtually no dissent. And since its ratification, the amendment has proven so "technical," perfunctory, and unambiguous as to go virtually unnoticed. Larson, *supra* at 709 (quoting Akil Reed Amar, *America's Constitution: A Biography* 428 (2005)). The amendment has "generat[ed] little legal commentary or public comment," has never been the "subject of a Supreme Court decision," and "has rarely been interpreted by the lower courts." *Id.* at 709-710, 731-733.

Yet certain of Petitioner's amici in this case have advanced a novel and unsupported interpretation of the Twentieth Amendment that would erode the authority of states over the federal elections conducted within their states in a manner foreign to the Twentieth Amendment's text, history, and purpose, and at odds with the constitution's federal structure. Those amici then weave their novel interpretation of section 3 of the Twentieth Amendment into their interpretation of the other constitutional provisions to advance an argument that is not supported by nor related to the Twentieth Amendment. *See* NRC Br. 8-9; RNC Br. 4-9.

This free-form constitutional reading cobbled together from unrelated portions of constitutional text does not do justice to the provisions it draws upon. The Anderson Respondents and numerous other amici have already explained why this argument fundamentally misinterprets Section 3 of the Fourteenth Amendment. This brief will not belabor those points. It will instead explain how this argument is also inconsistent with the Twentieth Amendment. That is because, properly understood, the relevant portion of the amendment is concerned solely with a "President Elect" who dies or has otherwise failed to qualify for the office of president, and no one becomes a "president elect" until *after* the electors have voted. The amendment therefore has no impact on candidates for president who become disabled from holding the presidency *before* the electors vote in December. Nor does it convey to Congress any role (exclusive or otherwise) in determining whether candidates are disqualified—regardless of when the disqualification occurs. That is the only interpretation of the amendment that comports with text, its history, and an unbroken line of lower-court opinions. That is the only interpretation that should prevail in this Court. And under that interpretation, nothing *in the Twentieth Amendment* should prohibit Colorado or any other state from removing a candidate from its ballots.

ARGUMENT

I. Nothing in the Twentieth Amendment's text or history prohibits states from removing disqualified candidates from their ballots.

1. "The Constitution vests states with "far-reaching authority" over presidential elections, including the means of appointing presidential electors. *See Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2324 (2020); U.S. Const. art.

II, § 1. And in exercising that authority, states are given broad discretion to "provide for *** standards as to the contents of the official ballots," *Buckley* v. *Valeo*, 424 U.S. 1, 292 (1976), as necessary to "protect the integrity of [the] political process." *Bullock* v. *Carter*, 405 U.S. 134, 145 (1972). That "legitimate interest in protecting the integrity and practical functioning of the political process" gives states the power "to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan* v. *Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding Colorado's decision to exclude presidential primary candidate from the ballot over failure to meet the requirement in Article II, section 1, clause 5 that the president must be a natural-born citizen).

2. The Twentieth Amendment does not do anything to displace the states' traditional authority to enforce constitutional qualifications for the presidency and exclude unqualified candidates from the ballot.

Section 3 of the Twentieth Amendment provides that "[i]f, at the time fixed for the beginning of the term of the President," 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. Nothing in that provision purports to interpret or modify the insurrection disqualification—or Congress's power to remove it—provided under the Fourteenth Amendment, which came more than 70 years earlier. That provision instead addresses a highly technical ambiguity in the *Twelfth* Amendment, which states that the "Vice-President shall act as President * * * in the case of the death or other constitutional disability of the president,"

but did not specify what should happen in the event a president elect died or became disqualified *before* taking office. U.S. Const. amend. XII.

The Twentieth Amendment addresses that question, specifying the line of succession that should occur upon the death or failure to qualify of the "President elect"—the person who has received a majority of the electoral votes when the electors vote in December but who has not yet assumed the office. The amendment therefore does not address presidential disabilities occurring *after* inauguration in January or *before* the electors vote in December.

