No. A23-1354

STATE OF MINNESOTA
IN SUPREME COURT

Joan Growe, et al.,

Petitioners,

v.

Steve Simon, Minnesota Secretary of State,

Respondent.

BRIEF OF PROFESSOR DEREK T. MULLER AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

PROF. DEREK T. MULLER
Notre Dame Law School
Eck Hall of Law
Notre Dame, IN 46556

DAKOTA LAW PLLC
Charles R. Shreffler (#0183295)
16233 Kenyon Ave., Ste 200
Lakeville, MN 55044
(612) 872-8000

Attorneys for Amicus Curiae
Prof. Derek T. Muller

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. States have the power to review the qualifications of presidential candidates. 4

II. States have no obligation to review the qualifications of presidential candidates. 14

III. Minnesota law does not empower the Secretary of State to review the qualifications of presidential candidates. 17

IV. Minnesota law may empower this Court to review the qualifications of presidential candidates. 19

A. Has the Minnesota legislature empowered this Court to review the qualifications of presidential candidates? 20

B. What standard of judicial review applies to disputes over qualifications? 22

C. Are the mechanisms to evaluate the qualifications of presidential candidates adequately tailored to the state's interests and do not unduly burden voters' opportunity to associate with the preferred candidate of their choice? 24

D. Does an adjudication of a qualification that Congress might alleviate in the future constitute an additional (and impermissible) qualification for federal office? 27

CONCLUSION 30

CERTIFICATE OF BRIEF LENGTH 31

TABLE OF AUTHORITIES

Cases

Anderson v. Celebrezze, 460 U.S. 780 (1983) 27, 28
Ankeny v. Governor of Ind., 916 N.E.2d 678 (Ind. Ct. App. 2009) 9, 18
Baker v. Carr, 369 U.S. 186 (1962) 10
Burdick v. Takushi, 504 U.S. 428 (1992) 27
Cawthorn v. Amalfi, 35 F.4th 245 (4th Cir. 2022) 2
Chiafalo v. Washington, 591 U.S. __, 140 S.Ct. 2316 (2020) 4, 5, 30
Cleaver v. Jordan, 393 U.S. 810 (1968) 6
Colorado Department of State v. Baca, 140 S.Ct. 2316 (2020) (per curiam) (mem.) 5
Cousins v. Wigoda, 419 U.S. 477 1975) 13
De La Fuente v. Simon, 940 N.W.2d 477 (Minn. 2020) (per curiam) 14, 24, 25, 27
Democratic Party of U.S. v. Wisconsin ex rel La Follette, 450 U.S. 107 (1981) 14
Duke v. Smith, 13 F.3d 388 (11th Cir. 1994) 14
Elliot v. Cruz, 137 A.3d 646 (Pa. Commw. Ct. 2016) 10
Elliott v. Cruz, 134 A.3d 51 (Pa. 2016) 10
Greene v. Secretary of State, 52 F.4th 907 (11th Cir. 2022) 2
Hassan v. Colorado, 495 F. App'x 947 (10th Cir. 2012) 8, 28
Hassan v. Colorado, 870 F. Supp. 2d 1192 (D. Colo. 2012) 8
Hassan v. Iowa, 2012 WL 12974068 (S.D. Iowa Apr. 26, 2012) 8
Hassan v. Iowa, 493 F. App'x 813 (8th Cir. 2012) 8
Hassan v. Montana, 2012 WL 8169887 (D. Mont. May 3, 2012) 8
Hassan v. Montana, 520 F. App'x 553 (9th Cir. 2013) 8
Hassan v. New Hampshire, 2012 WL 405620 (D.N.H. Feb. 8, 2012) 8
Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014) 8, 32
McInnish v. Bennett, 150 So.3d 1045, 1046 (Ala. 2014) (mem.) 18
McPherson v. Blacker, 146 U.S. 1 (1892) 4
Moore v. Harper, 600 U.S. 1 (2023) 23
Nixon v. Condon, 286 U.S. 73 (1932) 13
Nixon v. Herndon, 273 U.S. 536 (1927) 13

Nixon v. United States, 506 U.S. 224 (1993) 10

Perry v. Judd, 471 Fed. App'x 219 (4th Cir. 2012) 14

Powell v. McCormack, 395 U.S. 486 (1969) 10

Ray v. Blair, 343 U.S. 214 (1952) 4

Roudebush v. Hartke, 405 U.S. 15 (1972) 10

Socialist Workers Party of Illinois v. Ogilvie, 357 F.Supp. 109 (N.D. Ill. 1972) (per curiam) 7

