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 JORDAN L. MICHELSON IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF THE AMICUS CURIAE[1]

Jordan L. Michelson holds a J.D. from Boston College and is pursuing graduate studies in Philosophy at the same. His academic purviews include Philosophy of Law, Legal Logic, and Judicial Epistemology. Amicus is author of a forthcoming companion guide to the academic debate surrounding Section Three and frequently publishes articles on the topic. He consults on brief writing and legal research in civil rights cases and will be admitted to the New York bar in February 2024.

While Amicus has no concrete interest in who prevails in the Colorado Republican primary election and no particularized stake in who serves as the President of the United States during the 2025-2029 term, he has a profound interest in the Court's proper adjudication of this matter because he expects to practice constitutional law for decades to come. He therefore brings a long-term perspective on this issue that the more seasoned advocates and amici cannot. This is significant because, just as the modern Section Three disqualification challenge was made possible by Chief Justice Chase's *de facto* advisory opinion in *Griffin's Case* 150 years ago, an advisory opinion in the present day will not decisively settle the core legal issues.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amicus and his counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

INTRODUCTION

The Supreme Court of Colorado held that President Donald J. Trump is disqualified from holding the office of President because he "engaged in insurrection" against the Constitution of the United States—and that he did so after taking an oath "as an officer of the United States" to "support" the Constitution. The state supreme court ruled that the Colorado Secretary of State should not list President Trump's name on the 2024 presidential primary ballot or count any write-in votes cast for him. The state supreme court stayed its decision pending United States Supreme Court review.

The Court granted certiorari on the following question:

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

The threshold question this Court must ask is:

> Does Article III of the United States Constitution authorize the U.S. Supreme Court to determine whether the Colorado Supreme Court erred?

SUMMARY OF ARGUMENT

Does Section Three of the Fourteenth Amendment bar Donald J. Trump from holding office? The question has been litigated in the national media, in the court of public opinion, in academic journals, and in the political arena. It has been litigated via podcasts, law blogs, message boards, comment sections, and social media platforms. It has been litigated at kitchen tables, family gatherings, backyard barbecues, and water coolers nationwide. But it has not been litigated in the one place it *should* have been litigated: in a proper adversary proceeding between proper parties in a court of law with competent jurisdiction to grant the relief that would finally settle this dispute.

Here, final relief entails either a nationwide injunction against the Trump campaign or an authoritative declaratory judgment affirming (or disaffirming) Respondents' theory that Mr. Trump is, in the absence of Congressional amnesty, disqualified from holding public office by virtue of Section Three. Such relief was not available below and cannot become available for the first time on Supreme Court review.

Trump v. Anderson is not an Article III controversy. The court of first instance, the District Court of Denver, had no authority to issue a nationwide injunction. Nor could it have issued a declaratory judgment with coast-to-coast effect. Nor could it prevent Donald Trump from being sworn in as President of the United States on January 20, 2025, a conclusion that even the stingiest application of federalism demands. In short: the court of first instance lacked the authority to *actually* "disqualify" Donald Trump in any meaningful sense. Moreover, even if it *did* have that authority, the taxpayer-plaintiffs did not have Article III standing to ask for that relief. *See Anderson v. Griswold*, 2023 CO 63 ¶ 15 (Colo., 2023) (noting that "the federal district court remanded the case back to state court, concluding that it lacked jurisdiction because the Electors had no Article III standing").

Respondents' C.R.S. § 1-4-1204(4) "challenge to the listing of [a] candidate" was in fact a *collateral* attack on Donald Trump's eligibility. This collateral attack was carefully designed to end-run the standing requirement, the case-and-controversy requirement, due process of law, and foundational principles of federalism; the primary goal, it seems, was not to obtain an order disqualifying Mr. Trump from office *per se* but rather to bring public attention to his alleged disqualification. *Cf. Griffin's Case*,[2] 11 F.Cas. 7, 14-15 (C.C.Va.

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[2] Cited as "*Griffin's Case*" as per the Federal Reporter. It appears as *In re Griffin* or *Ex parte Griffin* elsewhere in the historical record. *Compare Ex parte Caesar Griffin*, 8 Am. Law Reg. (N.S.) 358 (1869), with *In re Caesar Griffin*, 25 Tex. Supp. 623 (1869); *see also Griffin's Ex'r v. Cunningham*, 61 Va. 31 (Va. 1870) (referring to "*In re Griffin*").

