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
Colorado Supreme Court

REPLY BRIEF OF RESPONDENT COLORADO REPUBLICAN STATE CENTRAL COMMITTEE IN SUPPORT OF REVERSAL

MICHAEL W. MELITO
MELITO LAW LLC
ROBERT A. KITSMILLER
PODOLL & PODOLL, P.C.
5619 DTC Parkway,
Suite 1100
Greenwood Village, CO 89112

CHRISTINA A. COMPAGNONE
OLIVIA F. SUMMERS
GARRETT A. TAYLOR
BENJAMIN P. SISNEY
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464

JAY ALAN SEKULOW
Counsel of Record
JORDAN A. SEKULOW
STUART J. ROTH
ANDREW J. EKONOMOU
JANE SERENE RASKIN
WALTER M. WEBER
CECILIA NOLAND-HEIL
NATHAN MOELKER
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave. NE
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

Counsel for Respondent CRSCC

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The Constitution does not allow states to seize authority and decide the 2024 presidential election. The Anderson Respondents have focused their brief on the events of January 6, 2021, arguing that those events were especially egregious and are the "central issue" in this case. (And. Res. 1). They are wrong. The central issue here is the more fundamental question of who has authority to decide questions of disqualification based on "insurrection." Section Three of the Fourteenth Amendment applies only to those categories of people specifically delineated, and the Constitution does not grant individual litigants, states, or state officials, authority to decide presidential elections. The Constitution vests authority in Congress, alone, to enforce Section Three.

I. The President Is Not an "Officer of the United States" Under Section Three of the Fourteenth Amendment.

A. The President Is Not an Officer of the United States.

Section Three disqualifies only those who served in specific enumerated positions, including "as an officer of the United States." U.S. Const. amend. XIV, § 3. The President is not such an officer. (CRSCC Br. § I). The Anderson Respondents rely on the Constitution's occasional reference to the President as holding an office. (And. Res. 34-35). But by its terms, Section Three does not apply to anyone who held an

"office." It applies specifically to those people who served as an "officer of the United States." And that term of art, read in constitutional context as recognized by scholarly sources like Justice Story, does not include the President.[1]

Anderson Respondents cite to Chief Justice Marshall's discussion of the term officer of the United States in *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823). (And. Res. 35). But he emphasized that an individual, "[i]f employed on the part of the United States, [] is an officer of the United States." *Maurice*, 26 F. Cas. at 1214. Elected officials are not "employed." The President is chosen by the electoral process, not "appointed by government to perform" specific enumerated duties as are officers of the United States. *Id. Maurice* emphasized that the President has authority to "appoint [] all offices of the United States." *Id.* at 1213. Chief Justice Marshall, in harmony with this Court's later precedent, made explicit that the Appointments Clause defines the nature of officers of the United States. Chief Justice Marshall's opinion is thus further evidence that the President is not an officer of the United States.

Likewise, Anderson Respondents cite *Lucia v. SEC*, 138 S. Ct. 2044, 2056-57 (2018) (Thomas, J., concurring), where Justice Thomas observed that at the founding "the phrase 'of the United States' was

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1 Anderson Respondents acknowledge in passing that Justice Story concluded that the President is not an officer of the United States. (And. Res. 41 n. 14). They make no attempt to address or refute his analysis, beyond pointing out that Justice Story unsurprisingly does use the more generic term officer to describe the President elsewhere.

merely a synonym for 'federal,' and the word 'officer' carried its ordinary meaning" as one who carries out "a continuous public duty." *Id.* (And. Res. 39). But Justice Thomas's concurrence cannot fairly be read as an attack on this Court's precedent in *United States v. Mouat*, 124 U.S. 303 (1888), and elsewhere, emphasizing that the President is not an officer of the United States. Instead, Justice Thomas emphasized that the term officer serves "to encompass all federal civil officials who perform an ongoing, statutory duty." *Lucia*, 138 S. Ct. at 2056. In *Lucia*, Justice Thomas emphasized that "all federal officials" have "ongoing statutory duties" and are "appointed in compliance with the Appointments Clause." *Id.* at 2057 (citing Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 507-45 (2018)). Of course, the President's authority is not limited by a specific statutory duty. Nor is the President appointed according to the Appointments Clause.