Strunk v. N.Y. State Bd. of Elections, 950 N.Y.S.2d 722, 2012 WL 1205117 (Sup. Ct. Apr. 11, 2012) 10

Studer v. Kiffmeyer, 712 N.W.2d 552 (Minn. 2006) (per curiam) 26

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) 14

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 30

United States v. Classic, 313 U.S. 299 (1941) 13

Williams v. Rhodes, 393 U.S. 23 (1968) 28

Yang v. Kosinski, 960 F.3d 119 (2d Cir. 2020) 14

Administrative Proceedings

Farrar v. Obama, OSAH-SECSTATE-CE-1215136-60-MALIHI (Ga. Office of State Admin. Hearings Feb. 3, 2012) 9

Joyce v. Cruz, 16 SOEB GP 526 (Ill. State Bd. of Elections Jan. 28, 2016) 9

New Hampshire Ballot Law Commission, Barack Obama Qualification Decision, 2011-4 25

Transcript of Proceeding, Challenge to Marco Rubio, Cause No. 2016-2 (Ind. Election Comm'n Feb. 19, 2016) 9

Williams v. Cruz, OAL Nos. STE 5016-16, STE 5018-16 (N.J. Office of Admin. Law Apr. 13, 2016) 9

Constitutional Provisions

U.S. CONST. amend. XIV, § 3 .... 3, 24, 30, 31

U.S. CONST. amend. XX, § 3 31

U.S. CONST. art. I, § 4, cl. 1 23

U.S. CONST. art. I, § 5, cl. 1 11

U.S. CONST. art. II, § 1, cl. 2 .... 3, 4, 23

Statutes

3 U.S.C. § 4 5
3 U.S.C. § 5 18
Minn. Laws Ch. 70 (2015) 24
Minn. Stat. § 204A.11 24
Minn. Stat. § 204B.06 24
Minn. Stat. § 204B.13 24
Minn. Stat. § 204B.44 .... 23, 24, 25, 29
Minn. Stat. § 204D.03 24
Minn. Stat. § 204D.10 24

Other Authorities

2004 General Election Results, Office of the Minnesota Secretary of State... 22
2008 General Election Results, Office of the Minnesota Secretary of State... 22
2012 General Election Results, Office of the Minnesota Secretary of State... 22
Derek T. Muller, *'Natural Born' Disputes in the 2016 Presidential Election*, 85 FORDHAM L. REV. 1097 (2016) 1
Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693 (2016) 17
Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529 (2021) 11, 12
Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559 (2015) 1, 11, 17
Derek T. Muller, *Weaponizing the Ballot*, 48 FLA. ST. U. L. REV. 61 (2021) 2, 29
Federal Election Commission, Official General Election Results for United States President, Nov. 4, 2008 7
George C. Sikes, *A Step Toward the Short Ballot*, 11 NAT'L MUNICIPAL REV. 260 (1922) 5
L.C. Miller, *Taking the Cross-Word Puzzle Out of Elections*, 10 MARQ. L. REV. 22 (1925) 5
Minnesota Election Results 1980 21

Opinion of the Attorney General, No. 911-j 20

Svend Petersen, A Statistical History of the American Presidential Elections With Supplementary Tables Covering 1968-1980 (1981) 12, 20

The Rules of the Republican Party, Aug. 24, 2020 16

News Articles

25-year-old asks high court to allow Senate filing, MINNEAPOLIS STAR, Sept. 15, 1972 20

Associated Press, *10 political parties to be on Minnesota ballot*, MINNEAPOLIS TRIBUNE, Sept. 10, 1980 21

Associated Press, *Age limit appeal launched*, FERGUS FALLS DAILY JOURNAL, July 15, 1972 20

Associated Press, *Eldridge Cleaver Kept Off Ballot*, SAN CLEMENTE DAILY SUN-POST, Aug. 22, 1968 6

Associated Press, *McCarthy, Cleaver Lose Court Fight for California Ballot Spot*, SACRAMENTO BEE, Oct. 7, 1968 6

Associated Press, *Write-In Candidate Names Are Approved*, PETALUMA ARGUS-COURIER, Sept. 28, 1968 6

Candidates who offer a choice, S.F. EXAMINER, Apr. 4, 1980 21

Clare Foran, *An Awkward Reality in the Democratic Primary*, THE ATLANTIC, May 25, 2016 15

Jeff Brown, *Minor parties 'stand tall' on big, small issues*, MINNEAPOLIS STAR, Nov. 3, 1980 21