1869) (using collateral attack on conviction to cast aspersions on insurrectionist judge's qualifications). Nor does it matter that the 501(c)(3) nonprofit behind this "challenge" has very close ties to an organization that probably *does* have standing: the Democratic Party.[3] If the Democratic Party, Joe Biden, Nikki Haley, Robert F. Kennedy, Jr., or any other *bona fide* electoral adversaries of Donald Trump want to have Mr. Trump removed from the ballot, they know where the courthouse is.

Nevertheless, this Court should reject the Petitioner's appeal because the Court may not, as a fundamental matter of constitutional law,[4] reach the merits. What Donald Trump and Anderson, *et al.*, are jointly[5] asking for is a textbook "advisory opinion" from the Supreme Court.[6] To even reach the certified question ("Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?"), the Court would first be "forced" to adjudicate a raft of substantive questions of law and

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[3] *See* Part I(C), *infra.*

[4] This amicus brief addresses the constitutional prohibition on advisory opinions. It therefore assumes *arguendo* that 28 U.S.C. § 1257 provides the Supreme Court with the most expansive appellate jurisdiction allowable under Article III.

[5] The fact that *both parties* were in favor of certiorari should have been a red flag. *See Anderson Respondents' Brief in Response to Petitioner Donald J. Trump's Petition*, p.31 ("The Petition for Writ of Certiorari should be granted.")

[6] Indeed, a more accurate caption to this case would be *Baude, et al., v. Blackman, et al*. *See* Part III, *infra.*

fact.[7] These substantive questions – tempting as it may be for this Court to decide them – have not been properly litigated "at law". They have only been litigated via an expedited C.R.S. § 1-1-113(1) "hearing" and an expedited C.R.S. § 1-1-113(3) "appeal" that would not be entitled to "full faith and credit" as a final judicial determination.[8]

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[7] To borrow some examples:

> 1. Whether a challenge to the constitutional qualifications of a candidate for President presents a non-justiciable political question?
>
> 2. Whether the Presidency and the President fall within the list of offices and officers to which Section 3 of the Fourteenth Amendment applies?
>
> 3. Whether states may exclude from the ballot candidates who are ineligible to hold office under Section 3?
>
> 4. 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?
>
> 5. Whether . . . Trump "engaged in insurrection" against the Constitution for purposes of Section 3?
>
> 6. Whether the state trial court's factual finding that Trump intentionally incited a violent insurrection on January 6, 2021, was clearly erroneous?
>
> 7. Whether the Electors Clause requires this Court to override the Colorado Supreme Court's interpretation of the Colorado Election Code?

Anderson Respondents' Brief in Response to Petitioner Donald J. Trump's Petition at *i-ii*.

[8] *See* Part II, *infra*. The end product of the C.R.S. § 1-1-113(1) "hearing" before the District Court of Denver was, in essence, a preliminary prediction as to whether a court of competent

Moreover, the proper parties are not before the Court.[9] It may be that Donald Trump is aggrieved by his removal from the Republican primary ballot; but his gripe is not *really* with the six Colorado voters. It is with the State of Colorado and its statutory framework, which (according to the Colorado Supreme Court) imbues the state judiciary with plenary power to deny ballot access to a candidate it deems unqualified after an attenuated hearing on the merits. To the extent that this framework violates the Constitution or trammels Mr. Trump's fundamental rights, redress must be sought against the state actor. *See*, *e.g.*, *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1197-98 (D. Colo.), *aff'd*, 495 F. App'x 947 (10th Cir. 2012) (would-be candidate, a naturalized citizen, had standing to sue *the State of Colorado* on constitutional grounds for refusing to list him on the ballot); *compare Craig v. Masterpiece Cakeshop*, 2015 COA 115 (2015) (challenging administrative determination) *with Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018) (challenging statutory scheme).

Accordingly, the question certified by the Court is not attached to a *bona fide* Article III "case or controversy." *See* U.S. Const. Art. III, § 2, cl. 1 (the judicial power extends only to certain types of "cases" and "controversies"). Answering that certified question,

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jurisdiction over the question would, upon a full adversarial disposition with proper adversaries, conclude that Donald Trump had "engaged in insurrection" and that Section Three thereby prevented him from assuming office. The C.R.S. § 1-1-113(3) "appeal" sought a *de facto* "advisory opinion" from the Colorado Supreme Court; simply put, there was no *bona fide* Article III "case or controversy" for that court to adjudicate.

