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 *AMICI CURIAE* THE SECRETARIES OF STATE OF MISSOURI, ALABAMA, ARKANSAS, IDAHO, INDIANA, KANSAS, MONTANA, NEBRASKA, OHIO, TENNESSEE, AND WEST VIRGINIA IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICI CURIAE*[*]

This case asks the Court to determine who decides when a presidential candidate should be disqualified from a ballot pursuant to Section Three of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 3 (hereinafter "Section Three"). The answer to that question is important, and while States define the role of their Secretaries of State differently, *Amici* emphatically agree the Court should *not* hold that it is their role to make disqualification decisions pursuant to Section Three. *Amici* consist of the following Secretaries of State:

1. The Honorable John R. ("Jay") Ashcroft was elected Missouri's 40th Secretary of State in November 2016, and reelected in November 2020. The Secretary of State is Missouri's "chief state election official[,]" MO. REV. STAT. § 28.035.1; *id.* § 115.136.1; *id.* § 115.158.1(5); *id.* § 115.160.3, and performs all duties "in relation to elections[.]" MO. CONST. art. IV, § 14. In this role, Secretary Ashcroft has spent over seven years implementing state and federal election laws and overseeing Missouri's elections.

2. The Honorable Wes Allen was elected Alabama's 54th Secretary of State in November 2022. The Secretary of State is Alabama's "chief elections official[,]" and is responsible for providing "uniform guidance for election activities" in the State. ALA. CODE § 17-1-3(a). Secretary Allen also previously served nearly a decade as Probate Judge of Pike County, Alabama—the County's "chief elections official[.]" *Id.*

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[*] No person, other than *amici curiae* and their counsel, authored this brief in whole or in part, nor has any person, other than *amici curiae* and their counsel, contributed money intended to fund the preparation or submission of this brief. *See* Rule 37.6.

§ 17-1-3(b). In these roles, Secretary Allen has spent many years implementing state and federal election laws and overseeing Alabama's elections.

3. The Honorable John M. Thurston was elected Arkansas's 34th Secretary of State in November 2018, and was reelected in November 2022. The Secretary of State is Arkansas's "chief election official[,]" ARK. CONST. amend. LI, § 5(b)(1), and serves as Chair of the Arkansas Board of Election Commissioners. ARK. CODE § 7-4-101(b). In this role, Secretary Thurston has spent over five years implementing state and federal election laws and overseeing Arkansas's elections.

4. The Honorable Scott Schwab was elected Kansas's Secretary of State in November 2016, and reelected in November 2020. The Secretary of State is Kansas's "chief state election official," KAN. STAT. ANN. §§ 25-2504, 25-1223, and is responsible for assisting, advising, and generally supervising county election officers in the State. *Id.* §§ 19-3424(a), 25-126(a). The Secretary of State also serves on the State's objections board, which addresses objections to any individual's qualifications to be a candidate. *Id.* § 25-308. In this role, Secretary Schwab has spent over seven years implementing state and federal election laws, and overseeing Kansas's elections. Secretary Schwab is also the current president of the National Association of Secretaries of State.

5. The Honorable Phil McGrane was elected Idaho's 28th Secretary of State in November 2022. The Secretary of State is Idaho's "chief election officer[.]" IDAHO CODE § 34-201. It is the Idaho Secretary of State's "responsibility to obtain and maintain uniformity in the application, operation and interpretation" of Idaho's election laws. *Id.* Secretary McGrane was previously the elected county clerk

overseeing elections in Ada County, Idaho, and has nearly twenty years of experience in election administration.

6. The Honorable Diego Morales was elected Indiana's 63rd Secretary of State in November 2022. The Secretary of State is Indiana's "chief election official." IND. CODE ANN. § 3-6-3.7-1. It is the Indiana Secretary of State's responsibility to perform the duties related to elections specified in title 3 of the Indiana Code. *Id.* § 3-6-3.7-2.

7. The Honorable Christi Jacobsen was elected Montana's 22nd Secretary of State in November 2020. The Secretary of State is Montana's "chief election officer[.]" MONT. CODE ANN. § 13-1-201. It is the Montana Secretary of State's "responsibility to obtain and maintain uniformity in the application, operation, and interpretation" of Montana's election laws. *Id.*

8. The Honorable Robert B. ("Bob") Evnen was elected Nebraska's 27th Secretary of State in November 2018, and reelected in November 2022. In Nebraska, the Secretary of State supervises the conduct of primary and general elections, provides training for election officials, and enforces Nebraska's Election Act. NEB. REV. STAT. § 32-202. The Secretary also decides "disputed points of election law[,]" which "have the force of law until changed by the courts." *Id.* § 32-201. Secretary Evnen has spent five years implementing state and federal election laws and overseeing Nebraska's elections.