Jim Talle, *You've got seven choices for president*, MINNEAPOLIS STAR, Nov. 3, 1972 20

Kirsten Lindermayer, *The presidential candidate who can't become president*, PHIL. INQUIRER, Feb. 20, 2008 7

Zoe Tillman, *Trump's Presidential Run Faces Legal Challenges Over His Role in Jan. 6 'Insurrection,'* BLOOMBERG, Nov. 16, 2022 31

INTEREST OF *AMICUS CURIAE*[1]

Derek T. Muller is a Professor of Law at Notre Dame Law School. His 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 identified in this Court's September 20, 2023 order, and this 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;
- *'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 2016 Republican presidential primary candidates challenged for being ineligible to serve as president; and

---

[1] No counsel for any party authored any part of this brief in whole or in part. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of the brief. Notre Dame Law School is not a signatory to the brief, and the views expressed here are solely those of *amicus curiae*.

- *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 that are 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 *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 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.

SUMMARY OF ARGUMENT

States hold the power to adjudicate the qualifications of presidential candidates. That power extends to the general election, even though the election is formally a process to appoint presidential electors. And that power extends to the primary election, even though state voters are formally selecting delegates to a party's nominating convention. But states have no obligation to

evaluate the qualifications of presidential candidates, and states may choose to permit openly unqualified candidates to appear on the ballot.

This brief describes historical state practices and how those longstanding practices comport with the Constitution, particularly the power of state legislatures under Article II, Section 1, Clause 2 to direct the manner of appointing presidential electors. This brief takes no position on substantive legal or factual questions surrounding Section 3 of the Fourteenth Amendment. But as a precursor to any substantive analysis of Section 3 (and assuming the dispute is ripe for adjudication), this Court should expressly reach two threshold legal conclusions and carefully evaluate a third.

First, a state election official has no obligation—indeed, no authority—to investigate the qualifications of presidential candidates or exclude ineligible presidential candidates from the ballot, unless state law authorizes such power. Second, a state legislature is permitted under the United States Constitution to provide mechanisms for the review of the qualifications of presidential candidates and for the exclusion of ineligible candidates. Third, this Court should carefully scrutinize whether the Minnesota legislature has provided such mechanisms, and this Court should evaluate the permissible contours of the exercise of those mechanisms in this case.

ARGUMENT

I. States have the power to review the qualifications of presidential candidates.

A. Article II, Section 1, Clause 2—the Presidential Electors Clause—of the United States Constitution provides, "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors . . . ." This clause is the source of authority for how states go about choosing presidential electors. And this is a broad power, described by the United States Supreme Court as "plenary," *McPherson v. Blacker*, 146 U.S. 1, 25 (1892), and "far-reaching," *Chiafalo v. Washington*, 591 U.S. __, 140 S.Ct. 2316, 2324 (2020).

The legislature's power to "direct" the "manner" of appointing electors includes the decision whether the legislature or the people choose electors. And it includes the decision whether to divide the state into districts, each choosing one elector; or to permit voting for all of the state's electors. *See McPherson*, 146 U.S. at 29–36. Consistent with this broad power to direct the manner of appointing electors, state legislatures have developed different mechanisms over the years.

For instance, states may add qualifications to presidential electors, such as requiring electors live in the state. *Chiafalo*, 140 S.Ct. at 2324. States may require electors to take a pledge to vote for specific presidential and vice presidential candidates. *Ray v. Blair*, 343 U.S. 214, 227–30 (1952). States may

strip electors of their office or fine them for disobeying that pledge. *Chiafalo*, 140 S.Ct. at 2328; *Colorado Department of State v. Baca*, 140 S.Ct. 2316 (2020) (per curiam) (mem.). States may replace electors after Election Day. Indeed, states allow electors to choose replacements in their body when a vacancy arises. *See, e.g.*, 3 U.S.C. § 4 ("Each State may, by law enacted prior to election day, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote."). States may require electors to be chosen at large as a single bloc of electors, and states may prohibit voters from choosing among individual electors. States need not even print the names of electors on the ballot. Instead, in a practice that began in the earlier twentieth century, states may simply print the names of presidential and vice presidential candidates on the ballot without naming any electors.[2]

Even though states are formally choosing presidential electors, and those electors then vote for the president and vice president, states unquestionably exercise broad discretion over how they appoint electors. That power extends to rules relating to the appearance of presidential candidates on the ballot.