[9] *See* Part I, *infra*.

especially as it is currently framed, would thus require the Supreme Court to issue an "advisory opinion" – a solemn and categorical taboo. *See Carney v. Adams*, 592 U.S. 53, 58 (2020) ("We have long understood [Art. III] to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions"); *California v. Texas*, 141 S.Ct. 2104, 2116 (2021) (Advisory opinions "would threaten to grant unelected judges a general authority to conduct oversight of decisions of the elected branches of Government"); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests'") (quoting *Aetna Life Ins. v. Haworth*, 300 U.S. 227, 240-41 (1937)).

The Supreme Court has a preeminent obligation to the United States Constitution. Often, that obligation requires the Court "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Sometimes, however, that obligation commands the Supreme Court to keep mum. *E.g.*, *Ex parte Levitt*, 302 U.S. 633 (1937) (refusing to pass on whether Justice Hugo Black was constitutionally disqualified from the Supreme Court by Article I, § 6, cl. 2).[10] The matter before the Court (1) involves a party, Anderson, *et al.*, that does not have Article III standing and never did, (2) would require the Court

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[10] This is true even where the Court is presented with "a question deeply interesting to the United States," *Marbury*, 5 U.S. at 176 (refusing to decide "whether an act, repugnant to the constitution, can become the law of the land") or when judicial inaction allows egregious unfairness or morally outrageous conduct to continue. *E.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

to stipulate contested matters of fact that have not been conclusively litigated *at law*, and (3) is clearly an academic question cloaked in juridical trappings. Consequently, an opinion on the merits would constitute a prohibited advisory opinion and a flagrant arrogation of constitutional authority, in direct violation of the Constitution and the separation of powers.

Therefore, the relief requested by the Petitioner (that "[t]he judgment of the Colorado Supreme Court should be reversed," *Brief for the Petitioner* p.50) must not be granted because the Court is constitutionally forbidden from reaching the merits of this dispute. There is no Article III "judgment" to reverse, much less a "final" judgment at law; and even if there were, the proper parties are not before the Court. Simply put, the Supreme Court does not have jurisdiction.

ARGUMENT

I. Respondents Lack Article III Standing

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982) (quoting U.S. Const. Art. III, § 2, cl. 1). Thus, in the absence of an "actual" conflict between legitimate parties, "[t]he power to declare the rights of individuals and to measure the authority of governments . . . 'is not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States.'" *Id.* (quoting *U.S. v. Ferreira*, 13 How. 40, 48 (1852)). "As an incident to

the elaboration of this bedrock [case or controversy] requirement, th[e Supreme] Court has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Id.*

Standing "limits the category of litigants empowered to maintain a lawsuit in federal court." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016). It can be established only where, among other things, "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975). Because "Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches, and confines the federal courts to a properly judicial role," *Spokeo*, 578 U.S. at 338 (cleaned up), it is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth*, 422 U.S. at 518-19.[11] In other words, it is a constitutional requirement of profound importance in every case. Where, as here, a necessary party lacks Article III standing, the Supreme Court lacks jurisdiction.

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[11] Standing "cannot be 'inferred argumentatively from averments in the pleadings,' but rather 'must affirmatively appear in the record.'" *FW/PBS v. City of Dallas*, 493 U.S. 215, 231 (1990) (citations omitted). A statutory or procedural right of action does not, alone, establish standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (procedural right); *Spokeo*, 578 U.S. at 331 (statutory violation). And standing cannot be waived. *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019); *see Renee v. Duncan*, 686 F.3d 1002, 1012 (9th Cir. 2012) ("Lack of Article III standing is a non-waivable jurisdictional defect").

A. It Was Decided Below that the Six Colorado Voters, Anderson, *et al.*, Did Not Have Article III Standing

In the first and second instances, the matter now before the court involved "a group of Colorado electors eligible to vote in the Republican presidential primary"[12] (Anderson, *et al.*) on one side of the "v." and a respondent (Jenna Griswold, as Colorado Secretary of State) and two intervenors (the Colorado Republican State Central Committee and Donald J. Trump) on the other. *Anderson v. Griswold*, 2023 CO 63, ¶ 1. (Dec. 19, 2023); *see also Anderson v. Griswold*, 2023 WL 8006216 (Colo.Dist.Ct. Nov. 17, 2023). The Coloradoans, through a petition procedure under the Colorado Election Code, "requested that the district court prohibit Jena Griswold, in her official capacity as Colorado's Secretary of State . . . from placing President Trump's name on the presidential primary ballot." *Id.* ¶ 2; *see Secretary of State Jena Griswold's Application for Enlargement and Division of Time for Oral Argument* p.4 ("The Respondent Electors . . . filed this case as petitioners *against* the Secretary.")