9. The Honorable Frank LaRose was elected Ohio's 51st Secretary of State in November 2018, and reelected in November 2022. The Secretary of State is Ohio's "chief election officer[,]" OHIO REV. CODE ANN. § 3501.04, and performs all duties related to the proper conduct of elections. *Id.* § 3501.05. In this role,

Secretary LaRose has spent more than five years implementing state and federal election laws and overseeing Ohio's elections.

10. The Honorable Tre Hargett was first elected Tennessee's Secretary of State by Tennessee's legislature in 2009, and reelected in 2013, 2017, and 2021. In Tennessee, the Secretary of State oversees the Coordinator of Elections and the Division of Elections of the Tennessee Department of State. TENN. CODE ANN. § 2-11-201. As Secretary of State, Secretary Hargett is responsible for certifying candidates' names on the presidential primary ballot in Tennessee. *Id.* § 2-5-205. Secretary Hargett is also a past president of the National Association of Secretaries of State, and has fifteen years of experience implementing state and federal election laws and overseeing Tennessee's elections.

11. The Honorable Andrew ("Mac") Warner was elected West Virginia's 30th Secretary of State in November 2016, and reelected in November 2020. The Secretary of State is West Virginia's "chief election official[,]" and is authorized to administer the State's various election laws. W. VA. CODE § 3-1A-6. During his tenure, Secretary Warner has overseen and administered numerous state and federal elections held in West Virginia.

Amici, therefore, possess the relevant experience and expertise that would be helpful to this Court in construing Section Three.

SUMMARY OF ARGUMENT

Secretaries of State serve an important role in our Republic, carrying out free and fair elections in the States. In doing so, they sometimes exercise important ministerial functions, such as evaluating a candidate's age and residency to ensure compliance with constitutional requirements.

But, until now, Secretaries of State have not exercised substantive authority to exclude a candidate from a ballot on the basis of the Fourteenth Amendment's insurrection clause. Whatever the Court decides in this case about the scope of that clause and the procedures for applying it, the Court *should not* give to Secretaries of State an inherent power to disqualify candidates for office. Such a decision would run counter to the plain text of Section Three and historical practice and understanding of the meaning of that clause. It would also introduce serious practical problems that would heighten partisan politics and lead to anti-democratic results. Whoever decides disqualification on the basis of insurrection, it should not be these state actors.

The insurrection clause addresses a candidate's moral and political fitness for office on the basis of national loyalty, which makes it different from other constitutional prerequisites for office, which are simple demographic requirements like age and citizenship. Secretaries of State are ill-positioned to evaluate the complex and sensitive moral question of fitness on the basis of loyalty. This is not a power these state officeholders want, and it is not one the Constitution gives them.

Section Three's purpose is clear: It prohibits someone from "hold[ing]" any of the enumerated offices if that person, "having previously taken an oath . . . to

support the Constitution of the United States," has "engaged in insurrection or rebellion against" the Constitution or has "given aid or comfort to the enemies thereof." U.S. CONST. amend. XIV, § 3. But according to the Colorado Supreme Court, "Section Three" does not state "*who decides* whether the disqualification has attached in the first place." *Anderson v. Griswold*, 2023 WL 8770111, at *19 (Colo. Dec. 19, 2023) (per curiam) (emphasis added), *cert. granted sub nom.*, *Trump v. Anderson*, 2024 WL 61814 (U.S. Jan. 5, 2024).

This case asks the Court to address the following question: Who decides when a presidential candidate is disqualified from a State's primary election ballot? Whatever the answer to that question, it emphatically should *not* be a power given to Secretaries of State.

The text of Section Three does not empower state officials such as Secretaries of State to make disqualification decisions pursuant to it. This Court has never interpreted Section Three to encompass such a power in over 150 years since the Fourteenth Amendment's ratification, and it should not start now. While other parts of the Constitution impose affirmative obligations on the States, those provisions are rote and divorced from the messy—and inherently political—question whether the insurrection clause should bar a candidate from office. Thus, a State's exercise of any disqualification power pursuant to those provisions—like, for example, disqualification based on a candidate's ineligibility due to age—is a poor foil for a disqualification decision made under the Fourteenth Amendment.

Section Three's original public meaning confirms what its plain text suggests: It was never meant to stand alone as a basis for States to disqualify candidates from federal office. Even before Chief Justice

Chase's decision in *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869), in which he held Section Three required federal enforcement legislation, state officials acted consistently with this view.