3. The amendment's history only emphasizes its narrow, technical purpose. That history specifies that the amendment "uses the term 'President elect' in its generally accepted sense, as meaning the person who has received the majority of the electoral votes, or the person who has been chosen by the House of Representatives in the event the election is thrown to the House," but who has not yet assumed the office. H.R. Rep. No. 72-345, at 5 (1932). The amendment speaks to the "serious problems" that can arise from a death or disqualification that occurs or is discovered in this narrow period after the electors vote and before inauguration. *Id.* at 5-6. For instance, a president elect might become incapacitated "due to illness or other misfortune" in a manner that leaves her unable to take the oath of office. *Lindsay* v. *Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2014). "Or, a previously unknown ineligibility may be discerned after the election." *Id.* For instance, after the electors vote, it might "develop[] that the President elect was not a native born citizen and therefore not legally qualified to be President." *Hearing on S.J. Res. 14*

Before the Comm. on the Election of President, Vice President and Reps. in Cong., 72nd Cong. 9 (1932) (statement of Rep. Lea). The Twentieth Amendment is meant to operate in these circumstances by bringing up the vice president elect to fill the role in place of the disqualified president elect.

By contrast, the Twentieth Amendment's history emphasizes that it has no application in "the case of the death of a party nominee before the November elections." H.R. Rep. No. 72-345, at 5. After all, the relevant House Committee Report states, "Presidential electors, and not the President, are chosen at the November election." *Ibid.* In such situations, the Constitution anticipates that the normal electoral processes will play out and the electors could vote for a replacement party nominee. And just as a death occurring before November falls outside the Twentieth Amendment's ambit, the same would logically apply to a disqualification that occurs before the November elections. As the House Committee Report adds, the amendment also does not apply in the case of a party nominee who dies after the November election and before the electors vote in December because "the electors would be free to choose a [different] President." *Id.* at 5.

4. The amendment's focus on the case of the death or failure to qualify of a president elect after the electors vote in December makes perfect sense. Absent the amendment, a person who died or failed to qualify from holding office after becoming the duly elected president elect would trigger an immediate constitutional crisis. Prior to the amendment, the constitution did not supply a means to undo the election once the electors had voted, nor could their vote be honored. And the constitution did not provide that the vice president elect would act as president. The

electors would have completed their business and been discharged, with no ability to be recalled to make an alternate choice. It is these situations the Twentieth Amendment addresses—and they are confined to instances in which death or disability occurs (or is discovered) *after* the electors vote in December and before the president takes office.

That means the Twentieth Amendment offers no help to Petitioner's amici. Far from prohibiting states from acting *pre-election* to preserve some ability for Congress to act *post-election*, the amendment simply has no application to pre-election disqualifications at all.

By contrast, the reading of the Twentieth Amendment that Petitioner's amici have offered simply cannot work. It makes no sense to treat that provision, which by its terms reaches only the death or failure to qualify of the "president elect," as somehow encompassing even those who are merely campaigning for the job. After all, Section 3 of the Twentieth Amendment not only concerns a "president elect" who is has "failed to qualify" but also concerns a "President elect" who "shall have died." Adopting the expansive definition of that term offered by Petitioner's amici would therefore strip the states of power to exclude a *dead candidate* from their ballots. The election would have to be run with the dead candidate's name on the ballot, even though would be no way for the dead candidate to become president. The text, history, and precedent of the Twentieth Amendment provides no support for such an extraordinary result.

II. Nothing in the Twentieth Amendment's text or history conveys to Congress any power—much less exclusive power—to determine whether presidential candidates are disqualified.

Just as nothing in the Twentieth Amendment's text or history indicates that states are deprived of the power to enforce constitutional qualifications for the presidency, nothing indicates that the power to enforce those qualifications falls to Congress—much less that Congress's power would be exclusive. While the amendment specifies that the vice president elect shall serve in the stead of a president elect who has "failed to qualify," that provision is entirely silent on who determines disqualification.

1. The history of the amendment makes clear that this silence was intentional. The House Report accompanying an earlier draft of the Amendment—one that addressed only the death of a president elect, not the inability to serve in the office—noted that omission was driven in part by uncertainty about "[w]hat constitutes 'inability,' and who is to determine the question, under the present Constitution," saying the questions "will probably never be decided." H.R. Rep. No. 70-309, at 6 (1928).[3] And even as

[3] The House Report speaks of "inability" rather than "qualify" because the drafters understood the terms as interchangeable. *See* H.R. Rep. No. 72-345 at 6 (stating that the amendment extends the "sixth paragraph of section 1 of Article II of Constitution" provision for the "case of the removal, death, resignation, or inability of the President" to the "President elect"); *Hearing on S.J. Res. 14*, *supra* at 72 Cong. 9 (statement of Rep. Lea) (asserting "qualify" "cover[s] all cases" including "insan[ity]," "kidnap[ping]," and "not [being] a native born citizen"); 75 Cong. Rec. 3830 (1932) (statement of Rep. Jeffers) ("causes of the failure *** to qualify" include "inability"); U.S. Const. art. II, § 1, cl. 6.

the amendment was revised to cover a president-elect who fails to qualify after the electors vote, Congress declined to assign anyone the power to adjudicate that inability, thus *preserving* rather than *displacing* the states' traditional authority over elections.