The Colorado voters also "requested declaratory relief against both the Secretary and Trump." 2023 WL 8006216, at *2. "The declaratory relief requested included a declaration that Trump was not constitutionally eligible for the office of the presidency." *Id.* Mr. Trump then intervened and attempted to remove the case to federal court; but "the federal district court remanded the case back to state court, concluding that it lacked jurisdiction because the Electors had no

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12 "'Elector' means a person who is legally qualified to vote in this state." C.R.S. § 1-1-104(12).

Article III standing and the Secretary had neither joined nor consented to the removal."[13] 2023 CO 63, ¶ 15. When Mr. Trump moved to dismiss the claim for declaratory relief on the grounds that "there [wa]s no standing on the declaratory judgment claim because there is no particularized or concrete injury . . . the Petitioners agreed to dismiss their declaratory judgment claim." 2023 WL 8006216, at *3.

Thus, it was mutually understood from early on in litigation that Anderson, *et al.*, had no Article III standing. In fact, the voters strategically benefitted from this lack of standing, insofar as Mr. Trump was not able to remove to federal court. The matter was able to proceed solely because of C.R.S. § 1-1-113, which outlines Colorado's atypical "expedited statutory procedure for litigating election disputes." 2023 CO 63, ¶ 46. That statutory procedure, as interpreted by Colorado courts, permits "[c]andidates, or other electors, who disagree with the Secretary of State's decision regarding whether to certify a candidate to the ballot can challenge the Secretary's decision in court." 2023 WL 8006216, at *58. To issue such a challenge, "any eligible elector" can file a "verified petition in a district court of competent jurisdiction." C.R.S. § 1-1-113(1); *see also* C.R.S. § 1-4-1204(4) (permitting a "challenge to the listing of any candidate on the presidential primary election ballot . . . in accordance with section 1-1-113(1).") Since the Election Code contemplates a proceeding pursuant to state law, the petitioners do not need Article III standing.

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[13] *i.e.*, because Secretary Griswold was on Mr. Trump's side of the "v.", the matter could not be removed to federal court.

B. As a Matter of Law, Anderson, *et al.*, Lack Article III Standing

One well-established principle in the doctrine of standing is that "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992). Courts have consistently applied this principle to reject voter standing. *See*, *e.g.*, *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146 (N.D. Cal. 2008) (no standing to challenge candidate John McCain's qualifications where "plaintiff himself is not a candidate in competition with John McCain"); *Berg v. Obama*, 586 F.3d 234, 240 (3d Cir. 2009) (plaintiff's "angst that the presence on the ballot of an ineligible candidate might lessen the chances that an eligible candidate might win was a non-cognizable derivative harm.")

The Supreme Court specifically affirmed this principle with respect to constitutional qualifications for public office in *Ex parte Levitt*, 302 U.S. 633 (1937). There, two members of the Supreme Court bar challenged the eligibility of former Alabama Senator Hugo Black to serve as a Justice of the Supreme Court. On paper, they were probably right.[14] But the

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[14] Article I, § 6, cl. 2 states that "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time." Black had been a senator when Congress "encreased" Supreme Court salaries. *See*, *generally*,

Court rejected this challenge without even considering its merits. *Id.* at 636 ("It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action . . . it is not sufficient that he has merely a general interest common to all members of the public.") If members of the Supreme Court bar lacked standing to challenge the plausibly unconstitutional appointment of a Justice to the Supreme Court, the six everyday Colorado voters can scarcely expect a different result.

C. Standing as Antidote to "Lawfare"

The issue before the Court has significant political implications. While that alone is not a reason to find that the matter is not justiciable, it gives rise to legitimate concerns about the potential for partisan abuses of the judiciary – *i.e.*, "lawfare."[15] Of significance here is the fact that Anderson, *et al.*, are not an organic group of litigants who sought out legal representation after suffering personal harm. They are so-called "proxy plaintiffs" for a partisan advocacy

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William Baude, *The Unconstitutionality of Justice Black*, 98 Tex. L. Rev. 327 (2019) (arguing that Hugo Black should have been automatically constitutionally precluded from serving on the Supreme Court).