State officials who exercised a disqualification power in the years after ratification did so by relying on *state statutes* explicitly referencing Section Three to disqualify *state* office-seekers. This history demonstrates that state officials likely construed Section Three as an invitation for federal and analogous state legislation to enable disqualification, and unlikely viewed Section Three as self-executing—otherwise, there would have been no need for States to enact separate legislation adopting and implementing Section Three's disqualification provisions. State officials relied on Section Three analogues—in lieu of direct enforcement under Section Three—because they believed they could not disqualify any candidate directly absent federal enabling legislation.

This view is consistent with the publicly-available understanding of some members of the Reconstruction Congress and some members of the ratifying public. Both groups understood Section Three was not self-executing and thus required Congress to pass enforcement legislation under Section Five. Neither group held the view that Section Three alone empowered state officials to disqualify candidates for federal office from the ballot. Indeed, Section Three was enacted at a time when the Reconstruction Congress passionately fought to enlarge federal power, and to curtail state power. It would have been ironic indeed for the Reconstruction Congress to believe Section Three would be fully and faithfully enforced on nothing more than the good faith of Southern Secretaries of State.

Even if the Court disagrees, and holds that Section Three is self-executing, Secretaries of State should not

be the decision-makers tasked with exercising any disqualification power. The exercise of such a power is not the type of ministerial qualification decision that a Secretary of State is well-equipped to make. It is, rather, a complex, political, and adjudicative question that requires a well-defined process that allows for a fulsome factual inquiry. Worse, allowing elected Secretaries of State to make time-sensitive and unreviewable decisions about ballot qualification will lead to partisan abuse. Tit-for-tat disqualification decisions, if abused by partisan actors, sets a dangerous precedent for a deeply-divided Nation.

ARGUMENT

I. SECTION THREE DOES NOT EMPOWER SECRETARIES OF STATE TO DISQUALIFY CANDIDATES FOR FEDERAL OFFICE

A. The Plain Text Does Not Empower Secretaries of State to Disqualify Presidential Candidates.

Section Three of the Fourteenth Amendment does not empower state officials such as Secretaries of State to disqualify presidential candidates from a State's primary election ballot under its plain text. That text states:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the

> Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. CONST. amend. XIV, § 3.

In this case, the Colorado Supreme Court correctly noted that "Section Three" does not state "who decides whether the disqualification has attached in the first place." *Anderson*, 2023 WL 8770111, at *19.

There is no express grant of authority to the States in this text, and when Congress means to give the States a power over federal elections, it does so expressly, not impliedly. Other provisions of the Constitution thus expressly impose affirmative obligations on the States. For example, the Electors Clause provides that "[e]ach State shall appoint . . . a Number of Electors" for the election of the President. U.S. CONST. art. II, § 1, cl. 2. The "[e]ach State shall" language in the Electors Clause has been construed as "impos[ing] an affirmative obligation on the States to establish the manner for appointing electors." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2329 (2020) (Thomas, J., concurring in the judgment) (citation and quotation marks omitted); *accord U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995) (noting that the "context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States").

Likewise, the Elections Clause provides that the "Times, Places and Manner of holding Elections" for Congress "shall be prescribed in each State by the Legislature thereof[.]" U.S. CONST. art. I, § 4, cl. 1. The Court has said that this express "duty" under the

Elections Clause "parallels the duty" under the Electors Clause. *U.S. Term Limits*, 514 U.S. at 805. The grant of authority is clear and direct.

Section Three contains no such directive to the States in its text. It certainly does not contain an affirmative obligation on a *state official* (like a Secretary of State) to disqualify a presidential candidate. When the Reconstruction Congress passed the Fourteenth Amendment, it knew how these other clauses, with their express authorization, operated. If Congress meant for the insurrection clause to be enforced in a way that mimics these powers, it could have drafted language that similarly imposed an affirmative obligation on the States to exercise the disqualification power that Section Three mentions. That Congress did not do so is powerful evidence that it did not mean to leave this power to any State actor.

The Fourteenth Amendment's other provisions support this interpretation. Section Five, for example, expressly delegates to Congress, not the States, the "power to enforce" the Fourteenth Amendment "by appropriate legislation[.]" U.S. CONST. amend. XIV, § 5. And while the Due Process Clause prohibits States from "depriv[ing] any person of life, liberty, or property, without due process of law," *id.* § 1, the Due Process Clause does not impose an "affirmative obligation" upon the States to "protect" their citizens from such deprivations. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). Rather, it serves as a "limitation on the State's power to act[.]" *Id.*

Accordingly, Section Three's plain text does not empower Secretaries of State to disqualify presidential candidates from a State's primary election ballot.

