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 FOR U.S. TERM LIMITS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

Amicus U.S. Term Limits ("USTL") is a nonpartisan, nonprofit organization based in Washington, D.C., that advocates for term limits at all levels of government.[1] USTL was the petitioner in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), where, by a 5-to-4 vote, the Court prohibited States from placing term limits on their members of Congress. That ruling prevents congressional term limits—which USTL had helped enact and defend in twenty-three States—from taking effect.

When this Court decided *Thornton* nearly three decades ago, it prevented enforcement of term limits and ballot access provisions that had been adopted in nearly two dozen States. *See Thornton*, 514 U.S. at 917 n.39 (Thomas, J., dissenting). Most of those state laws and constitutional amendments remain on the books today, with this Court's precedent the only thing standing in the way of implementation.

USTL is neutral as to the result of this case. But USTL is not neutral as to the constitutionality of congressional term limits and the importance of correcting *Thornton*'s errors. Petitioner and several amici have submitted briefs citing *Thornton* in support of their arguments for reversing the decision below. USTL submits this brief to explain that, however the Court decides this case, the Court's opinion need not and should not endorse *Thornton*'s

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[1] No counsel for a party authored this brief in whole or in part. No person other than U.S. Term Limits made a monetary contribution intended to fund the preparation or submission of this brief.

holding.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court need not resort to *Thornton*'s holding to resolve this case because this case does not implicate that holding. And the Court should not rely on *Thornton*'s holding because that holding is egregiously wrong. Future cases will likely allow the Court to reconsider *Thornton*. The Court has no cause to stray into that issue here.

I. In *Thornton*, a bare majority of this Court held that a State may not add *state-law* qualifications for the State's representatives in the U.S. Congress. In this case, the Colorado Supreme Court correctly understood itself to be enforcing a qualification for the Presidency from the *Federal Constitution*. The question here is whether that court's decision was correct under the Federal Constitution. USTL takes no position on that question. But that question in no way implicates *Thornton*'s holding.

II. *Thornton*'s holding is egregiously wrong. As Justice Thomas explained in his *Thornton* dissent, which was joined by three other Justices, and in his concurrence (joined in relevant part by Justice Gorsuch) in *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020), States retain the power under the Tenth Amendment to set conditions on their representatives in Congress as well as on their presidential electors. By relying on *Thornton* here, the Court would unduly extend *Thornton*'s already flawed logic, thus needlessly impairing its own opportunity to provide the full reconsideration that *Thornton* demands.

Given continuing efforts in several States to set additional qualifications on their representatives in Congress, that opportunity is likely to arise in a future case.

For these reasons, *Thornton*'s holding should play no part in whatever decision the Court issues here.

ARGUMENT

I. THIS CASE DOES NOT IMPLICATE *THORNTON*.

A. *Thornton* concerned a ballot access provision of the Arkansas Constitution that prohibited anyone who had represented the State in the U.S. House of Representatives for three terms or in the U.S. Senate for two terms from appearing on the ballot for those offices. By a 5-to-4 vote, the Court deemed the provision unenforceable. "Allowing individual States to adopt their own qualifications for congressional service," the Court reasoned, "would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States." *Thornton*, 514 U.S. at 783.

Although that reasoning is flawed, *see infra* Part II, it reflects that the question whether States may "adopt *their own qualifications* for congressional service" was *the* question in the case. *Id.* (emphasis added). That question accordingly shaped the entire majority opinion. As the Court framed the inquiry: "the constitutionality of [the term-limits provision] depends critically on the resolution of . . . whether the [Federal] Constitution forbids States to add to or alter the qualifications specifically enumerated in the Constitution" for members of the U.S. Congress. *Id.* at

787; *see also* U.S. CONST. art. I, § 2, cl. 2 (Qualifications for U.S. Representatives); U.S. CONST. art. I, § 3, cl. 3 (Qualifications for U.S. Senators). The Court began its analysis by recounting its resolution, in *Powell v. McCormack*, 395 U.S. 486 (1969), "of a related but distinct issue: whether *Congress* has the power to add to or alter the qualifications of its Members." *Thornton*, 514 U.S. at 787 (emphasis added). The Court interpreted *Powell* to conclude that Congress may not do so. *See id.* at 796. And the Court held that the Federal Constitution likewise prohibits "state-added qualifications." *Id.* at 800.