---

[2] *See, e.g.*, George C. Sikes, *A Step Toward the Short Ballot*, 11 NAT'L MUNICIPAL REV. 260 (1922) (describing new systems in Nebraska and Iowa) L.C. Miller, *Taking the Cross-Word Puzzle Out of Elections*, 10 MARQ. L. REV. 22 (1925) (describing new system in Wisconsin).

B. Since at least 1968, states have occasionally exercised the power to review the qualifications of presidential candidates and to exclude ineligible candidates from the ballot. And exclusions have routinely survived judicial scrutiny.

California excluded Eldridge Cleaver from the ballot in 1968. Cleaver was the 33-year-old nominee of the Peace and Freedom Party.[3] He challenged the exclusion in state court, which rejected his challenge.[4] Cleaver petitioned for certiorari to the United States Supreme Court. Without comment, the Court rejected the petition. *Cleaver v. Jordan*, 393 U.S. 810 (1968). A denial of a petition for writ of certiorari says little, if anything, about the merits. But it demonstrates the fact that a state did exclude a candidate from the ballot for failure to meet the qualifications for office. And intriguingly, California excluded Cleaver even though Cleaver would *become* eligible during the four-year term of office.

In 1972, 31-year-old presidential candidate Linda Jenness attempted to appear on the Illinois ballot as the Socialist Workers Party candidate. The Illinois

---

[3] Associated Press, *Eldridge Cleaver Kept Off Ballot*, SAN CLEMENTE DAILY SUN-POST, Aug. 22, 1968, at 1; Associated Press, *McCarthy, Cleaver Lose Court Fight for California Ballot Spot*, SACRAMENTO BEE, Oct. 7, 1968, at 1.

[4] Associated Press, *Write-In Candidate Names Are Approved*, PETALUMA ARGUS-COURIER, Sept. 28, 1968, at 1.

State Electoral Board excluded her from the ballot for her failure to sign a loyalty oath and because she was underage. A federal court found that the loyalty oath was unconstitutional, but it also found that excluding Jenness violated "no federal right." *Socialist Workers Party of Illinois v. Ogilvie*, 357 F.Supp. 109, 113 (N.D. Ill. 1972) (per curiam).

Review of qualifications of candidates and exclusion of ineligible candidates continues to this day. States routinely exclude ineligible candidates. In 2008, for instance, Róger Calero, a Nicaraguan national, was the Socialist Workers Party nominee for president. In some states, Calero's name appeared on the ballot. In others, a stand-in candidate, James Harris, appeared in Calero's place in states where Calero was excluded from the ballot.[5] In 2012, Abdul Hassan, who was not a natural born citizen, could not attest that he met this qualification for office and sued in an attempt to appear on the ballot. Hassan's claims failed in Iowa, Montana, New Hampshire, and Colorado.[6] Also in 2012,

---

[5] *See* Federal Election Commission, Official General Election Results for United States President, Nov. 4, 2008, https://www.fec.gov/resources/cms-content/documents/2008pres.pdf; Kirsten Lindermayer, *The presidential candidate who can't become president*, PHIL. INQUIRER, Feb. 20, 2008, https://www.inquirer.com/philly/hp/news_update/20080220_The_presidential_candidate_who_cant_become_president.html.

[6] *See Hassan v. Iowa*, 2012 WL 12974068 (S.D. Iowa Apr. 26, 2012), *aff'd*, 493 F. App'x 813 (8th Cir. 2012); *Hassan v. Montana*, 2012 WL 8169887 (D. Mont. May 3, 2012), *aff'd*, 520 F. App'x 553 (9th Cir. 2013); *Hassan v. New*

Peta Lindsay, a 27-year-old nominee for the Peace and Freedom Party, was excluded from the California ballot, a decision upheld in federal court. *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014).

Challenges to candidacies of John McCain, Barack Obama, and Ted Cruz routinely arose in recent years. Many challenges were dismissed because courts lacked jurisdiction to decide the claims. But a few election boards and courts reached the merits and concluded that these candidates were "natural born citizens," eligible to serve as president.[7]

Hampshire, 2012 WL 405620, at *4 (D.N.H. Feb. 8, 2012); *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1201 (D. Colo.), *aff'd*, 495 F. App'x 947 (10th Cir. 2012).