B. Historical Precedent Confirms That Section Three Does Not Give Secretaries of State An Inherent Disqualification Power Under The Constitution.

Historical practice confirms that the text of Section Three gives the States no affirmative power to disqualify any candidate from seeking federal office under it. If Section Three empowered Secretaries of State to disqualify federal office-seekers, they would have relied on it to remove candidates from the ballot before now. The post-Reconstruction years likely would have been target-rich for the exercise of this authority. But, until now, 150 years of unbroken historical practice points in the other direction. The first time any state official exercised such a power was just last year, when the Maine Secretary of State said she could make a disqualification determination under Section Three by cobbling together old state election laws. She ultimately concluded a presidential candidate was disqualified under Section Three from appearing on her State's primary election ballot.[1] Such a construction of Section Three is not grounded in its text, is undermined by the Fourteenth Amendment's structure, and

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[1] Ruling of the Secretary of State, In re Challenges of Kimberley Rosen et al. to Primary Nomination Petition of Donald J. Trump (Me. Sec'y of State Dec. 28, 2023). The Maine Secretary of State's decision has been appealed. Yesterday, the decision was stayed pending resolution in this case, and the Maine Superior Court remanded the case back to the Secretary for "further proceedings as necessary in light of" the forthcoming disposition in this case. *Trump v. Bellows*, No. AP-24-01, slip op. at 17 (Me. Super. Ct. Jan. 17, 2024). Notably, the court hoped that a decision in this case "will at least clarify what role, if any, state decision-makers, *including secretaries of state* . . . , play in adjudicating claims of disqualification brought under Section Three[.]" *Id.* at 4 (emphasis added).

is inconsistent with the surrounding original public meaning.

Courts viewed the text as requiring congressional action. Soon after the Fourteenth Amendment was ratified, they recognized that "legislation by congress [was] necessary to give effect to the prohibition" within Section Three. *Griffin's Case*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869). In *Griffin's Case*, Chief Justice Chase determined that Section Three was not self-executing, meaning, in that case, that the text alone could not automatically disqualify the state court judge who oversaw the petitioner's conviction. To exercise a disqualification power under Section Three, the Chief Justice recognized, "proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by congress." *Id.* Indeed, any "disability" imposed by Section Three upon an individual can only "be made operative . . . by the legislation of congress in its ordinary course." *Id.* According to Chief Justice Chase, Congress could—and Congress alone must—pass legislation to enforce Section Three.

Contemporary state officials seemingly shared the Chief Justice's understanding of Section Three. State officials who exercised a disqualification power to keep officers from taking or holding office relied on *state* statutes that explicitly referenced Section Three and applied it to *state* officers. *See, e.g.*, INTRUSION ACT, No. 156, § 1, 1868 LA. ACTS 199, 199-200; ELIGIBILITY ACT, No. 39, § 3, 1868 LA. ACTS 46, 47; QUALIFICATIONS ACT, ch. 1, § 8, 1868 N.C. SESS. LAWS, JULY SPEC. SESS. 1, 4. Indeed, in *Worthy v. Barrett*, 63 N.C. 199, 200 (1869), a county commission refused to administer an oath to the elected sheriff based on a North Carolina

analogue to Section Three.[2] Similarly, in *In re Tate*, 63 N.C. 308, 308-09 (1869), a state judge refused to allow the elected solicitor to take office. And in *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 631-33 (1869), *State ex rel. Downes v. Towne*, 21 La. Ann. 490, 490-92 (1869), and *State v. Lewis*, 22 La. Ann. 33, 33 (1870), state judges were removed from office in suits "brought under" Louisiana's analogue to Section Three. *Accord* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 98 n.59 (2021) (citing *Sands v. Commonwealth*, 62 Va. (21 Gratt.) 871, 885-87 (1872), as "rejecting a claim that the Virginia Constitution incorporated the Section Three exclusion as applied to jury service").

These proceedings demonstrate that state officials would move to disqualify when appropriate, but did not believe that Section Three was the basis of their power to do so. The constitutional text prohibits the holding of federal *or state* office by those whom it disqualifies. *See* U.S. CONST. amend. XIV, § 3 ("No person shall . . . hold any office . . . under *any State*[.]") (emphasis added). Thus, if it were self-executing, no state legislation would be required to disqualify any state office-holder under it. Louisiana and North Carolina, at least, believed that more was required to disqualify Civil War insurrectionists, which is why they passed state-level enabling legislation to accomplish that.