The Appointments Clause gives the President authority to appoint all

> Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2. Anderson Respondents argue that the words "herein otherwise provide for" could be

a reference to the selection of the Presidency by the Electoral College. (And. Res. 40). But read in context, those words clearly refer to the Clause's subsequent language giving Congress the power to allow the appointment of inferior officers by others. This is not an indication that the President is somehow "appointed" via the electoral process. Indeed, that suggestion is contradicted by the very precedent the Anderson Respondents cite: "[t]he Appointments Clause prescribes the exclusive means of appointing 'Officers.'" *Lucia*, 138 S. Ct. at 2051.

The Constitution is clear. The President commissions and appoints all officers of the United States; he is not one of them. U.S. Const. art. II, § 2, cl. 2; U.S. Const. art. II, § 3. Amici Akhil Reed Amar, et al., respond by arguing that the congressional certification process is what they term the "commission-equivalent" for the President. (Amar Amici 19). And they suggest that it might be possible for the President to commission himself. (*Id.* at 18-19) ("The president *ordinarily* does not commission himself.") (emphasis added). Their discussion of "equivalents" has no bearing whatsoever on the Constitution's text. Nor do they provide any support for their intimation that the President could commission himself. There is no evidence any President has ever done so. (Nor, for that matter, has any President commissioned the Vice President). And the clause is unequivocal; the President commissions *all* the officers of the United States. As Justice Story emphasized, the Commissions Clause is clear evidence that the President is not an officer of the United States. 1 Joseph Story, *Commentaries on the*

Constitution of the United States § 793, at 560 (Thomas Cooley ed., 4th ed. 1873). This Court has accordingly recognized, "[t]he people do not vote for the 'Officers of the United States.' . . . They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010) (internal citations omitted) (opinion of Roberts, C.J.).

Likewise, the Impeachment Clause is explicit; it provides that "all civil Officers of the United States" are subject to impeachment, and separately delineates the President. U.S. Const. art. II, § 4. As Justice Story explained, the President is separately listed because he is not one of the officers of the United States. Story, *supra*, at 559. The Amar Amici argue that because Justice Story did not live to see Section Three ratified, his discussion of the constitutional scope of officers of the United States is not "strongly relevant" to the meaning of that term of art. (Amar Amici 20). Likewise, Anderson Respondents argue that the Constitution's original use of the term officer of the United States is irrelevant to the meaning of the same term in Section Three. (And. Res. 42) ("[T]hese provisions of the original Constitution, adopted 80 years before the Fourteenth Amendment, do not control the meaning of Section 3."). This is antithetical to how this Court interprets the Constitution. When "a word [or phrase] is obviously transplanted from another legal source," it necessarily "brings the old soil with it." *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018) (quoting Richard F. Wolfson, *Some Reflections on the Reading of Statutes by Felix Frankfurter*, 47 COLUM.

L. REV. 527, 537 (1947)). Justice Story's carefully reasoned explanation of the constitutional meaning of officers of the United States was widely read and inevitably informed the drafters of Section Three, as it did those who subsequently interpreted it. Memb. of Cong., 17 U.S. Op. Att'y. Gen. 419, 420 (1882) (citing Story and emphasizing that a member of Congress, both for purposes of the Commissions and Appointments Clauses and for purposes of Section Three, "is not an officer of the United States in the constitutional meaning of the term."). In other words, the Attorney General, after the ratification of Section Three, explicitly emphasized that the meaning of the term in Section Three is parallel to the term in earlier provisions.

Likewise, this Court's Appointment Clause precedent, such as *United States v. Germaine*, 99 U.S. 508 (1878); *Mouat*, 124 U.S. 303; and *United States v. Smith*, 124 U.S. 525 (1888), continued to acknowledge the Constitution's clear meaning; the President appoints the officers of the United States and is not one of them himself.

In response to this considerable evidence, Amici Professors Burton, et al., have focused on an exchange in the drafting process wherein Senator Johnson sought clarification, not as to which classes of people were subject to disqualification under Section Three, but as to which offices former confederates were excluded from "holding." (Burton Amici 2). That discussion did not concern who was barred, but rather from which offices they were barred.

In fact, the same drafting debates contained further evidence that Section Three does not apply to

the President. Representative Stevens, critical of the fact that the presidency had been removed from Section Three, emphasized in a speech that Section Three "may give the next Congress and President to the reconstructed rebels." Cong. Globe, 39th Cong., 1st Sess. 3148 (1866). Stevens took for granted that Section Three, with the President not included, would not prevent the reconstructed rebels from seizing the presidency. Because the President was not included in Section Three, a rebel could still be President.

