No. 23-696

In the Supreme Court of the United States

COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,
Petitioner,

v.

NORMA ANDERSON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

ANDERSON RESPONDENTS' BRIEF IN RESPONSE TO COLORADO REPUBLICAN STATE CENTRAL COMMITTEE'S PETITION

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the President falls within the list of officials subject to the disqualification provision of Section 3 of the Fourteenth Amendment?

2. Whether Congress must first pass legislation under Section 5 of the Fourteenth Amendment before a state can enforce Section 3 of the Fourteenth Amendment, even if state law provides a cause of action to enforce it?

3. Whether the First Amendment gives political parties the right to override state law and list on state-run primary ballots candidates who are constitutionally ineligible to be President?

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INTRODUCTION

Section 3 of the Fourteenth Amendment, enacted after the Civil War, excludes from federal and state office those who engaged in insurrection against the Constitution after previously taking an oath to support it. Since Reconstruction, this provision has remained largely dormant because for roughly the next 150 years our nation did not endure another insurrection or rebellion against our Constitution.

That changed on January 6, 2021, when a violent mob attacked the United States Capitol at the behest of a sitting president to stop the constitutionally mandated transfer of presidential power following the 2020 election. The attack injured more than 100 law enforcement officers, killed at least one, and forced the Vice President and other lawmakers to flee for their lives. The mob temporarily stopped the counting of electoral votes mandated by the Twelfth Amendment.

Following a five-day trial, the state court concluded that the attack was an insurrection against the Constitution and that Donald Trump engaged in that insurrection. The court concluded that Trump summoned an angry crowd to Washington, D.C. by lying about election fraud, incited the crowd to violence during a speech at the White House Ellipse while knowing that many in the crowd were armed and prepared for violence, and continued to incite the mob even after learning that the Capitol was under violent attack. While the attack unfolded, Trump refused repeated calls to send reinforcements to the

Capitol or to call off the mob, instead expressing support for the attackers and calling members of Congress to pressure them to do the mob's bidding. After evaluating testimony from 15 witnesses as well as substantial documentary and video evidence, the trial court found that Trump intentionally incited imminent violence and did so with the intent to unleash a mob to obstruct the constitutional transfer of presidential power.

By spearheading the January 6 insurrection, Trump disqualified himself from holding federal office again. The Colorado Supreme Court correctly held that Section 3 applies to insurrectionist former Presidents, that disqualified insurrectionists may not seek the office of the Presidency, that to incite insurrection is to "engage in" insurrection, and that state courts have authority to adjudicate challenges to a presidential candidate's constitutional eligibility pursuant to state ballot-access rules. The court thus granted a petition brought by six Colorado voters ("Anderson Respondents") under the Colorado Election Code to exclude Trump from the presidential primary ballot, although it stayed that decision pending further review from this Court.

Although the Colorado Supreme Court's decision was correct and implicates no split of authority, this Court should nevertheless grant certiorari. This case is of utmost national importance. And given the upcoming presidential primary schedule, there is no time to wait for the issues to percolate further. The Court should resolve this case

on an expedited timetable, so that voters in Colorado and elsewhere will know whether Trump is indeed constitutionally ineligible when they cast their primary ballots.

But not all issues presented in the Colorado Republican State Central Committee's ("Colorado Republican Party") petition warrant this Court's attention. The Court should grant certiorari on Question 1 (whether Section 3 covers former Presidents) and a reframed Question 2 (whether states have authority to enforce Section 3 pursuant to state law absent federal legislation). But the Court should decline to hear the Colorado Republican Party's claim that it has a First Amendment right to place a constitutionally ineligible candidate on the primary ballot. This Court's settled precedent holds that the Constitution provides no right to confuse voters and clutter the ballot with candidates who are not eligible to hold the office they seek.

STATEMENT

A. Factual Background

The attack on the U.S. Capitol on January 6, 2021, was the culmination of a years-long pattern of Donald Trump encouraging his supporters to commit acts of political violence and praising them when they did so. Pet. App. 208a–211a, 32c-38c. Trump was no mere participant in the insurrection—his words and

deeds "were the factual cause of" the attack. *Id.* at 193a-195a, 57c–58c.