Here, by contrast, the Colorado Supreme Court did not purport to create any new state law qualification for the Presidency but instead was, and understood itself to be, enforcing a qualification that appears in the Federal Constitution itself—namely, Section Three of the Fourteenth Amendment. The Colorado Supreme Court summarized its relevant holdings as follows:

> • The [Colorado] Election Code allows the Electors to challenge President Trump's status as a qualified candidate *based on Section Three*. . . .
>
> • Congress does not need to pass implementing legislation for *Section Three's* disqualification provision to attach, and Section Three is, in that sense, self-executing.
>
> • Judicial review of President Trump's eligibility for office *under Section Three* is not precluded by the political question

> doctrine.
>
> • *Section Three* encompasses the office of the Presidency and someone who has taken an oath as President. . . .
>
> • The district court did not err in concluding that the events at the U.S. Capitol on January 6, 2021, constituted an "insurrection."
>
> • The district court did not err in concluding that President Trump "engaged in" that insurrection through his personal actions.

Pet. App. 9a–10a, ¶ 4 (emphases added). "The sum of these parts," the court concluded, "is this: President Trump is disqualified from holding the office of President *under Section Three*; because he is disqualified, it would be a wrongful act under the [Colorado] Election Code for the Secretary to list him as a candidate on the presidential primary ballot." Pet. App. 10a, ¶ 5 (emphasis added).

The validity of that conclusion depends on the holdings listed above. None of those holdings concerns whether Colorado may adopt its "own qualifications" for who its presidential electors may vote for in the Electoral College. *See Thornton*, 514 U.S. at 783. Rather, as those holdings show, this case concerns the meaning and applicability of a federal constitutional provision—Section Three—about which *Thornton* has nothing to say. Indeed, the *Thornton* Court *explicitly avoided* construing Section Three: The Court did not need to resolve whether Section Three in fact constitutes a qualification for federal office because it

is in any event "part of the text of the Constitution," meaning that it has "little bearing on whether Congress and the States may *add* qualifications to those that appear in the Constitution." *Id*. at 787 n.2 (emphasis added). On its own terms, then, *Thornton* is irrelevant to the questions presented in this case.

Petitioner's reliance on *Thornton* is therefore misplaced. At the certiorari stage, Petitioner asserted that the Colorado Supreme Court violated *Thornton* "by adding a new qualification for the presidency," specifically by "requir[ing] that a president be 'qualified' under Section 3 not only on the dates that he holds office, but also on the dates of the primary and general elections." Cert. Pet. 33. This argument rests upon a mischaracterization of the Colorado Supreme Court's decision. Whether that decision is right or wrong depends entirely on the qualifications for President that appear in the Federal Constitution, not the validity of any additional conditions or requirements that Colorado law has imposed upon that State's presidential electors.

To be sure, the Colorado Supreme Court held that if the *Federal* Constitution disqualifies former President Trump from returning to the White House, then he cannot appear on the ballot as a matter of state law. *See* Pet. App. 10a, ¶ 5. But *Thornton* is no more implicated by that holding than by the Colorado Supreme Court's interpretation of the Fourteenth Amendment. The *Thornton* Court held that States cannot use ballot-access restrictions to do indirectly what it concluded they cannot do directly, *i.e.*, add to the Constitution's qualifications for a federal office. *See* 514 U.S. at 829–30. If the qualification is already

in the Federal Constitution, however, that problem does not arise. No one could argue that Colorado violates *Thornton* by using ballot-access restrictions to enforce the presidential age and citizenship qualifications or the term limitations that appear in the Federal Constitution. *See* U.S. CONST. art. II, § 1; U.S. CONST. amend. XXII, § 1; COLO. SEC'Y OF STATE, *President & Vice President General Election: 2024 Candidate Qualification Guide* at 3 (July 27, 2023), https://bit.ly/3O47bpE (listing these provisions as "Basic Qualifications").