B. The Oath the President Takes Is Distinct from the Oath That Can Trigger Section Three.

The Anderson Respondents concede that Section Three "only excludes individuals who have taken a constitutional oath." (And. Res. 36). And they concede that the oath specified by Article VI—"to support the Constitution of the United States"—is not the same as the presidential oath specified in Article II, that is, to "preserve, protect, and defend" the Constitution. But, they say, "'[s]upport' is not a magic word." (And. Res. 44). The Anderson Respondents contend the oath to "preserve, protect, and defend" the Constitution is not different in kind from an obligation to "support" it. Yet, Section Three does not, by its terms, apply to anyone who has an "obligation" to support the Constitution. It applies only to those who have specifically taken the oath "to support the Constitution of the United States." Constitutional meaning is found by examining "the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them." *Lake County v. Rollins*,

130 U.S. 662, 670 (1889). The framers could have written Section Three to apply to anyone with a constitutional obligation more generally, but they did not. They specifically required the Article VI oath. No comparison of the similarities of duties changes the simple fact that President Trump never took this oath.

Anderson Respondents rely heavily on Attorney General Stanberry's discussion of Section Three, yet Stanberry articulated the prerequisite specifically required for disqualification was the Article VI "official oath to support the Constitution of the United States." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 182, 203 (1867). He did not suggest an "obligation" to support would be sufficient; Stanberry specifically required "an official oath to support." President Trump has not taken that official oath.

It is not by mere coincidence that the President is distinguished from the officers of the United States. His role is unique; this Court has recognized that he is not an individual officer or employee of the government, but himself serves *sui generis* as the executive branch. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020) ("The President is the only person who alone composes a branch of government.").

II. Enforcement of Section Three Has Always Occurred Pursuant to Congressional Authorization, and Never Through a Self-Executing State or Individual Action.

Section Three enforcement is granted to Congress, not to state officials or courts, much less private litigants. For one hundred and fifty years,

American courts recognized that they had no authority to decide Section Three disqualifications, absent congressional authorization. *Griffin's Case*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869). The Colorado Supreme Court's aberrant ruling lacks any historical justification and is inconsistent with this Court's precedent. As the Solicitor General's representative recently emphasized in oral argument to this Court, no "provision of the Constitution provides of its own force a remedy." Transcript of Oral Argument of United States as Amicus Curiae Supporting Respondent at 76, *Devillier v. Texas*, U.S. No. 22-913 (argued Jan. 16, 2024), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-913_l6gn.pdf.

Anderson Respondents contend that self-execution has no bearing on their claim, because they did not sue directly under Section Three. They proclaim that states can enact their own laws to enforce federal provisions, thereby circumventing any execution issue, and that there is "[n]o authority" for the "remarkable proposition" that they cannot do so. (And. Res. 52). On the contrary, this Court has emphatically rejected this argument that a state has authority to create a federal cause of action and repeatedly embraced this so-called "remarkable proposition." "The elements of, and the defenses to, a federal cause of action are defined by federal law. . . . A State may not, by statute or common law, create a cause of action under § 1983 against an entity whom Congress has not subjected to liability." *Howlett v. Rose*, 496 U.S. 356, 375-76 (1990). "Congress surely did not intend to assign to state courts and

legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985).

This Court has been clear: states do not have authority to create causes of action under federal provisions. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2008). In our constitutional system, states have never been empowered to expand federal law of their own volition; Congress, and Congress alone, has authority to create enforcement mechanisms for the provisions of the Constitution and federal law.

The Amar Amici cite Military Governor Canby's reliance on Section Three to bar elected officials from taking office in former confederate states as purported evidence that the Amendment was understood to be self-executing. (Amar Amici 13-14). Setting aside the incongruity of applying precedent from states under military occupation to the ability of the people of Colorado to vote for the candidate of their choice today, the fact is that Canby did not disqualify "on his own initiative." (Amar Amici 14). Instead, his military enforcement of Section Three was pursuant to congressional authorization. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428. Congress created military districts for the occupied confederate states, authorized the President to appoint military commanders of those states, and explicitly authorized those military commanders to enforce Section Three. No military officer purported to

disqualify elected officials of his own volition; they were carrying out the enforcement instructions of Congress.