Members of the Reconstruction Congress and some members of the ratifying public concurred. Both groups understood Section Three was not self-executing and thus required Congress to pass enforcement

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[2] In *Worthy*, the unsuccessful sheriff petitioned for this Court's review, but the Court dismissed for lack of federal question jurisdiction. *Worthy v. Comm'rs*, 76 U.S. (9 Wall.) 611, 613 (1869).

legislation. *See generally* Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, (Dec. 29, 2023) (manuscript at 7-8, 26-27, 57), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838. That is why Congress enacted legislation to enforce the provisions of Section Three shortly after ratification. *See* ENFORCEMENT ACT OF 1870, ch. 114, 16 Stat. 140, 143. This legislation authorized federal officials to bring *quo warranto* actions in federal court to remove insurrectionist officeholders. *Id.* If the authors of the Fourteenth Amendment believed it contained an inherent disqualification power, they would not have passed redundant legislation to enforce it. If anything, such legislation would undermine a stronger power inherent in the constitutional text itself, and lawmakers at the time were not known for their restrained views of constitutional authority.

In all events, no one held the view that Section Three gave to state officials an inherent disqualification power. Such a view would have been anathema to the Reconstruction Congress, which fought passionately to "enlarge[]" the *federal government's* powers, and to "limit[]" those of the States. *Ex parte Virginia*, 100 U.S. 339, 345 (1879). Powers related to elections would have been central to this view. If anything, by utilizing state laws passed to enforce the provisions of Section Three—in lieu of direct enforcement under Section Three—state officials likely understood they could not do indirectly what Congress did not do directly until 1870. Thus, absent an act of Congress, States cannot disqualify presidential candidates under Section Three.

II. EVEN IF THE COURT HOLDS THAT SECTION THREE IS SELF-EXECUTING, IT SHOULD NEVERTHELESS AVOID ANY CONSTRUCTION THAT EMPOWERS SECRETARIES OF STATE TO EXERCISE AN INHERENT DISQUALIFICATION POWER BECAUSE OF THE OBVIOUS PRACTICAL PROBLEMS THAT WOULD FLOW FROM SUCH A DECISION

Section Three's text and original public meaning suggest that it is not self-executing. However, if the Court holds Section Three *is* self-executing, then *Amici* nevertheless submit that *they* should not be the arbiters of a Section Three disqualification. Serious problems would flow from such a decision.

Although States describe the powers of this office differently, no Secretary of State is well-positioned to evaluate disqualification on the basis of the insurrection clause. While some States[3] authorize a Secretary of State to take an initial pass at a presidential candidate's qualifications to hold office, even that power is very different from a determination of disqualification pursuant to oath-breaking and insurrection. While the nuance of state election laws are dense, there are three useful categories of state power that are relevant here. Understanding how these offices function—even when they function differently—makes clear that *no* Secretary of State should make a Section Three determination.

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[3] Relevant here, the vast majority of States hold state-run presidential primary elections like Colorado and Maine. Fed. Election Comm'n, *2024 Presidential Primary Dates and Candidate Filing Deadlines for Ballot Access*, (Dec. 15, 2023), https://www.fec.gov/resources/cms-content/documents/2024pdates.pdf.

First, some States vest no authority in a Secretary of State to assess and adjudicate a presidential candidate's eligibility as a precondition for placement on the primary election ballot.[4] *E.g.*, *Anderson*, 2023 WL 8770111, at *12 (holding Colorado Secretary of State had "no duty" under Colorado law to "independently investigate the qualifications of a presidential primary candidate"); *Davis v. Wayne Cnty. Election Comm'n*, 2023 WL 8656163, at *13 (Mich. Ct. App. Dec. 14, 2023) (per curiam) (holding Michigan Secretary of State "must place" presidential candidate on the presidential primary ballot "regardless of whether he would be disqualified from holding office" under Section Three), *appeal denied sub nom.*, *LaBrant v. Sec'y of State*, 998 N.W.2d 216 (Mich. 2023); *Growe v. Simon*, 997 N.W.2d 81, 82 (Minn. 2023) (per curiam) (holding Minnesota Secretary of State commits "no error" when presidential candidate is placed on primary ballot after political party "provides his name to the Secretary of State, notwithstanding [the] claim that [the candidate] is disqualified from holding office under Section 3" (quotation marks omitted)); *Taitz v. Democrat Party of Miss.*, 2015 WL 11017373, at *12

[4] The same holds true for placement on the general election ballot. *See, e.g.*, *McInnish v. Bennett*, 150 So. 3d 1045, 1045 (Ala. 2014) (Bolin, J., concurring) (Alabama Secretary of State has no "affirmative duty to investigate the qualifications of a candidate for President of the United States of America before printing that candidate's name on the general-election ballot"); *Wrotnowski v. Bysiewicz*, 958 A.2d 709, 713 (Conn. 2008) (Connecticut Secretary of State is "neither require[d] nor authorize[d] . . . to verify the constitutional qualifications of a candidate for the office of president of the United States" before placing name on the general election ballot); *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 209 (Cal. Ct. App. 2010) (California Secretary of State "does not have a duty to investigate and determine whether a presidential candidate meets eligibility requirements of the United State[s] Constitution" before placement on the general election ballot).