[7] *See, e.g.*, *Ankeny v. Governor of Ind.*, 916 N.E.2d 678, 688 (Ind. Ct. App. 2009) (state appellate court finding in challenge to Barack Obama's and John 2016) (state trial court concluding that "Ted Cruz is eligible to serve as President of the United States").McCain's candidacies that a "natural-born citizen" was someone born within the borders of the United States); *Farrar v. Obama*, OSAH-SECSTATE-CE-1215136-60-MALIHI (Ga. Office of State Admin. Hearings Feb. 3, 2012) (administrative law judge holding that Barack Obama, a person born in the United States, is a natural born citizen regardless of the citizenship of his parents); *Joyce v. Cruz*, 16 SOEB GP 526 (Ill. State Bd. of Elections Jan. 28, 2016) (state election board concluding that Ted Cruz "became a natural born citizen at the moment of his birth" because his mother "was a U.S. citizen"); Transcript of Proceeding at 23, Challenge to Marco Rubio, Cause No. 2016-2 (Ind. Election Comm'n Feb. 19, 2016), https://perma.cc/T5RL-26P4 (by a vote of 3-1, Indiana Election Commission rejected a motion to exclude Cruz from the ballot); *Williams v. Cruz*, OAL Nos. STE 5016-16, STE 5018-16 (N.J. Office of Admin. Law Apr. 13, 2016) (administrative law judge finding that "Senator Cruz meets the Article II, Section I qualifications and is eligible to be nominated for President"); *Elliot v. Cruz*, 137 A.3d 646, 658 (Pa. Commw. Ct. 2016), *aff'd*, 134 A.3d 51 (Pa.

C. This approach fits the Constitution's text and structure. To start, there is no "textually demonstrable constitutional commitment of the issue" to another body. *Baker v. Carr*, 369 U.S. 186, 217 (1962).[8] Furthermore, I have expressly argued in other cases that states lack the power to judge the qualifications of *congressional* candidates. *See* Muller, *Scrutinizing*, 90 IND. L.J. at 594–98. But while the Constitution expressly vests the power to be "*the*" judge of congressional elections in each house of Congress, there is no such power for presidential elections. *See* U.S. CONST. art. I, § 5, cl. 1.

That means states are not excluded from the range of actors who may judge qualifications. Voters, for instance, might judge the qualifications of candidates and decide not to vote for candidates if they believe the candidates are ineligible. Presidential electors might judge the qualifications of

---

[8] It is worth noting that, formally, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Baker*, 369 U.S. at 210. That said, if a power is given to a branch of the federal government that is "unreviewable" by federal courts, *see Powell v. McCormack*, 395 U.S. 486, 520 (1969), or left to that branch's "final responsibility," *see Nixon v. United States*, 506 U.S. 224, 240 (1993) (White, J., concurring in the judgment), it is hard to find circumstances in which a state might review the determination. *Accord Roudebush v. Hartke*, 405 U.S. 15, 25–26 (1972) (state may not "usurp" or "impair" Senate's power to judge the elections and returns of its members). *But see Strunk v. N.Y. State Bd. of Elections*, 950 N.Y.S.2d 722, 2012 WL 1205117, at *11–12 (Sup. Ct. Apr. 11, 2012) (state court finding itself bound by the "political question doctrine" when presidential candidates' qualifications were challenged).

presidential candidates, as might Congress when it convenes to count electoral votes.[9] But none of them hold the exclusive power to judge qualifications, and certainly nothing purports to oust states from exercising a similar power.

State power over the "manner" of appointing electors is broad. Recall that a state legislature may choose to keep this power to itself and appoint electors. That has not happened since Colorado did so in 1876.[10] State legislatures have preferred to empower the people of the state to choose presidential electors. And in doing so, surely the state legislature can limit the people's choice to only eligible presidential candidates, as the legislature holds the greater power of choosing the electors itself.

The state's interest in ensuring that voters and electors choose only eligible candidates is heightened in a presidential election. In the past, Congress has refused to count electoral votes when electors vote for an ineligible candidate.[11] A state risks losing its representation in the Electoral College—the mechanism to express the state's preferences in a presidential election—if Congress refuses to count those votes. And when Congress counts electoral votes, it only

---

[9] *See* Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1538–39 (2021).

[10] SVEND PETERSEN, A STATISTICAL HISTORY OF THE AMERICAN PRESIDENTIAL ELECTIONS WITH SUPPLEMENTARY TABLES COVERING 1968-1980, at 45 (1981).

[11] Muller, *Regularly Given*, 55 GA. L. REV. at 1538 n.42.

does so once every four years. There is no opportunity for a special election to make up for a state's failure to send a full delegation of electors whose votes will be counted in Congress. States may rightly take precautions to ensure that only votes cast for eligible candidates will be sent to Congress.

D. Challenges to presidential candidates in primary elections appear to be of more recent vintage but track the same kind of exercise of state power. Challenges to Ted Cruz's candidacy in 2016, for instance, arose exclusively in the context of a presidential primary.