Petitioner likens enforcing Section Three at this stage to impermissibly enforcing a State-law "pre-election residency requirement for congressional or senatorial candidates, when the Constitution requires only that representatives and senators inhabit the state when elected." Cert. Pet. at 33 (internal quotation marks omitted); *see also* Daines Amicus Br. at 14 (same). The lower-court decisions that have prohibited States from enforcing such requirements are wrong, for they are based upon *Thornton*'s misreading of the Constitution. *See Texas Democratic Party v. Benkiser*, 459 F.3d 582, 589–90 (5th Cir. 2006). In any event, whether a State may impose additional residency requirements on its congressional delegation as a matter of *state* law has no bearing on whether the Colorado Supreme Court erred when it purported to enforce what it viewed as a *federal* qualification for the Presidency.

The remaining references to *Thornton*'s holding throughout the briefing miss the mark for the same basic reasons. The amicus brief for the Republican National Committee and National Republican

Congressional Committee notes that, under *Thornton*, "States cannot even enforce state law to disqualify someone from federal office." RNC Amicus Br. at 14. That is a correct statement of *Thornton*'s holding but, again, is not what happened here. The same is true of the briefs in *Colorado Republican State Central Committee v. Anderson*, which involves a similar petition for certiorari to the Colorado Supreme Court. *See* Cert. Pet. at 25, *Colo. Republican State Central Committee*, No. 23-696 (incorrectly suggesting that a State would create a new qualification in violation of *Thornton* by enforcing any qualification found in Section Three); Public Interest Legal Foundation Amicus Br. at 10, *Colo. Republican State Central Committee*, No. 23-696 (citing *Thornton* for the point—not at issue here—that "eligibility for office is fixed and exclusive in the Constitution") (internal quotation marks omitted). Again, because the Colorado Supreme Court understood itself to be enforcing a qualification from the Federal Constitution, *Thornton*'s holding simply does not apply.

B. Analyzing this case as if the Colorado Supreme Court had grounded its decision in state law rather than Section 3 of the Fourteenth Amendment would also force the Court to decide a difficult question that it took care to reserve four terms ago: whether the Presidential Qualifications Clause permits a State to "adopt[] a condition on its appointments [to the Electoral College] that effectively imposes new requirements on presidential candidates." *Chiafalo*, 140 S. Ct. at 2324 n.4. Although some of Petitioner's amici cast that question as an easy one on which all

nine Justices agreed in *Thornton*, *see* Daines Amicus Br. at 5–6, the question is in fact novel and far from straightforward.

On the one hand, it is beyond serious dispute that Colorado "has no reserved power to establish qualifications for the office of the President." *Thornton*, 514 U.S. at 861 (Thomas, J., dissenting). That is because "the selection of the President is not up to [Colorado] alone, and [Colorado] can no more prescribe the qualifications for that office than it can set the qualifications for Members of Congress from Florida." *Id.* The President holds nationwide federal office, and a single State cannot add to the qualifications for President for the same reason that it could not unilaterally close the Bank of the United States.

On the other hand, this Court has long recognized that the States may "set qualifications for their [own] Presidential electors." *Id.* (citing *Williams v. Rhodes*, 393 U.S. 23, 29 (1968), and *McPherson v. Blacker*, 146 U.S. 1, 26–36 (1892)). The Court expressly acknowledged as much in *Chiafalo*, observing that "[a] State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period." 140 S. Ct. at 2324. Consistent with this Court's precedent, the States imposed qualifications and conditions on their presidential electors from the earliest days of the Republic.[2]

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[2] In the presidential election of 1788, several States required that their presidential electors reside in particular counties or districts, *see* Mass. Resol. of Nov. 19, 1788, *in* 1