(S.D. Miss. Mar. 31, 2015) ("This court can find no clear legal duty, created by the Mississippi election statutes, for the Secretary of State to inquire into or investigate each presidential candidate's credentials."). Secretaries of State in these States obviously have little experience with—and no administrative structure to support—an evaluation whether a candidate should be disqualified under Section Three.

A second category includes States that have clearly and unambiguously provided a mechanism for their Secretary of State to assess a candidate's constitutional qualifications for placement on the primary ballot. Georgia appears to be the *only* State with such a mechanism. *See* GA. CODE ANN. § 21-2-5(a)-(c). Georgia directly authorizes its Secretary of State to determine whether any "candidate is qualified to seek and hold the public office for which such candidate is offering." *Id.* § 21-2-5(c). "If the Secretary of State determines that the candidate is not qualified," the "Secretary of State shall withhold the name of the candidate from the ballot[.]" *Id.* There is no reason to think that the Reconstruction Congress wanted to give Georgia alone—sitting, as it does, in the heart of the South—the power to judge disqualification pursuant to the insurrection clause.

A third category includes States with more ambiguous grants of authority to their Secretaries of State. Many States—in one form or another—have on the books arcane election laws intended to allow ministerial review of nomination papers, declarations of candidacy, and the like. Maine, for example, authorizes its Secretary of State to determine the "validity" of a nominating petition, which in turn requires a certification under oath that the candidate "meets the qualifications of the office the candidate seeks[.]" ME. REV. STAT. tit. 21-A, §§ 336(3), 337(2), 443. New Jersey

likewise authorizes its Secretary of State to "pass upon the validity" of a nominating petition "in the first instance" and to do so "in a summary way[.]" N.J. REV. STAT. § 19:23-20.2; *see id.* § 19:23-7 ("Accompanying the petition, each person indorsed therein shall file a certificate, stating that he is qualified for the office mentioned in the petition[.]"). Oklahoma more explicitly requires the acceptance of a declaration of candidacy, unless it "shows on its face that the candidate does not meet the qualifications to become a candidate for the office[.]" OKLA. ADMIN. CODE § 230:20-3-37(b).

Whether the States (like Maine) that allow for some power to review qualifications ever intended to operate as a mechanism to enforce Section Three is dubious at best. Most qualification determinations can be made by comparing one uncontested document (a birth certificate to establish age and residency, for example) with the constitutional qualifications required to hold office. If a qualification decision can be made by comparing one state document to another, that is one thing. This is a basic demographic determination.

Section Three's disqualification provision is something quite different: It is a moral determination about a candidate's patriotism and fitness for office. To hold that Congress gave to the States an inherent and expansive disqualification power under Section Three would be shocking. Enabling this view would allow Secretaries of State to disqualify their political rivals (about whom they may claim disloyalty in one form or another) using arcane election laws as a vehicle to mount backdoor challenges to a presidential candidate's qualifications to hold office without any constitutional protection or appellate review of that determination. *Cf. Moore v. Harper*, 600 U.S. 1, 38 (2023) (Kavanaugh, J., concurring) (state courts cannot "'impermissibly distort[]'" state election law

"'beyond what a fair reading required'" (quoting *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)); *see also U.S. Term Limits*, 514 U.S. at 831 (States cannot "dress[] eligibility to stand for [federal office] in ballot access clothing" (citation omitted)).

The Court should construe Section Three in a manner that avoids that contorted and anti-democratic result. The Court should instead allow Secretaries of State (in places where they have such power) to continue to exercise the traditional, ministerial powers they have always had, but no more. Regardless what other powers a State gives its Secretary of State, States generally impose non-discretionary ministerial duties that include certifying candidates and placing their names on the primary election ballot.[5]

When a candidate's name is certified for placement on the ballot, it means the candidate has timely and properly completed the requisite paperwork. *Accord Vowell v. Kander*, 451 S.W.3d 267, 274-75 (Mo. Ct. App. 2014). It is a ministerial function, not a merits determination. Certification statutes are thus unlikely sources of authority to assess a candidate's substantive qualification to hold office. And the traditional, ministerial role of a Secretary of State would likely explain why, before 2023, "*no* Secretary of State ha[d] *ever* deprived a presidential candidate of ballot access based on Section Three[.]"[6]

This leaves to Secretaries of State an appropriately limited power to determine placement on a presidential ballot. Secretaries of State may refuse to place on

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[5] *E.g.*, COLO. REV. STAT. § 1-4-1204(1); GA. CODE ANN. § 21-2-193; ME. REV. STAT. tit. 21-A, §§ 337(1), 443; MICH. COMP. LAWS § 168.615a(1); N.J. REV. STAT. § 19:23-20.1.