The Supreme Court has long held that the right to vote in a *congressional* primary is protected by the federal Constitution. *See United States v. Classic*, 313 U.S. 299, 314–22 (1941). And a state-run primary is state action subject to federal constitutional limitations. *See, e.g.*, *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932). That said, "[t]he States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates." *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975).

Strictly speaking, the presidential primary process is farther removed from the presidential election than a typical primary. The presidential primary is one step in the selection of delegates from the state to a party's presidential nominating convention. After that nominating convention, the party's

preferred presidential candidate appears on the ballot in all states—and unlike a typical primary, a candidate who lost a state's presidential primary for a party may nevertheless appear as the nominee of that party on the general election ballot.

Still, three important principles guide the conclusion that states can exclude ineligible candidates from the presidential primary ballot. *First*, the state may administer its presidential primary election as it sees fit. *See Democratic Party of U.S. v. Wisconsin ex rel La Follette*, 450 U.S. 107, 120–21 (1981) (noting that Wisconsin may choose to run an "open" presidential primary). *Cf. Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215–16 n.6 (1986) (holding that state's placed an impermissible burden on political party with primary rules that clashed with party's associational preferences and distinguishing *Democratic Party*). *Second*, the state is bound by federal constitutional limitations in how it conducts its presidential primary as if it were any other election. *See, e.g.*, *De La Fuente v. Simon*, 940 N.W.2d 477, 492–97 (Minn. 2020) (per curiam); *Yang v. Kosinski*, 960 F.3d 119, 130–34 (2d Cir. 2020); *Duke v. Smith*, 13 F.3d 388, 394 (11th Cir. 1994). *Third*, the presidential nominating convention is free to ignore state presidential primary results that run afoul of the party's rules. *See Democratic Party*, 450 U.S. at 126.

States may choose to run presidential primaries as they see fit. Sometimes, a state's ordinary rules exclude serious candidates from the ballot. *See, e.g.*, *Perry v. Judd*, 471 Fed. App'x 219 (4th Cir. 2012) (rejecting challenge by Texas Governor Rick Perry, who was unable to appear on the Virginia presidential primary ballot for failing to submit petitions with enough voter signatures in a timely fashion). And sometimes, states examine the qualifications of presidential primary candidates like Ted Cruz. The state is constrained by constitutional limitations—more on those in Part IV, below. But if the state has the power to review qualifications and exclude ineligible candidates in the general election, it likewise has that power in the primary election, too.

If the Republican Party of Minnesota disapproves of the rules for conducting a presidential primary in Minnesota, it can hold a caucus and ignore the presidential primary.[12] And if the Republican National Committee disapproves of Minnesota's decision, it can refuse to seat delegates from the state of Minnesota, as the Supreme Court in *Democratic Party* mentioned a

---

[12] *See, e.g.*, Clare Foran, *An Awkward Reality in the Democratic Primary*, THE ATLANTIC, May 25, 2016, https://www.theatlantic.com/politics/archive/2016/05/washington-primary-bernie-sanders-hillary-clinton/484313/ ("Hillary Clinton won the state's Democratic primary, symbolically reversing the outcome of the state's Democratic caucus in March where Sanders prevailed as the victor. The primary result won't count for much since delegates have already been awarded based on the caucus.").

party might do. The RNC's own rules provide, "no state law shall be observed which hinders, abridges, or denies to any citizen of the United States, eligible under the Constitution of the United States to hold the office of President of the United States or Vice President of the United States, the right or privilege of being a candidate under such state law for the nomination for President of the United States."[13] The RNC will need to adjudicate whether a state's process into scrutinizing qualifications "hinders" the rights of presidential candidates. (That said, the RNC in 2016—under a similar set of rules of the party—proceeded without delay to count all of the delegates from states where candidates like Ted Cruz faced eligibility challenges.) But these are questions of a political party's approach to state law. The state, however, may develop appropriate rules for a presidential primary.

II. States have no obligation to review the qualifications of presidential candidates.

A state legislature may decide to create a law that would enable review of the qualifications of presidential candidates. But states do not have an affirmative duty or obligation to investigate the qualifications of presidential candidates and prevent ineligible candidates from appearing on the ballot. And election officials certainly hold no independent authority to go forth and

[13] Rule 16(d)(2), The Rules of the Republican Party, Aug. 24, 2020, https://prod-static.gop.com/media/Rules_Of_The_Republican_Party.pdf.

investigate the qualifications of candidates without express legislative authorization.

