

STATE OF MINNESOTA  
IN SUPREME COURT

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Joan Growe, et al.,

Petitioners,

v.

No. A23-1354

Steve Simon, Minnesota Secretary of State,

Respondent.

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**REQUEST OF PROF. DEREK T. MULLER FOR  
LEAVE TO FILE *AMICUS CURIAE* BRIEF**

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***Introduction***

Derek T. Muller is a Professor of Law at Notre Dame Law School. He requests leave to appear as *amicus curiae* in this action and to file a brief in support of neither party.

***Statement of Interest***

Professor Muller’s research focuses on election law, particularly the role of states in the administration of federal elections. He has written extensively about topics that touch upon issues 2(a) & (b) identified in this Court’s September 20, 2023 order,<sup>1</sup> and his scholarship long predates this controversy. Some of those pieces include:

- *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559 (2015), which examines who holds the power to review the qualifications of presidential candidates, including whether states hold that power;

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<sup>1</sup> “. . . (a) whether Section 3 of the Fourteenth Amendment is self-executing; (b) whether Section 3 of the Fourteenth Amendment operates to preclude a person from being President of the United States . . . .”

- *'Natural Born' Disputes in the 2016 Presidential Election*, 85 FORDHAM L. REV. 1097 (2016), which evaluates how state courts and state election officials went about reviewing the qualifications of presidential candidate Ted Cruz and other candidates challenged for being ineligible to serve as president; and
- *Weaponizing the Ballot*, 48 FLA. ST. U. L. REV. 61 (2021), which looks at the scope of state power to include or exclude presidential candidates on the ballot, and the contours of the procedures they may use that remain within the appropriate scope of their authority.

Professor Muller filed amicus briefs in support of no party in *Cawthorn v. Amalfi*, 35 F.4th 245 (4th Cir. 2022) and in *Greene v. Secretary of State*, 52 F.4th 907 (11th Cir. 2022) on distinct but related issues of state power to adjudicate the qualifications of congressional candidates. *See Cawthorn*, 35 F.4th at 272 & 274 n. 10 (Richardson, J., concurring in the judgment) (citing Professor Muller's scholarship).

Professor Muller's research touches upon the questions in this Court's order. State power to adjudicate qualifications is a precondition to any Section 3 substantive disputes.

To start, the issue in 2(a) of state power to adjudicate qualifications relates to the question of whether Section 3 of the Fourteenth Amendment is "self-executing." While this question addresses whether Congress must enact legislation to give effect to Section 3, a separate concern arises about whether and how states may enforce the qualifications or disqualifications enumerated in the Constitution.

Likewise, the question in 2(b) about whether Section 3 precludes a person from "being President of the United States" (emphasis added) includes a separate issue—whether a state has the power to preclude a presidential candidate from appearing on the ballot, including (1) a candidate appearing on a state's primary election ballot as a determining step for the selection of delegates for a party's nominating convention, and (2)

a candidate whose name is listed on the ballot as a proxy of a slate of presidential electors pledged to support the candidate.

An amicus brief is desirable so that this Court might have a more fulsome understanding of the contours of state power to adjudicate presidential qualifications. These are complex issues arising in short-fuse litigation, where briefing from the parties may be limited or focused on particular issues. These issues of state power can affect many presidential candidates in many contexts, and the precedent set here will affect qualifications disputes of presidential candidates for many election cycles to come.

This amicus brief will explain how states hold the power to judge the qualifications of presidential candidates. This power extends even into the presidential primaries and even though states are formally electing only presidential electors. The brief will then identify some questions that this Court ought to consider about the scope of state power to review the qualifications of presidential candidates.

Professor Muller's interest in the case is public in nature. As a scholar of election law, he desires to see the case decided in a way that comports with the best reading of the United States Constitution and existing precedent.

Professor Muller respectfully requests the opportunity to participate as amicus curiae in support of neither party.

Respectfully submitted,

Dated: September 26, 2023

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this petition conforms to the requirements of Minn. R. Civ. App. P. 129.01(c) regarding length and format for the application seeking permission to file an *amici curiae* brief. The length of this petition is 723 words, including headings, footnote, and quotations, but exclusive of caption, signature block, and certificate. This petition was prepared using Microsoft Word software.

Dated: September 26, 2023

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