15 *See Lawfare*, Cambridge Dictionary, [https://dictionary.cambridge.org/us/dictionary/english/lawfare] ("the use of legal action to cause problems for an opponent"); *Lawfare*, Collins Dictionary [https://www.collinsdictionary.com/us/dictionary/english/lawfare]; ("the strategic use of legal proceedings to intimidate or hinder an opponent").

group, Citizens for Responsibility & Ethics in Washington ("CREW"),[16] which has close ties to the Democratic Party.[17] When it comes to Donald Trump, CREW's partisan bias is particularly pronounced: it has been openly committed to hamstringing Mr. Trump's political ambitions since the former president first took office in 2017.[18] While CREW's partisan disposition does not affect the merits of this litigation whatsoever, the fact remains that this matter has been brought before the Supreme Court by a third-party organization that raised money from Democratic Party megadonors on the promise to "kick Donald Trump's ass."[19]

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16 CREW, *Lawsuit Filed to Remove Trump from Ballot in CO Under 14th Amendment* (Sept. 6, 2023) https://www.citizensforethics.org/news/press-releases/lawsuit-filed-to-remove-trump-from-ballot-in-co-under-14th-amendment/ (announcing legal challenge); CREW, *Colorado lawsuit enforcing Donald Trump's constitutional disqualification* (viewed Jan. 29, 2024) https://www.citizensforethics.org/legal-action/lawsuits/colorado-lawsuit-enforcing-donald-trumps-constitutional-disqualification/.

17 *See* InfluenceWatch, *Citizens for Responsibility and Ethics in Washington (CREW)* https://www.influencewatch.org/non-profit/citizens-for-responsibility-and-ethics-in-washington/; Bill Allison, *CREW's Watchdog Status Fades After Arrival of Democrat David Brock* (Bloomberg, April 11, 2016) https://www.bloomberg.com/politics/articles/2016-04-11/washington-watchdog-adjusts-to-life-with-partisan-roommates.

18 Gabriel Debenedetti, *Brock Groups Set $40 Million Budget to Fight Trump* (Politico, Jan. 21, 2017) https://www.politico.com/story/2017/01/david-brock-fundraising-trump-233974.

19 Rozina Sabur, *Inside the Left-Wing Pressure Group That Has Vowed To Take Down Trump* (Telegraph, Dec. 20, 2023) https://www.telegraph.co.uk/us/politics/2023/12/20/left-wing-pressure-group-crew-taking-on-donald-trump/.

The specter of "lawfare" litigation presents serious practical and ethical problems that make *Trump v. Anderson* a particularly inapt vehicle for a legal issue of this magnitude. For one thing, it detracts from the legitimacy of the judiciary and the franchise. What message does it send to Donald Trump's supporters if a project funded by political megadonors obtains a judicial veto of their first (and in many cases only) choice for president? Not a good one.

Moreover, there is a real worry that CREW's campaign to disqualify Trump, if successful, will (further) open the proverbial floodgates to partisan exploitation of election law to cripple political campaigns. Under this paradigm, we are warned, a flurry of politically motivated and carefully timed lawsuits will emerge on the eve of every major election, forcing candidates to spend valuable time and resources in the courthouse rather than the campaign trail. *See*, *generally*, *Brief of Former Attorneys General Edwin Meese III, Michael B. Mukasey, and William P. Barr; Law Professors Steven Calabresi and Gary Lawson; and Citizens United as Amici Curiae* at 27-30.

If standing to challenge electoral qualifications were to only attach to those with a particularized stake in the outcome, (*e.g.*, *bona fide* candidates, political parties, or state actors), as was the rule prior to January 6, 2021,[20] concerns such as these are

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[20] *E.g.*, *Berg v. Obama*, 586 F.3d 234 (3d Cir. 2009); *Robinson v. Bowen*, 567 F.Supp.2d 1144 (N.D. Cal. 2008); *Kerchner v. Obama*, 669 F.Supp.2d 477 (D. N.J. 2009); *Keyes v. Bowen*, 117 Cal.Rptr.3d 207 (Cal.Ct.App. 2010); *Grinols v. Electoral Coll.*, 2013 WL 2294885 (E.D.Cal. 2013), *aff'd*, 622 F.App'x 624 (9th Cir. 2015); *Strunk v. NY State Bd. of Elections*, 2012 WL 1205117 (N.Y.Sup.Ct. 2012), *aff'd*, 5 N.Y.S.3d 483 (N.Y. App. Div. 2015);

ameliorated. The legitimacy concern is blunted because the legal challenge comes directly from the political adversary (be that an opponent, a party, or a state-level politician). Such suits would be more transparent, would be funded out of both sides' war chests, and would allow those who launch specious suits to be held politically accountable. Meanwhile, the floodgates would not be opened because "proxy plaintiffs" would not be able to anchor "lawfare" litigation campaigns. *Quo warranto*-style relief would still be available to those with proper standing, but it would proceed in a consolidated, orderly, above-the-belt, and transparent manner.