"[P]rior to the January 6, 2021 rally, Trump knew that his supporters were angry and prepared to use violence" and "did everything in his power to fuel that anger." *Id.* at 48c. Before the 2020 election, he declared that the only way he would lose the election "is if the election is rigged" and exhorted his supporters, "We can't let that happen." *Id.* at 39c. Trump continued to question the election's integrity up to election day. *Id.* at 178a, 38c–39c.

After he lost the election, Trump relentlessly stoked anger in his supporters by spreading lies that the election had been stolen by fraud, despite advisers telling him there was no evidence to support his claims. *Id.* at 178a–180a, 39c–41c. He promoted large "Stop the Steal" rallies in Washington, D.C. that turned violent. *Id.* at 180a–81a. Many rallies targeted this Court. *Id.* at 42c–44c. Trump acknowledged and justified violence at the events. *Id.* He also sent scores of tweets about the election targeting Republican lawmakers and this Court. *Id.* at 179a–181a, 42c–44c. Trump knowingly inspired violent threats against public servants. When warned by a Georgia election official that his words would "get [someone] killed," Trump re-tweeted the warning and doubled down on the very rhetoric that was inspiring the violent threats. *Id.*

Even after the duly certified electors cast their ballots for President-elect Joe Biden on December 14,

2020, Trump continued plotting to overturn the election. Beginning on December 19, 2020, when he tweeted, "Big protest in D.C. on January 6. Be there, will be wild!", Trump repeatedly urged his supporters to descend on Washington, D.C. on January 6, the day federal law required Congress to count and certify the electoral votes. *Id.* at 181a, 44c–46c. Violent extremists viewed Trump's tweet as a "call to arms" and began to plot activities to disrupt the January 6 joint session of Congress. *Id.* at 182a.

At the same time, Trump peddled the unfounded claim that Vice President Pence could unilaterally reject Congress's certification of electoral voters, despite being told otherwise. *Id.* at 44c, 48c. Trump continued to focus his supporters' ire on Pence and to intensify his calls to action as January 6 approached, insinuating that Democrats' supposed attempts to steal the election were "an act of war" justifying a "fight to the death." *Id.* at 186a, 44c–46c.

Trump's supporters heeded his calls, and many came to Washington on January 6 armed and prepared for violence. *Id.* at 48c–50c. From the attendees who passed through security checkpoints to watch Trump deliver a speech at the Ellipse, the Secret Service confiscated hundreds of weapons, ranging from knives to tasers. *Id.* at 187a, 49c. Another 25,000 attendees remained outside the security perimeter, not subject to screening. *Id.* at 187a, 49c. Many wore tactical gear, like ballistic

helmets, gas masks, and body armor. *Id.* at 49c–50c, 88c–89c.

Before he gave his speech to the assembled crowd the morning of January 6, Trump knew many of his supporters were armed and angry. *Id.* at 185a, 50c–54c. He also knew from past experience "how his supporters responded to his calls for violence," and that they knew to disregard contrary calls to act peacefully as "insincere" efforts to maintain plausible deniability. *Id.* at 209a–210a, 220a, 32c, 38c. Trump delivered an incendiary speech to the assembled crowd perpetuating the lie that the election had been stolen, claiming that Vice President Pence had authority to refuse certification of the results, and declaring that "we" (referring to the angry assembled crowd) would "never concede" and were "not going to let" Congress certify the vote for Biden. *Id.* at 187a–189a, 50c–56c. He called out Pence by name 11 times, used some variation of "fight" 20 times, and directed the crowd to march with him to the Capitol. *Id.* at 212a, 50c–56c. He encouraged his supporters to go beyond protected political speech: "When you catch somebody in a fraud, you're allowed to go by very different rules." *Id.* at 212a, 50c–54c. And he told them, "if you don't fight like hell, you're not going to have a country anymore." *Id.* at 189a. Many of the most incendiary comments were not in Trump's prepared remarks. *Id.* at 54c–56c.

Trump's speech "incited imminent lawless violence" and "was intended as, and was understood by a portion of the crowd as, a call to arms." *Id.* at 214a, 57c–58c. During the speech, the crowd reacted with shouts of, "storm the Capitol!" and "invade the Capitol Building!" *Id.* at 189a, 56c. Crowds surged from the Ellipse to the Capitol during and after the speech. *Id.* at 189a, 58c.