After states began printing their own ballots to distribute to voters in the late nineteenth century, states could determine which electors' names would appear on the ballot, and if a presidential candidate's name would appear on the ballot, too. *Cf.* Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693, 708–14 (2016). States then began to simplify that process by listing only the presidential candidate's name.

Many ineligible candidates have appeared on the ballot over the last 130 years, mostly underage candidates. James Cranfill, for instance, was the 33-year-old vice presidential candidate for the Prohibition Party in 1892. Eldridge Cleaver in 1968 was the Peace and Freedom Party's presidential candidate in 1968, also just 33, and appeared on the ballot. The list goes on: Michael Zagarell, Linda Jenness, Andrew Pulley, Larry Holmes, Gloria La Riva, Róger Calero, Arrin Hawkins, and Peta Lindsay have all appeared on the ballots of at least some states, into the twenty-first century, despite being underage or not a natural born citizen. (In all of these cases, states have excluded ineligible candidates where there is no factual or legal doubt about their ineligibility. A 27-year-old or a Nicaraguan national are indisputably ineligible to be president.) *See* Muller, *Scrutinizing*, 90 IND. L.J. at 600.

In short, over the years, one can easily and readily find avowedly ineligible candidates who have appeared on the presidential election ballot. If state legislatures have not created rules to exclude ineligible candidates, then those candidates may appear on the ballot (assuming they have met other conditions for ballot access).

It is no response that state officials take an oath to uphold the Constitution and therefore have an independent obligation to enforce the qualifications of presidential candidates. State election officials do not act unless they have authorization, express or implied, of state law or the state constitution to administer federal elections. In rare instances, federal law provides an obligation on state election officials. *See, e.g.*, 3 U.S.C. § 5. This is simply a question of departmentalism—some tasks are parceled out to different federal or state actors in our constitutional system. And courts have agreed that election officials have no such independent obligation to investigate qualifications. *See, e.g.*, *McInnish v. Bennett*, 150 So.3d 1045, 1046 (Ala. 2014) (mem.) (Bolin, J., concurring specially) ("I write specially to note the absence of a *statutory framework* that imposes an affirmative duty upon the Secretary of State to investigate claims such as the one asserted here, as well as a procedure to adjudicate those claims."); *Ankeny v. Governor of Ind.*, 916 N.E.2d 678, 681 (2009) ("[W]e note that the Plaintiffs do not cite to any authority

recognizing that the Governor has a duty to determine the eligibility of a party's nominee for the presidency.").

The power to review qualifications already resides with the voters, presidential electors, and Congress. And it may reside in state officials or state courts, if the state legislature so directs. But it is not a duty inherent in the office of an election administrator to investigate qualifications. Indeed, to do so might usurp the power of the state legislature to select the manner of appointment.

The notion that state election officials should be asking for the birth certificates of presidential candidates or holding hearings about the circumstances of their birth, without any authorization from the legislature or a statutorily-created process for investigation, would be significant. It is a reason to be skeptical of claims that any state election official can investigate qualifications, as the consequences do sweep far more broadly than Section 3.

III. Minnesota law does not empower the Secretary of State to review the qualifications of presidential candidates.

Minnesota Secretaries of State have long disclaimed the power to review the qualifications of presidential candidates. In 1970, an opinion of the Attorney General held, "We find no statute which authorizes the Secretary of State to determine whether a candidate, nominated by petition, is lawfully qualified to serve in the office for which he is running." Opinion of the Attorney

General, No. 911-j, Sept, 15, 1970, *reprinted in* 3 MINN. L. REG. 122 (Sept. 30, 1970).

In 1972, Minnesota's Secretary of State Arlen Erdahl attempted to exclude Linda Jenness from the ballot in Minneosta.[14] By September, however, the Secretary of State put Jenness back on the ballot: "Byron Starns, assistant attorney general, said presidential and vice-presidential candidates do not themselves file for the office—electors supporting them do. Thus the secretary of state has no official knowledge of their age."[15] Jenness and her running mate, 21-year-old Andrew Pulley, appeared on the Minnesota ballot.[16] The ticket earned 940 votes for president in Minnesota.[17]

In 1980, however, the Secretary of State (here, Petitioner Growe) excluded Pulley from the ballot—but included Workers World Party vice presidential candidate Larry Holmes, who was 27 years old in 1980.[18] In 2004, non-citizen

---

[14] Associated Press, *Age limit appeal launched*, FERGUS FALLS DAILY JOURNAL, July 15, 1972, at 2.

[15] *25-year-old asks high court to allow Senate filing*, MINNEAPOLIS STAR, Sept. 15, 1972, at 9B.