Any decision about whether a State may impose qualifications on who its presidential electors may vote for would need to account for the States' "far-reaching authority over presidential electors." *Chiafalo*, 140 S. Ct. at 2324; *see also McPherson*, 146 U.S. at 27 (observing that Article II, § 1, cl. 2 "convey[s] the broadest power of determination" on the States over their presidential electors). It would also be necessary to grapple with the fact that "[i]n the Nation's earliest elections, state legislatures mostly picked the electors" rather than holding popular elections for President. *Chiafalo*, 140 S. Ct. at 2321. If a state legislature may permissibly cut ordinary voters out of this process entirely and select the State's presidential electors itself, it is far from self-evident why a state legislature could not take the lesser step of circumscribing which presidential candidates are qualified to receive the State's votes in the Electoral College. *Cf.* Letter from Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814), *in* 14 WRITINGS OF THOMAS JEFFERSON 82–83 (Andrew A. Lipscomb & Albert E. Bergh eds., 1904) (arguing that

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DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788–1790, at 508, 509 (Merrill Jenson & Robert A. Becker eds. 1976); Va. Act. of Nov. 20, 1788, *in* 2 FIRST FEDERAL ELECTIONS 293, 294 (Gorden DenBoer, et al., eds. 1976).; Del. Act of Oct. 28, 1788, *in* 2 FIRST FEDERAL ELECTIONS 69–71; Md. Act of Dec. 22, 1788, *in* 2 FIRST FEDERAL ELECTIONS 136, 138; other States included requirements of state residency, *see* N.H. Act of Nov. 12, 1788, *in* 1 FIRST FEDERAL ELECTIONS 790–792; N.J. Act of Nov. 21, 1788, *in* 3 FIRST FEDERAL ELECTIONS 14–19 (Merrill Jenson, et al., eds. 1976); Pa. Act of Oct. 4, 1788, *in* 1 FIRST FEDERAL ELECTIONS 299–302; and at least two States required that their presidential electors own land, *see supra* N.J. Act of Nov. 21, 1788; *supra* Va. Act of Nov. 20, 1788.

States have reserved power under Tenth Amendment to disqualify convicted felons and the mentally incompetent from standing for election to Congress).

While U.S. Term Limits ultimately takes no position on this difficult issue here, Petitioner and his amici are mistaken to the extent that they argue that it is a trivial matter to extend *Thornton*'s holding under Article I to a State's selection of presidential electors under Article II.

II. *THORNTON* IS EGREGIOUSLY WRONG AND SHOULD NOT BE REAFFIRMED OR EXTENDED.

Even if the Court is persuaded that this case could be resolved by reaffirming and extending *Thornton*, it should not do so because *Thornton* was wrong.

The *Thornton* majority reasoned that "the power to add qualifications" for members of Congress was "not within the 'original powers' of the States" before the creation of the Federal Government; that this power was thus "not reserved to the States by the Tenth Amendment"; and that, even if it were an original State power, the Framers intended to "'divest[]' States" of that power through the Federal Constitution. 514 U.S. at 800–01. In dissent, Justice Thomas thoroughly explained why this conception of "reserved powers" is mistaken. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, *nor prohibited by it to the States*, are reserved to the States respectively, or to the people." U.S. CONST., amend. X (emphasis added). "As far as the Federal Constitution is concerned, then, the States can

exercise all powers that the Constitution does not withhold from them." *Thornton*, 514 U.S. at 847–48 (Thomas, J., dissenting). Nowhere does the Federal Constitution withhold from States the power to set their own qualifications for their own representatives in Congress. And since "*all* governmental powers stem from the people of the States, it would simply be incoherent to assert that the people of the States could not reserve any powers that they have not previously controlled," such as the power to set qualifications for Congress. *Id*. at 851 (emphasis added).

Justice Thomas elaborated on this point in his concurring opinion in *Chiafalo*, where the Court unanimously held that States have power to condition appointment of their presidential electors in the electoral college—namely, to require that electors make an enforceable pledge to vote for their State party's nominee for President. As Justice Thomas explained, that is because "the Constitution is silent about the exercise of [that] particular power," meaning that, under the Tenth Amendment, "the States enjoy it." 140 S. Ct. at 2333 (Thomas, J., concurring in the judgment) (internal quotation marks omitted).