At 12:53 pm, just before his speech ended, Trump's supporters began their attack. *Id.* at 58c. Less than 90 minutes later, at 2:13 pm, they breached the Capitol building, which led to the House of Representatives and the Senate suspending the certification process and evacuating their chambers. *Id.* at 59c–60c, 66c. The mob violently assaulted police officers—"police officers were tased, crushed in metal door frames, punched, kicked, tackled, shoved, sprayed with chemical irritants, struck with objects thrown by the crowd, dragged, hit with objects thrown by the crowd, gouged in the eye, attacked with sharpened flag poles, and beaten with weapons and objects that the mob brought to the Capitol or stole on site"—and defied law enforcement's orders. *Id.* at 60c–61c, 169a. Many law enforcement officers were injured and hospitalized, and at least one died from the attack. *Id.* at 61c.

The mob's overriding purpose was to help keep Trump in office by preventing the constitutionally mandated counting of the electoral votes that had been cast in President Biden's favor. *Id.* at 170a, 62c–64c. Trump's supporters told police officers defending

the Capitol that Trump sent them, called the officers traitors, and referenced war (including the Civil War), revolution, and stopping certification of the election. *Id.* at 62c–63c. They chanted "fight for Trump," "Stop the Steal," and "1776"—the last, a reference to the American revolution that far-right extremists used as a literal call for violent revolution. *Id.* at 62c–64c. Chaos and violence reigned for hours. *Id.* at 62c, 88c–89c.

Rather than try to stop the attack, Trump poured gasoline on the fire. *Id.* at 65c–71c. At 2:24 pm, an hour after he knew that crowds were attacking the Capitol, he tweeted: "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!" *Id.* at 190a, 65c. This tweet incited further violence, refocusing his supporters' rage on the Capitol and the lawmakers inside it. *Id.* at 190a, 65c. In the minutes after Trump's tweet, the crowd surged violently forward. *Id.* at 65c–66c.

For roughly three hours after learning of the violence, Trump did nothing to stop the mob. *Id.* at 219a–220a, 65c–71c. At no point did Trump mobilize law enforcement or National Guard reinforcements to quell the attack. *Id.* at 67c–69c. At no point did Trump heed advisors' and allies' pleas for intervention. *Id.* at 191a–192a, 67c. Instead, he continued calling members of Congress urging them to do the mob's

bidding and stop the electoral count, rebuffing Rep. Kevin McCarthy's pleas for aid by saying, "I guess these people are more upset about the election than you are." *Id.* at 191a–192a, 67c. When told that the mob was chanting "Hang Mike Pence," Trump responded that perhaps the Vice President deserved to be hanged. *Id.* at 191a, 67c. Trump "fully intended to—and did—aid or further the insurrectionists' common unlawful purpose of preventing the peaceful transfer of power." *Id.* at 195a. "And for many hours, he and his supporters" did so. *Id.*

Although Trump sent two tepid and misleading tweets during the attack telling the mob to "remain peaceful" toward law enforcement (which falsely implied that the attacking mob *was* peaceful), he did not condemn the attack, did not direct the mob not to harm lawmakers or the Vice President, and did not tell the mob to disband. *Id.* at 190a–191a, 66c–67c. It was not until 4:17 pm, three hours after the attack began, that Trump instructed the mob to leave—but even in that statement, he praised the attackers. *Id.* at 192a, 69c.

Later that evening, Trump again lauded the attackers as "great patriots," called on them to remember January 6 "forever," and maintained that the attack was justified because his "sacred landslide victory" was "unceremoniously & viciously" stolen from him. *Id.* at 192a–193a, 70c.

B. Procedural Background

On September 6, 2023, four Republican and two unaffiliated Colorado voters sued Trump and the Colorado Secretary of State in state court. *Id.* at 2a–3a, 2b–3b. The Colorado Election Code enables voters to challenge the qualifications of candidates seeking to be on a primary ballot. *Id.* at 34a–35a. The petition explained that it would be unlawful for the Secretary to place Trump on the 2024 Republican presidential primary ballot because he engaged in the January 6 insurrection and is therefore disqualified under Section 3 of the Fourteenth Amendment. *Id.* at 10a–11a. The Colorado Republican Party soon intervened. *Id.* at 12a.