There is also a more serious concern where, as here, a 501(c)(3) organization sponsors or facilitates "lawfare" litigation. A 501(c)(3) organization is a tax-exempt nonprofit, and therefore may "not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3). Initiating and supporting legal initiatives aiming to limit Mr. Trump's ballot access, with the express goal of preventing him from assuming office in 2025, fits squarely into that prohibition. This presents two further reasons that the Court should be particularly adamant that parties demonstrate standing in high stakes "lawfare" litigation: (1) to avoid any whiff of impropriety whereby the general public might infer that the legal action

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Taitz v. Democrat Party of Mississippi, 2015 WL 11017373 (S.D. Miss. 2015); *but see Elliott v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016), *aff'd*, 635 Pa. 212 (2016) (dismissing on other grounds); *State ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619 (N.M.Dist.Ct. Sept. 6, 2022) (CREW test suit); *Anderson v. Griswold*, 2023 WL 7017745 (Colo.Dist.Ct. Oct. 25, 2023).

has, to any degree, been ginned up as a political hatchet job, and (2) to draw a *very* bright line between public interest lawsuits and federal tax fraud.

II. To Answer the Certified Question on the Merits, the Court Would Have to Adjudicate Matters of Fact That Have Not Been Litigated "At Law"

Unless this Supreme Court decides the certified question on case-specific legal technicality, it will be forced to weigh in on the facts as well as the law. However, the facts were never litigated "at law." The proceedings in the courts below certainly had the appearance of judicial proceedings: there were adverse parties, represented by counsel, in a courtroom, with a judge (or, in the case of the Colorado Supreme Court, seven justices). But Article III justice is not about appearances. It is about procedures. The mere fact that this matter was "litigated" in the colloquial sense[21] is not enough. The question is whether it was litigated "at law"; that is, whether there was a *bona fide* "case or controversy" with suitable due process between proper parties before a court of competent jurisdiction.

To avail itself of the factual record below, this Court would first have to establish that the hearing of first instance constituted the sort of judicial proceeding "at law" that would be entitled to "full faith and credit" across the nation. *See* U.S. Const. Art. IV, § 1 ("Full Faith and Credit" clause); *Scott v. McNeal*, 154 U. S.

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[21] "Litigated, adj. . . . (b) *gen*. Contested, disputed." *Litigated*, Oxford English Dictionary (July 2023), https://doi.org/10.1093/OED/7863758212. As opposed to "Litigated, adj. . . . (a) Made the subject of a lawsuit; contested at law." *Id.*

34, 46 (1894) ("No judgment of a court is due process of law, if rendered without jurisdiction in the court"); *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 15 (1907) ("The constitutional requirement that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state is necessarily to be interpreted in connection with other provisions of the Constitution, and therefore no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law.")

Here, there was not a case "at law." There was an expedited C.R.S. § 1-1-113(1) administrative hearing overseen by the District Court of Denver and an expedited C.R.S. § 1-1-113(3) appeal of the determination that Section Three "does not apply to Presidents who engage in insurrection or to insurrectionists wanting to be President."[22] *See also Anderson v. Griswold*, 2023 CO 63 at ¶ 46 (explaining that "Colorado's expedited statutory procedure for litigating election disputes may be unfamiliar nationally"). These expedited proceedings did not

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22 *See Petitioner's Application for Review Under § 1-1-113(3) C.R.S.* (Nov. 20, 2023) at 2-3:

Petitioners-Appellants request this Court review the following issue:

> Did the district court commit reversible error in ruling that Section 3 of the Fourteenth Amendment, which disqualifies people who engaged in insurrection against the Constitution after taking an oath to support the Constitution, does not apply to Presidents who engage in insurrection or to insurrectionists wanting to be President?

have parties with Article III standing, did not involve a court with final authority to decide whether Mr. Trump would be permitted to assume office if elected,[23] and were litigated at a pace more befitting a preliminary injunction than "one of the most important cases in American history." *Amar* & *Amar*, p.1.