In its original brief, Colorado Republican State Central Committee ("CRSCC") documented thoroughly this Court's precedent that congressional authorization and execution is necessary for the Fourteenth Amendment to provide a cause of action. (CRSCC Br. § 2) (See this Court's cases cited therein emphasizing that the Fourteenth Amendment contains "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)). It does not of its own strength create a cause of action. *City of Boerne v. Flores*, 521 U.S. 507 (1997), is not to the contrary, and in fact cites *Katzenbach*. *Id.* at 517. *City of Boerne* holds that Congress cannot *inflate the scope* of constitutional rights, *id.*; it does not say that states or individual litigants themselves have enforcement power.

Anderson Respondents would dismiss this analysis with a citation to *Juidice v. Vail*, 430 U.S. 327, 334-35 (1977), and its discussion of *Ex parte Young*. But *Vail* casts no doubt on the black-letter principle that all causes of action under federal law must originate with Congress. *Ex parte Young*, a case awarding injunctive relief, did not create a cause of action nor did it suggest that provisions of the Constitution could be self-executing. Instead, it provided a mechanism for surmounting sovereign immunity, not a cause of action in itself. *See Seminole*

Tribe v. Florida., 517 U.S. 44, 47, 74 (1996) (The Court "refused to supplement" the congressional remedial scheme "with one created by the judiciary."). In *Alexander*, 532 U.S. at 286, this Court made these principles clear when plaintiffs sued a state official, seeking injunctive relief under the Fourteenth Amendment. If Anderson Respondents were right, the *Alexander* plaintiffs would have stated a cause of action. But this Court did not so hold. Instead, it held that, without congressional authorization, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter." *Id.* at 286-87. Any right "to enforce federal law must be created by Congress." *Id.*

In other words, *Ex parte Young* allows for suits against state officials for injunctive relief, but only when the statute allegedly violating itself provides a cause of action.

> Private parties who act in compliance with federal law may use *Ex parte Young* as a shield against the enforcement of contrary (and thus preempted) state laws. . . . But matters differ when litigants wield *Ex parte Young* as a cause-of-action-creating sword. In that setting . . . [w]hat is required is that Congress created a cause of action for injunctive relief in the statute or otherwise made § 1983 available.

Mich. Corr. Org. v. Mich. Dep't of Corr., 774 F.3d 895, 906 (6th Cir. 2024) (decision of Sutton, C.J.).

The Anderson Respondents cite the trial court decision *United States v. Davis*, 7 F. Cas. 63, 102 (C.C.D. Va. 1869), as purported evidence that Section Three is self-executing. (And. Res. 55). But Chief Justice Chase's decision in *Davis* casts no doubt on *Griffin's Case*. *Davis* concerned an attempt to use Section Three as a defense, a "shield" in a criminal proceeding. Such a defense is possible, regardless of whether Section Three provides a self-executing cause of action. Chief Justice Chase's analysis in *Davis* is not in conflict with *Griffin's Case*; it reflects the same nuances this Court has highlighted when examining questions surrounding whether other provisions are self-executing. *Davis* in no way suggests that Section Three could provide any cause of action.

Amici Professors Orville Vernon Burton, et al., argue that *Griffin's Case* applied only to individuals who held office before the Fourteenth Amendment's ratification. (Burton Amici 26-27). That is, of course, not how *Griffin's Case* was understood by subsequent authorities, which treated it as operative and highly persuasive authority despite the fact that it involved a person who held office before promulgation of the Fourteenth Amendment. *See, e.g.*, *Cale v. City of Covington*, 586 F.2d 311, 317 (4th Cir. 1978). *Griffin*'s holding was not limited or based on that specific fact: "the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislations of congress in its ordinary course." *Griffin's Case*, 11 F. Cas. at 26. It held categorically,

based on the text of the Fourteenth Amendment and in accord with *Ex parte Virginia*, that only Congress can provide a means of enforcement.

Were Section One of the Fourteenth Amendment in fact self-executing, the entirety of constitutional litigation would be upended. For example, under 42 U.S.C. § 1983, the congressionally enacted mechanism for enforcement of Section One, claims against a state or state official are precluded. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 60 (1989). Can litigants circumvent this by proceeding directly under a self-executing Section One? What is the statute of limitations and what procedural mechanisms apply? Do any of Section 1983's limitations, such as qualified immunity, apply to a self-executing cause of action under Section One? Courts would need to wrestle with these, and other, novel questions if Section One were self-executing. Such a rule would also be in profound tension with past holdings that states cannot broaden § 1983. *See Howlett*, 496 U.S. at 375-76.