The parties engaged in extensive pretrial motion practice and made significant disclosures. The court's initial scheduling order set a six-week process for briefing dispositive motions, providing fact and expert witness disclosures, and exchanging expert reports and exhibits. Supp. App. 1a–4a.[1] The trial court also instructed the parties that they could request fact witness depositions after exchanging witness lists, though Trump declined to request any fact witness or trial preservation depositions. *See id.* at 3a–4a, 40a n.2. Trump filed three motions to

[1] Because certain relevant rulings of the trial court were not included in Petitioners' appendix, the Anderson Respondents have included a Supplemental Appendix containing those additional rulings.

dismiss, and moved to exclude the Anderson Respondents' exhibits and witnesses. Pet. App. 13a–16a, 3c–9c (summarizing filings and rulings).

Trump's motions included an Anti-SLAPP motion to dismiss under Colorado law. Responding to this motion required the Anderson Respondents to submit sworn "affidavits stating the facts upon which the" claim "is based." C.R.S. § 13-20-1101(3)(b). A month before trial, the Anderson Respondents submitted declarations from six witnesses along with dozens of exhibits, disclosing the testimony and evidence they would put on at trial.

The trial court disposed of all motions to dismiss prior to the hearing. In denying one of Trump's motions to dismiss, the trial court rejected as "irrelevant" Trump's assertion that Section 3 of the Fourteenth is not self-executing because the case was brought under Colorado's Election Code, "which provides . . . a cause of action." Supp. App. 30a. The trial court also rejected the Colorado Republican Party's argument that the suit violated its First Amendment Rights. Pet. App. 34b–41b.

The trial court conducted a five-day evidentiary hearing on October 30 through November 3. *Id.* at 16a. During the hearing, the Anderson Respondents called eight witnesses, and Trump called seven witnesses. *Id.* at 19c–29c (summarizing testimony and assessing credibility). Trump chose not to testify. Neither the Secretary nor the Colorado Republican Party called witnesses.

The trial court offered Parties the opportunity to call witnesses remotely, out of order, and outside the five-day hearing. Trump did not ask to call any witnesses outside the five-day hearing. *Id.* at 18c n.6. He did not use all the time available to him nor did he ask for any additional time or processes to present his case. *Id.* Nor did he ever explain or make a proffer about what additional evidence or testimony he would have provided had the procedures been different. Much of the Anderson Respondents' evidence consisted of undisputed eyewitness testimony (including by Trump's own witnesses), government reports to which Trump did not object, and Trump's own public statements.

On November 17, the trial court issued its 102-page final order. It found by clear and convincing evidence that the January 6 attack on the Capitol was an insurrection against the Constitution, and that Trump engaged in that insurrection. *Id.* at 75c, 116c–117c. The trial court found that Trump knew his violent supporters understood his statements to be "literal calls to violence" and knew he could "influence his supporters to act violently on his behalf," *id.* at 38c; that Trump "did everything in his power to fuel [his supporters'] anger with claims he knew were false" about the 2020 election and Vice President Pence's power to "hand him the election" on January 6, *id.* at 48c; that Trump "acted with the specific intent to incite political violence and direct it at the Capitol with the purpose of disrupting the electoral

certification," *id.* at 111c–115c, and that his conduct on January 6 was "the factual cause of, and a substantial contributing factor to," the attack on the Capitol, *id.* at 57c–58c. The trial court made these decisions in part based on its evaluation of the credibility of the witnesses at trial. *See id.* at 19c–29c. The trial court determined, however, that Section 3 does not apply to insurrectionist Presidents or to insurrectionists seeking the office of the Presidency. *Id.* at 123c–124c. Accordingly, the trial court ordered the Secretary to place Trump on the presidential primary ballot. *Id.* at 125c.

Both sides appealed to the Colorado Supreme Court, which heard extended oral argument on December 6 and issued its opinion on December 19. *Id.* at 4a–6a. The Colorado Supreme Court held that Section 3 disqualified Trump from appearing on Colorado's primary ballot and directed the Secretary not to list Trump's name on the 2024 presidential primary ballot. *Id.* at 223a–224a. It affirmed much of the trial court's reasoning, including its findings that Trump engaged in insurrection against the Constitution, *id.* at 195a, that Section 3's disqualification attaches without congressional action and is self-executing in that sense, *id.* at 77a–98a, and that excluding ineligible candidates from the ballot does not infringe the Colorado Republican Party's First Amendment associational rights, *id.* at 63a–68a.