The Court should recognize the decisions below for what they are: an administrative hearing in the first instance and an advisory opinion by the Colorado Supreme Court in the second. This poses a problem because, even assuming that these expedited C.R.S. § 1-1-113 determinations are "final judgments or decrees" for purposes of 28 U.S.C. § 1257 (which is not a given), the *constitutional* "case or controversy" requirement still applies. Thus, to the extent that the C.R.S. § 1-1-113(1) hearing was "wanting in the due process of law," *Old Wayne Mut.*, 204 U.S. at 15, or its determinations "rendered without jurisdiction," *Scott*, 154 U. S. at 46, the Court must operate as if the fruit of that proceeding (*i.e.*, the factual record) does not exist – effectively liquidating any "case" or "controversy."

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[23] Even the most ardent supporters of disqualification understand that the Colorado decision would not bind other states, let alone the national government. *See*, *e.g.*, *Amicus Curiae Brief of Akhil Reed Amar and Vikram David Amar in Support of Neither Party* pp.4-5 & 30 (*Amar & Amar*) (abstention by the Supreme Court would beget a "fifty-state solution" whereby every state would make its own individual decision as to Mr. Trump's (dis)qualifications under Section Three). This is significant because a court has no Article III jurisdiction when it cannot redress the grievance at hand. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

III. The Matter Before the Court Is an Academic Question Cloaked in Juridical Trappings

If the Supreme Court must abide by one commandment, it is this: "THOU SHALT NOT ISSUE ADVISORY OPINIONS." The prohibition against advisory opinions has been in effect since the beginning of the Republic[24] and remains the rule today. *Marbury v. Madison*, 5 U.S. 137, 176-77 (1803); *Ex parte Levitt*, 302 U.S. 633, 636 (1937); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Carney v. Adams*, 592 U.S. 53, 58 (2020); *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423–24 (2021). The parties in this matter urge the Supreme Court to violate this most sacred dictate based solely on exceptional exigency and national significance. *See Petitioner Donald J. Trump's Petition for Writ of Certiorari*, p.18 (the issues raised "are of exceptional importance and urgently require this court's prompt resolution"); *Anderson Respondents' Brief in Response to Petitioner Donald J. Trump's Petition*, p.5 (the issues raise "questions of significant national importance that the Court should take up").

This Court must not yield. As John Marshall wrote in *Marbury v. Madison*, Supreme Court advisory opinions are categorically forbidden even when the matter raises "a question deeply interesting to the United States." 5 U.S. at 176. The *Marbury*

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[24] *See Letter to George Washington from Supreme Court Justices, 8 August 1793* ("The Lines of Separation drawn by the Constitution between the three Departments of Government—their being in certain Respects checks on each other—and our being Judges of a court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions" of law that President Washington had asked the Justices to answer).

Court considered an issue far more fundamental than the one the Court is presented with today – "whether an act, repugnant to the constitution, can become the law of the land" – but refused to answer it. *Id.* Likewise, in *Ex parte Levitt*, the Court refused to pass on a question of paramount national importance: whether one of its own was constitutionally ineligible to sit on the nation's highest court. 302 U.S. at 636. The import of this precedent is clear: the U.S. Supreme Court may not entertain threadbare controversies that amount to mere academic quarrels "in the rarified atmosphere of a debating society." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982).

A. *Baude v. Blackman*: the Rarified Debate to Which the Court Has Been Invited

In *The Sweep and Force of Section Three*, a law review article so contemporary that it has yet to be officially published, professors William Baude and Michael Stokes Paulsen make the argument that Donald Trump is "automatically" disqualified under Section Three of the Fourteenth Amendment. *See*, *generally*, William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. Rev. 1 (forthcoming 2024) (Aug. 10, 2023, preprint). Virtually the exact same argument was made by Anderson, *et al.*, in the court of first instance, then in the Colorado Supreme Court, and now in their brief before this Court. *See*, *e.g.*, *Brief on the Merits for Anderson Respondents* pp. 15, 16, 34, 36, & 53 (citing *Sweep and Force* at pp. 17-49, 63-104, 106-107, & 112-122). Likewise, the Colorado Supreme Court majority cited Baude and Paulsen at virtually every step of its analysis. 2023 CO 63 ¶¶ 93 (Section Two is "self-

executing"), 98 (original intent), 100 & 103 (whether *Griffin's Case* is good law), 150 (President is an "Officer of the United States"), & 194 (defining "engage in").