Anderson Respondents cite several state cases to justify the idea of a self-executing Section Three. (And. Res. 5) (citing *Worthy v. Barrett*, 63 N.C. 199, 200-01 (N.C. 1869); *In re Tate*, 63 N.C. 308, 309 (N.C. 1869); *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 632 (La. 1869)). None of these cases even discussed the self-executing question, let alone attempted to apply a supposedly self-executing Section Three.

Instead, *Worthy* concerned a state statute modeled on the Fourteenth Amendment. In North Carolina, a statute provided that "no person

prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Art. XIV, shall qualify under this act or hold office in this State." *Worthy*, 63 N.C. at 200 (quoting N.C. Acts of 1868, Ch. 1, sec. 8). This statute by its terms incorporated provisions from Section Three as a standard for a *state* qualification statute, applicable to *state* officers, a measure well within a state's authority. No comparable Colorado law exists; but if it did, it would apply only to state officers, not the presidency of the United States. North Carolina was not purporting to decide federal election disqualifications with this state statute. *Tate* is a brief decision reaffirming the same principle.

In *Watkins*, this context was even more explicit. A Louisiana statute likewise incorporated Section Three's provisions. The Louisiana court explained: "[i]n enacting it the Legislature established a mode of legally ascertaining whether persons holding office under the authority of the State of Louisiana are incompetent to exercise the duties of those offices by reason of the disabilities imposed upon certain classes of people." *Watkins*, 21 La. Ann. at 632. In other words, the State of Louisiana referenced the Fourteenth Amendment in setting a standard for qualifications for *state* office.

Neither *Watkins* nor the North Carolina cases ever suggested that the Fourteenth Amendment itself is self-executing. Instead, they were addressing fundamentally different state laws governing *state* officeholders. Moreover, those state laws were authorized by Congress. Anderson Respondents claim that "states enforced Section 3 even before

Congress enacted the first federal enforcement legislation in 1870." (And. Res. 52). That claim is false. Congress had mandated that these states, as a condition of their readmission as states, enforce by statute the terms of Section Three as to their state officials. An Act to Admit States, ch. 70, § 3, 15 Stat. 73, 74 (June 25, 1868). These state statutes, in other words, were mandated by the statutory enforcement of Congress.

Anderson Respondents propose that there would be a contradiction between the two-thirds removal of disqualification provision and the normal majority rule for adopting enforcement legislation. (And. Res. 54). But this is not how a grant of legislative power works. The former power to remove disqualification deals with a specific power, like confirming nominees (which need not be bicameral or signed by the President), while the latter power of enforcement reflects normal legislation. There is no tension here. If there were, the same problem would exist between Senate *confirmation* of judges (not bicameral) and Congressional *authorization* of judgeships through normal legislation. No one would contend that Congress lacks authority to create judgeships because the Senate must confirm those judges. The same is true here. Congress's possession of the disqualification *removal* power under a specific two-thirds standard does not conflict with its possession of enforcement authority under a standard of bicameralism and presentment.

Amici Edward Foley, et al., attempt to use the congressional adoption of the Amnesty Statutes as purported evidence that Section Three was self-

executing, arguing that Congress's lifting of the Section Three disqualification demonstrated a belief that Section Three barred insurrectionists from office without implementing legislation. (Foley Amici 7). This argument is without merit. Congress had authority to lift disqualifications, and nothing about Section Three indicated that a disqualification had to be fully imposed before Congress could act. A pardon can be provided before an individual's conviction; the same was true here. Congress could lift disabilities for individuals without suggesting that those individuals already had been removed from office.

Anderson Respondents suggest the absence of specific contemporary enforcement legislation as an argument in favor of self-execution. This is backward. Whether or not enforcement legislation is required has nothing to do with whether it currently exists. If Section Three is not self-executing and there is no current enforcement legislation, that is not a problem for this Court. It is a question for Congress to resolve (or not). Our country has functioned adequately without the provisions of the Enforcement Act, repealed in 1948, and it is Congress that addresses (or not) the policy decision of whether to reimplement it.

Anderson Respondents, along with various amici, emphasize the role of federalism in our constitutional order and the discretion of states to structure their own electoral systems. While fifty-one different solutions may be a great idea for federalist experimentation in other contexts, Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018), in deciding the

qualification of presidential candidates it is a recipe for national disaster. "In light of the Framers' evident concern that States would try to undermine the National Government; they could not have intended States to have the power to set qualifications." *United States Term Limits v. Thornton*, 514 U.S. 779, 810 (1995). The Colorado Election Code cannot provide a means for a work-around of congressional authority to apply and implement Section Three.