The Court reversed the ruling that Section 3 does not apply to Presidents or to the Presidency. *Id.* at 146a.[2]

The Colorado Supreme Court stayed its order through January 4, 2024, the day before the Secretary must certify the ballot: "If review is sought in the Supreme Court before the stay expires, it shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot until the receipt of any order or mandate from the Supreme Court." *Id.* at 224a.

The Colorado Republican Party petitioned this Court for certiorari and requested an expedited schedule on December 27, 2023. *See* Pet.; Petr's Mot. to Expedite. The Anderson Respondents also moved for an expedited schedule on December 28. *See* Anderson Resp. Mot. to Expedite.

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[2] The seven justices of the Colorado Supreme Court ruled 4-3 in favor of the Anderson Respondents, with two of the justices dissenting only on state law grounds. Pet. App. 225a (Boatwright, C.J., dissenting), 318a (Berkenkotter, J., dissenting). While one of the dissenters concluded that enforcement of Section 3 requires Congress to adopt legislation pursuant to Section 5 of the Fourteenth Amendment, *id.* at 243a–247a (Samour, J., dissenting), he did not take issue with the majority's or trial court's findings that Trump engaged in insurrection against the Constitution.

REASONS FOR GRANTING CERTIORARI

A. The Petition Raises Two Questions of Significant National Importance That the Court Should Take Up

The Anderson Respondents agree the Court should grant certiorari, though only on two of the three questions presented by Petitioner.

To be sure, there is no split of authority over the meaning of Section 3 of the Fourteenth Amendment or its application to Trump. While courts have dismissed some cases raising similar claims, they did so on purely procedural grounds. Federal courts have dismissed them for lack of Article III standing. *See, e.g., Castro v. Scanlan*, 86 F.4th 947, 953 (1st Cir. 2023). Some state courts have dismissed them because, unlike Colorado, those states had no law authorizing challenges to candidate qualifications in presidential primaries. *See Growe v. Simon*, 997 N.W.2d 81 (Minn. 2023); *Davis v. Wayne Cnty. Election Comm'n*, No. 368615, No. 368628, 2023 WL 8656163 (Mich. Ct. App. Dec. 14, 2023), *appeal denied sub nom., LaBrant v. Sec'y of State*, No. 166470, 2023 WL 8897825 (Mich. Dec. 27, 2023).

Only one other challenge to Trump's candidacy has so far reached the merits: an administrative adjudication by the Maine Secretary of State under a state ballot access procedure. That decision likewise concluded that Trump engaged in insurrection against the Constitution, that Section 3 covers the

Presidency, that states have authority to enforce Section 3 and other qualifications for the Presidency, and that Trump would therefore be excluded from the primary ballot. *See In re Challenges of Rosen et al.* (Dec. 28, 2023), available at https://www.maine.gov/sos/news/2023/Decision%20in%20Challenge%20to%20Trump%20Presidential%20Primary%20Petitions.pdf.

But even with no split, this case presents "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." S. Ct. R. 10(c). Whether the Fourteenth Amendment prohibits a former President (and current presidential primary front-runner) who engaged in insurrection against the Constitution from holding office again is a question of paramount national importance. Because 2024 presidential primary elections are imminent, there is no time or need to let these issues percolate further.

Of the three questions the Colorado Republican Party presented in its petition, the first two merit this Court's attention. The Anderson Respondents also agree with Petitioner's framing of the first question presented:

> "1. Whether the President falls within the list of officials subject to the disqualification provision of Section 3 of the Fourteenth Amendment?"

But the second question presented is more properly framed:

> "2. Whether Congress must first pass legislation under Section Five of the

> Fourteenth Amendment before a state can enforce Section 3 of the Fourteenth Amendment, even if state law provides a cause of action to enforce it?"