[6] In re Challenges of Kimberley Rosen et al., slip op. at 33 (emphases added).

the ballot those presidential candidates who are indisputably ineligible from holding office because they are too young to meet the Constitution's age requirement, *Lindsay v. Bowen*, 750 F.3d 1061, 1064-65 (9th Cir. 2014) (affirming California Secretary of State's exclusion of twenty-seven-year-old from presidential primary election ballot), or because they were not born in the United States. *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (affirming Colorado Secretary of State's exclusion of naturalized citizen from presidential general election ballot), *cert. denied*, 569 U.S. 1018 (2013). This rule is consistent with what this Court has characterized in the ballot-access context as a State's interest in "protect[ing] the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986) (affirming that States may restrict ballot access to avoid "voter confusion" and "frivolous candidacies").

Disqualification under the Fourteenth Amendment asks something quite different. It is not about rote challenges to straightforward constitutional eligibility requirements resolved with paperwork. It is, instead, a difficult, nuanced, and inherently political question of moral character. Where, as here, a presidential candidate's eligibility is disputed on the basis of national loyalty—and, indeed, allegations of insurrection against the United States—a Secretary of State alone should not exercise raw political power to remove the candidate from the ballot.

This line is clear and administrable. In the cases where a candidate is indisputably ineligible to hold office, "there [is] no need for the secretary of state to affirmatively investigate the matter of the candidates' qualifications." *McInnish*, 150 So. 3d at 1050 (Bolin,

J., concurring). That is because any dispute about a candidate's qualifications on the basis of age, residency, or citizenship is resolvable using objective and verifiable data. *See* U.S. CONST. art. II, § 1, cl. 5.[7]

Section Three is a different animal. Whether a presidential candidate has "engaged in insurrection" to warrant disqualification is not a clearcut demographic question like age, residency, or citizenship. It cannot be answered by filling in a bubble in response to census data. Rather, at its core, this question is a subjective, fact-specific, moral determination that may yield different results based on different facts. A question of

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[7] It is an open question whether disqualification under Section Three is a form of punishment or affirmative criteria for holding office. *Compare U.S. Term Limits*, 514 U.S. at 787 n.2 (seeing "no need to resolve" whether Section Three created additional qualifications for office); *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (declining to address whether a disqualification under Section Three constituted a "qualification" for office), *with Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866) ("Disqualification from office many [sic] be punishment, as in cases of conviction upon impeachment."); C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 AKRON L. REV. 1165, 1196 (2009) ("[Chief Justice] Chase made it clear that he took the position that the disability imposed by Section 3 of the Fourteenth Amendment constituted a punishment within the meaning of the law."); HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 127 (1908) (noting "[t]he third section may be called the punitive section of the Amendment").

Regardless of whether disqualification under Section Three is a form of punishment or affirmative criteria, Secretaries of State should not be making the Section Three determination because they are ill-suited to replicate the traditional safeguards one would have for an adjudication in court.

loyalty is a very different thing from an inquiry into age. The cert-stage submissions in this very case make clear that reasonable minds can disagree about when an "insurrection" has occurred and whether someone has "engaged in" one such that they should be disqualified from holding office. *Compare* Pet. for Writ of Cert., at 27-28, *with* Brief in Resp., at 12-13. Vesting election authorities (which, in some States, may include county clerks) with such broad power could lead to the thorny and anti-democratic outcome that different States decide the same candidate is or is not qualified in the same election cycle, and could lead to political recrimination across election cycles.

Secretaries of State are ill-equipped to exercise such a power. The existing statutory framework—which authorizes Secretaries of State to check the math on ballot paperwork—was not built to entertain anything beyond a summary determination. Such a limited review is consistent with the powers Secretaries of State often exercise. They are usually "nonjudicial officer[s]" without "subpoena power or investigative authority" to "investigate the qualifications of all presidential candidates" in "cases where an actual dispute arises regarding a candidate's qualifications." *McInnish*, 150 So. 3d at 1049 (Bolin, J., concurring). A fact-finder with different constitutional protections and administrative support—including built-in due process protections that would accompany such a determination—should make that decision. But absent a disqualification decision properly made by the right authority, Secretaries of State have little guidance in determining when, whether, and how Section Three's disqualification provisions should attach.