Anderson Respondents would place the burden on the CRSCC to cite a "constitutional provision stripping states of the power to enforce constitutional qualifications for the Presidency." (And. Res. 45-46). This, too, is backward. The question is not whether the Constitution *elsewhere* denies enforcement power over Section Three, but rather whether the Fourteenth Amendment confers *upon states or individuals* the power to veto, as disqualified, presidential candidates. Since the Fourteenth Amendment was designed precisely to limit the power of rebellious states, it makes no sense at all to empower such states to bar candidates from federal office. The burden is on Respondents to justify their argument that former confederate states could likewise have removed Ulysses S. Grant from the presidential ballot based on an allegedly self-executing Section Three, even though every past enforcement of Section Three occurred pursuant to Congress's authorization.

States have ample freedom to experiment. But that freedom does not and cannot extend to experimenting with the qualifications for President. There is only one standard for those qualifications.

Congress, and Congress alone, possesses enforcement authority. A state could no more claim for itself the authority to enforce Section Three than it could claim for itself the authority to expel legislators from Congress, or, as this Court rejected when California tried it, to redefine the enforcement mechanisms of § 1983. *See Moor v. County of Alameda*, 411 U.S. 693, 698-710 (1973). Only Congress can do so. Congress, representing the Nation's various interests and constituencies, is the best and only judge of when and how to authorize Section Three's affirmative enforcement.

III. The Historical Evidence Continues to Confirm That Section Three Applies Only to *Holding* Office.

The fact that Section Three applies to *holding* office, not *seeking* it, is further confirmed by Congress's original enforcement of Section Three. Congress implemented Section Three in the Enforcement Act of 1870, which provided that when an individual held office in violation of Section Three, district attorneys could seek a "writ of quo warranto" and "prosecute the same to the removal of such person from office." Act of May 31, 1870, ch. 114, § 14, 16 Stat. 140, 143. The provision would only apply "whenever any person shall hold office" in violation of Section Three. *Id.* In other words, Section Three was enforced by Congress, even in the context of the Civil War, to prevent people from *holding* their offices.

IV. The Anderson Respondents' Theories Pose a Danger to the First Amendment.

The Anderson Respondents mischaracterize CRSCC's First Amendment argument as claiming that the First Amendment invalidates the application of Section Three or "provides a right to list constitutionally ineligible candidates on the ballot." (And. Res. 51). The CRSCC made no such argument. It reiterated this Court's precedent emphasizing that political parties must be free "to select a 'standard bearer who best represents the party's ideologies and preferences.'" *Eu v. San Francisco Cnty. Democratic Cent. Committee*, 489 U.S. 214, 224 (1989) (citing *Ripon Society, Inc. v. National Republican Party*, 525 F. 2d 567, 601 (1975) (Tamm, J., concurring in result), *cert. denied*, 424 U.S. 933 (1976)). This precedent demonstrates that the unbridled interpretation of the Colorado Supreme Court is fundamentally flawed. Anderson Respondents cite *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), but *Timmons* also emphasized that qualification requirements must be "reasonable, nondiscriminatory restrictions." *Id.* If Section Three were interpreted correctly, enforced by Congress and consistent with due process, no First Amendment issues would arise. The First Amendment issues have arisen here not because of disqualification in the abstract, but because President Trump was disqualified, not according to procedures established by Congress, but by the unauthorized and unguided state court ruling in Colorado. It is that decision, *ultra vires*, which

infringes the First Amendment here. Excluding a candidate from the ballot, despite the facts that Section Three does not apply to him, does not authorize enforcement by private litigants, and applies only to *holding* office, represents the sort of political and arbitrary ballot exclusion this Court has rejected.

CONCLUSION

The judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted,

February 5, 2024

MICHAEL W. MELITO
MELITO LAW LLC
ROBERT A. KITSMILLER
PODOLL & PODOLL, P.C.
5619 DTC Parkway,
Suite 1100
Greenwood Village, CO 89112

CHRISTINA A. COMPAGNONE
OLIVIA F. SUMMERS
GARRETT A. TAYLOR
BENJAMIN P. SISNEY
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464

JAY ALAN SEKULOW
Counsel of Record
JORDAN A. SEKULOW
STUART J. ROTH
ANDREW J. EKONOMOU
JANE SERENE RASKIN
WALTER M. WEBER
CECILIA NOLAND-HEIL
NATHAN MOELKER
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave. NE
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

Counsel for Respondent CRSCC