As currently phrased, the Colorado Republican Party's second question asks only whether Section 3 is "self-executing," ignoring that Colorado has adopted state procedures for enforcing federal constitutional qualifications for office before a candidate can access Colorado's primary ballot.

The Colorado Supreme Court resolved both of these questions correctly.

First, the overwhelming weight of historical and legal authority shows that Section 3 applies to the President because the President is an "officer of the United States" and the presidential oath to preserve, protect, and defend the Constitution is an "oath to support the Constitution." Pet. App. 113a–146a.

The President is an "officer of the United States" and therefore is subject to disqualification under Section 3 if he engages in insurrection. An officer of the United States is simply one who holds a federal office. *See, e.g.,* John Bouvier, Law Dictionary (1856) (defining "Officer" as "he who is lawfully invested with an office" and giving the President as an example of an executive "officer"); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (Marshall, C.J.) ("An office is defined to be 'a public charge or employment,' and he who performs the duties of the office, is an officer. If employed on the

part of the United States, he is an officer of the United States."). An authoritative U.S. Attorney General opinion interpreting Section 3 defined "officer of the United States" as synonymous with those who hold "offices under" the United States, which the President does. Pet. App. 135a–136a. And the historical evidence confirms a public understanding at the time the Fourteenth Amendment was ratified that the President is an "officer of the United States." *Id.* at 132a–135a.

Nor does the Colorado Republican Party offer any rationale for Section 3 to exempt insurrectionist former Presidents (and no other officeholders). Section 3 was concerned with betrayal by those who hold high office, and the Presidency is the very highest and hence most dangerous one. *Id.* at 138a–140a. And because all Presidents other than Trump previously served in Congress, in State government, or in other official roles subject to Section 3, the Colorado Republican Party's position appears to be that Section 3 contains a loophole that exempts Trump alone. The Court should not assume that the framers intended this bizarre result, nor that they inadvertently created such a loophole.

Notably, the Colorado Republican Party does not seek review of the Colorado Supreme Court's related determination that the Presidency is an "office, civil or military, under the United States" that disqualified individuals may not hold. *See* Pet. 11 n.3 (addressing this issue only in a footnote). For good reason. The Constitution says the President takes an

"oath of office," it refers to the "office" of the Presidency 25 times, and it uses the phrase "office under the United States" in various provisions that apply to the Presidency. Pet. App. 119a–123a. Moreover, there was an overwhelming historical consensus during Reconstruction that Section 3 disqualified confederate leaders like Jefferson Davis from becoming President. *Id*. at 129a–130a. As a matter of basic logic, because the Presidency is an "office under the United States," the person who holds that office is an "officer of the United States."

Second, there is no requirement for Congress to enact legislation before a state court can enforce Section 3 under a state law cause of action. This Court has confirmed that the Reconstruction Amendments, including the Fourteenth Amendment, require no congressional legislation before courts may enforce them. *Id*. at 79a–87a; *see also Civil Rights Cases*, 109 U.S. 3, 20 (1883) (Thirteenth and Fourteenth Amendments are "undoubtedly self-executing without any ancillary legislation"); *see also City of Boerne v. Flores*, 521 U.S. 507, 522, 524 (1997) (Fourteenth Amendment imposes "self-executing" limits that courts have the "power to interpret").

Section 3's text makes this point even more clear: the requirement of a 2/3 supermajority of both houses to *remove* the disqualification means that the disqualification *already exists* by operation of the Constitution. Pet. App. 79a. If Section 3 were not self-executing, then bare majorities in Congress could

"nullify Section 3's supermajority requirement" by blocking or repealing enforcement legislation. *Id.* at 87a, 103a. Although Chief Justice Chase's non-binding decision while riding circuit in *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815) ("*Griffin's Case*") could be read to suggest that Section 3 is a dead letter absent enforcement legislation, that logic conflicts with both the plain text of the Fourteenth Amendment and with this Court's controlling precedent. Pet. App. 89a–95a.

Even if legislation creating a cause of action were required before a private plaintiff may sue to enforce Section 3, nothing in the Constitution vests Congress with *exclusive* authority to establish such a cause of action. Here Colorado law authorizes a voter to sue to ensure only eligible candidates appear on the ballot. *Id.* at 95a–96a, 78a n.11. Thus, state law—not Section 3 itself—created the cause of action. *Id.* And historically, state courts have enforced Section 3 against disqualified officers through state procedures even before Congress passed the first federal right of action in 1870. *See, e.g., Worthy v. Barrett*, 63 N.C. 199 (1869); *In re Tate*, 63 N.C. 308 (N.C. 1869).