Nor is the opposite position immune to the crutch of nascent academic scholarship. Mr. Trump's brief directly addresses arguments made by Baude and Paulsen, *see Brief for the Petitioner*, pp.29-30 & n.41, and appeals to their principal scholarly rivals, professors Blackman and Tillman. *Id.* p.32 & n.42 (citing Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, 15 NYU J. L. & Liberty 1, 46 (2021)). One of the dissents in the 4-3 Colorado Supreme Court decision cited to Blackman and Tillman several times for important substantive propositions. *See Anderson v. Griswold*, 2023 CO 63 (Samour, J., dissenting) at ¶¶ 279, 299, & 324 (citing Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 Tex. Rev. L. & Pol. 350 (forthcoming 2024) (Nov. 24, 2023, preprint) at pp. 15, 23, 140, & 214-15). Most substantively, the District Court of Denver predicated its decision on the issue that was appealed to the Colorado Supreme Court on the scholarship of professor Kurt Lash. *See* 2023 WL 8006216 at *97 (citing Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, at 10 (Oct. 28, 2023))

Baude, Paulsen, Blackman, Tillman, Lash and many others have initiated a vibrant debate with incredible potential for the future of jurisprudential scholarship.[25] However, as this is a nascent field of

[25] This is not idle praise. Amicus has set out to chronicle this

legal inquiry, many of these complex and critical issues have weathered few (if any) iterations of academic criticism. As a result, some sub-domains have been neglected.[26] Others have produced theories that, though not "half-baked," are certainly "undercooked."[27]

Which is all to say that *Baude*, *et al.*, *v. Blackman*, *et al.*, is unripe for disposition even in the domain of academia. To say "the jury's not out" on these issues is to falsely imply that one has been empaneled. Instead, the parties have appealed the academic quarrel directly to the United States Supreme Court, so that the Justices may consider the clashing arguments in what can only be described as "the rarified atmosphere of a debating society." *Valley Forge Christian Coll.*, 454 U.S. at 472.

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debate at length precisely because it is uncharacteristically vibrant (especially in the stodgy world of legal academia). *See*, *generally*, Jordan L. Michelson, *Jordan Michelson's Section Three Companion* (2024) https://jordanmichelson.substack.com/

[26] Notably, Baude and Paulsen's treatment of "Prior Constitutional Provisions" (an Orwellian name for the Bill of Rights if ever there was one), has garnered little attention despite several *very* controversial provocations. *See*, *e.g.*, *Sweep and Force* at 56 (speculating that a person can be deprived of "the right to hold public office" without due process of law because public office is not property); *Id.* 56-57 (*ex cathedra* proclamation that Section Three was last-in-time and therefore supersedes the Bill of Rights); *Id.* 57-61 (arguing that "free speech principles must give way" to the ostensibly tremendous force of Section Three).

[27] *E.g.*, Baude and Paulsen's theory of constitutional self-execution cashes out to the old economist's saw: "first, assume a can opener."

B. It is an Invitation the Court Must Decline

Baude v. Blackman wears *Trump v. Anderson* like a skin suit, demanding that this country's apex Justices weigh in on whether Baude and Paulsen's theory is "right" as a matter of law or whether the criticisms of Blackman, Tillman, and Lash should prevail. This has the character of an advisory opinion, not a "real and substantial controversy admitting of specific relief through a decree of a conclusive character." *Aetna Life Ins. v. Haworth*, 300 U.S. 227, 240–41 (1937). Consequently, these academic questions are not germane to the Supreme Court of the United States. *See TransUnion LLC*, 594 U.S. at 423–24 ("Under Article III, federal courts do not adjudicate hypothetical or abstract disputes.") Not yet.

CONCLUSION

Advisory opinions are forbidden by Article III, and for good reason: such opinions "grant unelected judges a general authority to conduct oversight of decisions of the elected branches of Government." *California v. Texas*, 141 S.Ct. 2104, 2116 (2021). The fact that the Colorado Supreme Court exercised such authority is of no moment – that tribunal is not governed by Article III. What matters is that the opinion issued by the state court cannot be reviewed by the Supreme Court of the United States; such opinion was a *de facto* advisory opinion, not a final judgment on a "case or controversy" litigated "at law," and thus is not subject to the Supreme Court's appellate jurisdiction.

This outcome will come as a disappointment to many. The issue of Donald Trump's constitutional eligibility for office is no doubt "a question deeply interesting to the United States." *Marbury v. Madison*, 5 U.S. at 176. But unless a *bona fide* "case or controversy" arises between "parties having adverse legal interests," *Rice*, 404 U.S. at 246, this Court has no business addressing it. Until then: mum's the word.

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