Any other result leads to a foreseeable and unfortunate parade of horribles. If Secretaries of State—partisan elected officials—alone may determine who

meets the obtuse provisions of Section Three, there are few obvious safeguards preventing abuse. A disqualification decision would presumably be unreviewable and made without any of the constitutional protections of due process that our system takes for granted in much less significant moments. If disqualification from receiving a social security check merits some constitutional protection, perhaps disqualification for a ballot likewise does. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). And the fact-finder who makes such a determination ought to have more resources and experience at his disposal than Secretaries of State do.

At least two state appellate courts have sounded a warning bell on that very problem in ballot qualification cases that predate this one.

First, the Missouri Court of Appeals in *Vowell v. Kander*, addressed the question whether the Missouri Secretary of State could decline to allow a candidate to appear on a state ballot because voter registration records indicated she had not been a registered voter for the requisite period of time. 451 S.W.3d at 270. The Secretary took the position that the candidate would not be placed on the primary ballot unless she produced documentation proving her qualifications to hold office. *Id.* By virtue of a statute requiring him to certify that a candidate "'is entitled to be voted for[,]'" the Secretary claimed he could "investigate and adjudicate whether candidates who file declarations of candidacy are qualified to serve in the office they seek." *Id.* at 274 (citation omitted).

The state appellate court rejected that claim, holding in part that the Secretary had a limited role in election matters in order to "avoid[] the assumption of judicial functions by ministerial officers." *Id.* at 275 (quotation marks and citation omitted). That, "in turn[,]

minimizes the partisan political mischief that can result from ministerial officers adjudicating candidate qualifications." *Id.* The court in *Vowell* thus refused to sanction a rule that would inevitably weaponize a traditionally ministerial role and allow a Secretary of State to keep a political rival off the ballot.

The California Court of Appeals echoed a similar concern in *Keyes v. Bowen*. There, a group of voters questioned whether President Obama was a natural born citizen qualified to be President. 117 Cal. Rptr. 3d at 209. Relevant here, they argued that the California Secretary of State had an "affirmative duty to verify" a presidential candidate's eligibility to hold office. *Id.* The court found no merit to that contention. The Secretary of State has no "duty to investigate and determine whether a presidential candidate meets eligibility requirements of the United State[s] Constitution." *Id.* The "presidential nominating process," the court explained, "is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified[.]" *Id.* The court warned of the "truly absurd" and "chaotic" results that would arise were it otherwise. *Id.* at 215. Election authorities would effectively be given the "power to override a party's selection of a presidential candidate." *Id.* Courts in all fifty States, if allowed "to issue injunctions restricting certification of duly-elected presidential electors," could yield "conflicting rulings," which would "delay[] transition of power in derogation of statutory and constitutional deadlines." *Id.*

The court in *Keyes* thus concluded that "[a]ny investigation of eligibility" is not for election authorities—it is instead "best left to each party, which presumably will conduct the appropriate background check or risk that its nominee's election will be derailed by an objection in Congress, which is authorized to entertain and

resolve the validity of objections following the submission the electoral votes." *Id.*[8] The question in *Keyes* was an easily-resolvable demographic contention. If that question caused the court concern about the consequences flowing from a Secretary's verification of a candidate's eligibility, *a fortiori* questions of insurrection and loyalty raise those concerns, too.

Vowell and *Keyes* correctly identified the harms that would flow from a needling Secretary of State. Section Three should not, in the words of Professor McConnell, be construed as "empowering partisan politicians such as state Secretaries of State to disqualify their political opponents from the ballot, depriving voters of the ability to elect candidates of their choice."[9] Without guidance over nebulous definitions of insurrection and when a candidate has engaged in it, and without the necessary procedural safeguards to prevent a partisan tit for tat, *Amici* will be placed in a precarious position—one that potentially jeopardizes the "right to vote freely for the candidate of one's choice[.]" *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Court should adopt a construction of Section Three that avoids that anti-democratic result.

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[8] This Court denied a petition for writ of certiorari. *Keyes v. Bowen*, 565 U.S. 817 (2011).

[9] Eugene Volokh, *Prof. Michael McConnell, Responding About the Fourteenth Amendment, "Insurrection," and Trump*, VOLOKH CONSPIRACY (Aug. 12, 2023, 6:58 PM), https://reason.com/volokh/2023/08/12/prof-michael-mcconnell-responding-about-the-fourteenth-amendment-insurrection-and-trump/.

CONCLUSION

The Court should reject an interpretation of Section Three of the Fourteenth Amendment that empowers state Secretaries of State to disqualify presidential candidates from the primary election ballot.

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