There is nothing unconstitutional about states enforcing constitutional requirements in the absence of federal legislation. To the contrary, the Supremacy Clause *requires* state courts to enforce federal law, including the Constitution, in accordance with their normal procedural rules. U.S. Const. art. VI, cl. 2; *Howlett v. Rose*, 496 U.S. 356, 367 (1990). And *Griffin's Case*, even if good law, is not to the contrary:

it was a federal habeas case and did not address the authority of state courts to enforce Section 3 through a cause of action created by state law.

While the Colorado Supreme Court's ruling on each of these federal constitutional issues was correct, this Court should nevertheless grant certiorari now so that *all* Americans know whether Trump is eligible to be President when casting their votes this year. If this Court does not step in now, it risks millions of voters casting ballots for Trump in states where he appears on the ballot, only to find out later that he is disqualified. Clarity that only this Court can provide is needed and needed soon.

B. This Case Is the Proper Vehicle to Address These Issues Quickly

This case presents the ideal vehicle for this Court to address the questions presented. The trial court and Colorado Supreme Court decided the case on a full evidentiary record. Both Trump and the Colorado Republican Party participated at both levels. *See* Pet. App. 11a–12a, 16a–17a, 23a–24a, 2c, 9c. The trial court held a five-day hearing on the merits with the Anderson Respondents calling eight witnesses and Trump calling seven. *Id.* at 16a–17a, 9c, 19c–29c. The trial court entertained and issued written decisions ruling on the parties' pretrial motions to dismiss, motions *in limine*, and motions to exclude the Anderson Respondents' expert witnesses. *Id.* at 10a–

16a, 3c–10c. The trial court gave both sides flexibility to call witnesses remotely, out of order, and (if necessary) even after the initial five-day hearing to ensure a full and fair opportunity to be heard. *Id.* at 18c n.6, 73a–75a. The trial court issued a 102-page opinion including detailed factual findings that Trump engaged in insurrection against the Constitution. *See id.* at 1c–125c. The Colorado Supreme Court addressed every appellate issue raised in a detailed 133-page majority opinion following thorough briefing by the parties and *amici* and two hours of oral argument. *See id.* at 1a.

Time is of the essence. As explained in the Anderson Respondents' Motion to Expedite, Colorado is a universal mail-in ballot state. It must certify the primary ballots on January 5, 2024, so that they can be printed and mailed in accordance with state and federal law. *See* Anderson Resp. Mot. to Expedite 3–4, 6. It will begin mailing ballots to overseas voters on January 20, 2024, and to all in-state voters on February 12, 2024. *Id.* 4–6. Even though Colorado's primary is officially on March 5, 2024—Super Tuesday—Coloradans can begin voting as soon as they receive their ballots in the mail. *Id.* Iowa holds the country's first Republican caucus on January 15, 2024, with most states holding their Republican primaries or caucuses before March 12, 2024. *Id.* at 7–8.

The Anderson Respondents respectfully request that the Court issue a decision on the Petition

for a Writ of Certiorari by January 5, 2024, and if certiorari is granted, a decision on the merits by February 11, 2024. *Id.* at 4, 7. This will ensure that voters in Colorado (and elsewhere) will know whether Trump is disqualified before they cast their primary ballots.

C. The Court Should Deny Certiorari on Petitioner's Third Question Presented

Despite the importance of this case, the Colorado Republican Party's third Question Presented is not worthy of the Court's attention. It frames that question as "whether the denial to a political party of its ability to choose the candidate of its choice in a presidential primary and general election violates that party's First Amendment Right of Association?" Pet. i. But this case is not about a political party's right to choose candidates in the abstract. The real issue presented here is whether a party has a First Amendment right to put a *constitutionally ineligible* candidate on the ballot. There is no split on that question, and this Court's settled precedent answers it with a clear "no."