Thornton was wrong the day it was decided, but this Court's subsequent decisions have further eroded its underpinnings. The majority in *Chiafalo* interpreted the word "manner" in the Presidential Electors Clause as broad enough to permit a State to direct its presidential electors to cast their ballots for the candidate who the State's voters selected. *Id.* at 2324. But in *Thornton*, the Court rejected a similarly expansive interpretation of the word "manner" in the

Elections Clause, holding that the identical word in Article I's parallel provision is a limited "grant of authority to issue procedural regulations." *Thornton*, 514 U.S. at 832-33. Prior to *Thornton*, one future member of this Court argued that the word "manner" in the Elections Clause is broad enough to allow States to adopt congressional term limits. *See* Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 Hofstra L. Rev. 341, 345 (1991). This Court's decision in *Chiafalo* provides significant additional support for that view.

Relying on the *Thornton* holding to reverse the decision below would not only perpetuate *Thorton*'s errors, but would extend those errors to a new context and create a conflict with *Chiafalo*. Primary elections are a mechanism by which State political parties choose the nominee that their presidential electors will vote for—and, in Colorado, will be bound to vote for—in the electoral college if that nominee wins the State's general election. *See* COLO. REV. STAT. § 1-4-304(5). In barring a disqualified candidate from the primary- or general-election ballot, a State does not exercise some reserved power to set qualifications for the office of President. Rather, they exercise their power to condition electors' eventual votes in the electoral college, a power that *Chiafalo* unanimously recognized and that, as Justice Thomas has explained, States enjoy under the Tenth Amendment.

This Court's decision last term in *Moore v. Harper*, 600 U.S. 1 (2023), also undermines the *Thornton* majority's reasoning and historical analysis. Whereas *Thornton* concluded that state authority to regulate

congressional elections is a power that "*exclusively* spring[s] out of the existence of the national government," 514 U.S. at 802 (emphasis added), the Court said in *Moore* that when a State legislature regulates congressional elections it "acts *both* as a lawmaking body created and bound by its state constitution, *and* as the entity assigned particular authority under the Federal Constitution," 600 U.S. at 27 (emphases added). The *Thornton* majority gave great weight to Justice Story's understanding of the Elections Clause, 514 U.S. at 802, while in *Moore* this Court followed the *Thornton* dissent in discounting Story's views about the same provision, 600 U.S. at 34 (citing *Thornton*, 514 U.S. at 856 (Thomas, J., dissenting)). The *Thornton* Court also disregarded early state laws that imposed qualifications on holding congressional office, reasoning that "the practice of States is a poor indicator of the effect of restraints of the States." 514 U.S. at 826 n.41. But in *Moore*, the Court made precisely the same type of evidence the centerpiece of its historical analysis. 600 U.S. at 32–33. *Moore* thus provides further reason to conclude that *Thornton* was wrongly decided.

Since *Thornton* was "egregiously wrong when decided" and is out-of-step with subsequent caselaw, it is ripe for reversal. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring it part). The Court should not risk appearing to solidify *Thornton*'s holding here—certainly not when future cases are likely to arise that will enable the Court to reconsider *Thornton* more squarely and with better-developed briefing. For example, the Utah Supreme Court has recently ordered expedited briefing in a

case concerning a proposed ballot initiative to impose maximum age limits on the State's representatives in the U.S. Congress. *See* Order, *Phillips v. Henderson*, Case No. 20231098-SC (Utah Dec. 21, 2023). A similar initiative has been proposed for this year's election ballot in North Dakota. *See* Initiative Petition to the N.D. Sec'y of State, "*Congressional Age Limits*," https://bit.ly/3Hiu0Ch.

The Federal Constitution does not impose maximum age limits on U.S. Representatives or Senators. The above initiatives would thus likely run afoul of *Thornton*. Yet as these initiatives show, citizens in multiple States continue to seek to combat the deleterious effects of perpetual incumbency and increase their representatives' accountability. Such efforts are likely to result in litigation that will eventually enable this Court to reconsider, and to correct, *Thornton*'s errors.

CONCLUSION

However the Court decides this case, it should do so without relying on *Thornton*'s holding.

Respectfully submitted,

January 18, 2023

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