That same House Report went on to suggest that regardless of who might possess the power to enforce the constitutional qualifications for the presidency, Congress was not among them. In addressing the particular case of a president who dies "after the electors vote [in December] and before the votes are counted [in January]," the Committee indicated that under the constitution, Congress would be required to count the votes as cast by the electors even if the president elect subsequently died: "An analysis of the functions of Congress indicates that no discretion is given and that Congress must declare the actual vote." H.R. Rep. No. 70-309, at 7. "The votes at the time they were cast were valid," the Report notes, and "Congress would declare that the deceased candidate had received the majority of the votes." *Ibid.*

2. Indeed, no organ of federal government was given *any* explicit power to disqualify a person from serving as president until ratification of the Twenty-Fifth Amendment, which authorized the president himself, or vice president with agreement of the majority of principal executive officers, to declare the president unable to discharge the duties of the office. *See* U.S. Const. amend. XXV, §§ 3, 4. Yet even that constitutional provision did not empower federal actors to disqualify the president elect—they could only disqualify the president. Furthermore, there is still no provision of the constitution that gives Congress the power to enforce the constitutional qualifications of the presidency and to disqualify anyone from serving as

the president. The Fourteenth Amendment empowers Congress only to *remove* the disqualification of any person, including a president elect in the case of insurrection, and only by supermajority vote of both houses. Outside of this limited express grant of authority, the Constitution is entirely silent on whether Congress has any role in disqualifying a president or president elect. And that silence should not be read to displace the state's traditional authority over elections.

Any other reading of the Twentieth Amendment would be foreign to the text and spirit of that amendment. If the amendment actually sought to eliminate states' traditional roles in overseeing their elections and conferred sole authority on Congress to decide—even after an election—whether presidential candidates were disqualified, then the amendment or the legislative history would have suggested as much. Giving Congress the sole authority to decide the qualification of the president elect to assume the office of president could have profound consequences. No one would know until after an election had run and the electors had voted whether millions of voters had wasted their vote on a candidate who Congress subsequently disqualified. If that is what the Twentieth Amendment honestly did, that surprising result should have been the subject of at least one hotly contested Supreme Court decision and dozens of scholarly works. Yet none of those authorities exist. That silence on the subject of the Twentieth Amendment is deafening to the cries of those who would employ the amendment for such an extraordinary use in this case.

III. Cases interpreting the Twentieth Amendment have uniformly interpreted it in line with its text and history.

Given that text, history, and common sense all lie on the side of interpreting the Twentieth Amendment to preserve state authority to enforce presidential qualifications it is unsurprising that the cases among the lower courts have likewise preserved state authority. In *Lindsay* v. *Bowen*, 750 F.3d 1061 (9th Cir. 2014), which addressed a challenge to the California Secretary of State's decision to exclude a 27-year-old from a presidential primary contest, the Ninth Circuit squarely rejected the identical argument that amici raise here: that the Twentieth Amendment "prohibit[s] states from determining the qualifications of presidential candidates"—reserving that role to Congress. *Id.* at 1065. The Court concluded that "nothing in the Twentieth Amendment states or implies that Congress has the *exclusive* authority to pass on the eligibility of candidates for president." *Ibid.*; *see also Peace and Freedom Party* v. *Bowen*, 912 F. Supp. 2d 905, 911-912 (E.D. Cal. 2012) (holding that "state election officials can and do prohibit certain candidates from appearing on a ballot" and that "[n]othing in the legislative history of Section 3 suggests Congress intended to limit" that power). By contrast, no court has ever endorsed the notion of a "Dormant Twentieth Amendment" as described by Petitioner's amici. *Lindsay*, 750 F.3d at 1065. And this Court should not be the first.

CONCLUSION

Accordingly, the Court should reject the interpretation of the Twentieth Amendment offered by Petitioner's amici and should not use it to overturn the decision below.

Respectfully submitted,

/s/ J. Carl Cecere

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