The Colorado Republican Party identifies no split of authority that would warrant certiorari. To the contrary, at least one federal circuit court has held that the First Amendment does not compel the inclusion of constitutionally ineligible candidates on presidential primary ballots. *See Lindsay v. Bowen*,

750 F.3d 1061, 1063–65 (9th Cir. 2014) (upholding exclusion of 27-year old from presidential primary ballot). Others have held that states have a "legitimate interest in protecting the integrity and practical functioning of the political process," which allows them "to exclude from the ballot [presidential] candidates who are constitutionally prohibited from assuming office." *See Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding exclusion of naturalized citizen from presidential primary ballot).[3]

The Colorado Republican Party wrongly claims that the Minnesota Supreme Court's recent decision in *Growe v. Simon* is "analogous" to this case. Pet. 27. That court affirmed dismissal of the ballot access challenge because Minnesota state election law gives political parties discretion to place even ineligible candidates on the primary ballot. *Growe*, 997 N.W. at 83 ("[T]here is no state statute that prohibits a major political party from placing on the presidential nomination primary ballot, or sending delegates to the national convention supporting, a candidate who is ineligible to hold office."). The decision did not address First Amendment associational rights at all.

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[3] The Colorado Republican Party is wrong that "[f]or the first time in American history . . . a political party has been denied the opportunity to put forward the presidential candidate of its choice." Pet. 6; *see, e.g.*, *Lindsay*, 750 F.3d at 1063–65 (affirming exclusion of presidential candidate for a minor party from primary ballot because they did not meet constitutional qualifications).

Besides there being no split, the question also does not raise an important issue of federal law that has not been, but should be, settled by this Court. This Court has already addressed when a state's refusal to place a candidate on the ballot violates a party's First Amendment rights. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358–59 (1997) (adopting test requiring courts to balance "character and magnitude" of the burden imposed by the state's ballot access rule "against the interests the State contends justify the burden"). The Colorado Supreme Court applied the *Timmons* test in rejecting the Colorado Republican Party's First Amendment associational argument. Pet. App. 67a–68a. Thus, the Colorado Republican Party here at best seeks error correction regarding application of settled law.

And there was no error. "That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights." *Timmons*, 520 U.S. at 359. After all, "[b]allots serve primarily to elect candidates, not as forums for political expression." *Id.* at 363. For that reason, states do not infringe a party's First Amendment rights by denying ballot access to candidates who are "ineligible for office." *Id.* at 359.

That this case involves a primary rather than the general election does not change that analysis. Political parties have many outlets for exercising their First Amendment rights of protest and association without surreptitiously disenfranchising voters by placing on the primary ballot candidates who are

ineligible to participate in the general election or to ultimately hold office.[4]

The Colorado Republican Party argues that the decision below is different from *Timmons* and *Lindsay* because it imposed a ballot access requirement that was not "reasonable" or politically "neutral." Pet. 31–32. That is wrong. The Colorado Supreme Court did not impose any substantive requirement at all. The Constitution did. And as *Timmons* makes clear, there is nothing unreasonable about a state avoiding voter confusion by excluding from the ballot a constitutionally ineligible candidate. That the Colorado Republican Party might not like the Colorado Supreme Court's interpretation and application of Section 3 does not give rise to a valid First Amendment claim.

Finally, there is no need for the Court to address the Colorado Republican Party's First Amendment question. If the Court affirms the Colorado Supreme Court's decision and concludes Trump is disqualified, there is hardly a compelling reason for the Court to address a political party's purported right to place constitutionally ineligible candidates on the primary ballot. It is highly unlikely

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[4] The cases cited by the Colorado Republican Party struck down laws mandating non-party members' participation or non-participation in a party's primary. Pet. 31 (citing *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), *Tashjian v. Republican Party*, 479 U.S. 208 (1986)). The Colorado Republican Party points to no case suggesting—much less holding—that political parties have a First Amendment right to place ineligible candidates on the primary ballot.

a party would do so given the consequences of an ineligible candidate winning the primary. And if the Court reverses and concludes Trump is eligible, the question will be moot.

The Court faces enough weighty and novel issues here without adding another question calling for fact-bound application of settled law in a posture that will almost surely render the question academic.

CONCLUSION

The Petition for Writ of Certiorari should be granted, limited to the Questions Presented as framed in this brief.

Respectfully submitted,

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