[16] Jim Talle, *You've got seven choices for president*, MINNEAPOLIS STAR, Nov. 3, 1972, at 17A.

[17] PETERSEN, STATISTICAL HISTORY, at Supp. Tables.

[18] *Candidates who offer a choice*, S.F. EXAMINER, Apr. 4, 1980, at 34 (noting that Larry Holmes was 27 years old); Associated Press, *10 political parties to be on Minnesota ballot*, MINNEAPOLIS TRIBUNE, Sept. 10, 1980, at 4B (noting

Róger Calero and underage running mate Arrin Hawkins appeared on the Minnesota ballot.[19] Calero appeared on the ballot again in 2008.[20] 27-year-old Peta Lindsay appeared on the 2012 ballot.[21]

In short, Minnesota Secretaries of State have long permitted avowedly ineligible candidates to appear on the ballot, at least in part due to the fact that the legislature has not expressly provided any mechanisms for election officials to adjudicate the qualifications of candidates. The Secretary of State accepts paperwork. He does not investigate eligibility.

IV. Minnesota law may empower this Court to review the qualifications of presidential candidates.

Consistent with Part I of this brief, Minnesota law may empower this Court to review the qualifications of presidential candidates. I use the term "may"

---

inclusion of Holmes); Jeff Brown, *Minor parties 'stand tall' on big, small issues*, MINNEAPOLIS STAR, Nov. 3, 1980, at 12A (noting exclusion of Pulley); Minnesota Election Results 1980, at 16, https://www.lrl.mn.gov/archive/sessions/electionresults/1980-11-04-g-sec.pdf (noting Holmes on the Workers World Party ticket, which received 698 votes).

[19] 2004 General Election Results, Office of the Minnesota Secretary of State, https://www.sos.state.mn.us/elections-voting/election-results/2004/2004-general-election-results/.

[20] 2008 General Election Results, Office of the Minnesota Secretary of State, https://www.sos.state.mn.us/elections-voting/election-results/2008/2008-general-election-results/.

[21] 2012 General Election Results, Office of the Minnesota Secretary of State, https://www.sos.state.mn.us/elections-voting/election-results/2012/2012-general-election-results/.

deliberately. This Court should proceed cautiously because of a variety of legal difficulties that arise when judging the qualifications of presidential candidates. I offer four questions to answer in interpreting and applying any statute relating to the disqualification of presidential candidates from the ballot.

A. Has the Minnesota legislature empowered this Court to review the qualifications of presidential candidates?

However this Court construes Section 204B.44(a)(1) and related statutes at issue in this case, this Court should take care to ensure that it does not exceed "the bounds of ordinary judicial review" to the extent a judicial interpretation of state law violates the Presidential Electors Clause. *Cf. Moore v. Harper*, 600 U.S. 1, 36 (2023) (standard for Article I, Section 4, Clause 1, the Elections Clause). The "Legislature" of the State of Minnesota is empowered to direct the appointment of presidential electors, and, to the extent the state's presidential primary relates to that power, this Court should ensure that its interpretation comports with the legislature's directive.

Section 204B.44(b) expressly includes "federal" office among the offices that may face a statutory challenge. But there remain several open questions about the interpretation of this statute. To name some:

1. In 2015, the Minnesota legislature amended Section 204B.44(a) to expressly include the provision, "including the placement of a candidate on the official

ballot who is not eligible to hold the office for which the candidate has filed." But the 2015 bill made several amendments relating to qualifications challenges that appear only to relate to state offices. *See, e.g.*, Minn. Laws Ch. 70 (2015), § 20 (amending § 204B.06 to allow judicial review under § 204B.44 "[f]or an office whose residency requirement must be satisfied by the close of the filing period"); § 21 (amending § 204B.13 to handle vacancies that arise from § 204B.44 for offices under primaries under Minn. Stat. §§ 204D.03 & 204D.10, not § 204A.11, which relates to presidential primaries). It is not clear whether this new amendment to Section 204B.44(a) was intended to extend to presidential candidates.

2. Elsewhere, in a Section 204B.44(a) dispute, this Court has said, "The Presidential Eligibility Clause serves as the *exclusive* source for the qualifications to serve as President," a phrase that appears to exclude Section 3 of the Fourteenth Amendment from a challenge under this provision. *See De La Fuente*, 940 N.W.2d at 490 (emphasis added).

3. Likewise, this Court added, "The road for any candidate's access to the ballot for Minnesota's presidential nomination primary runs *only* through the participating political parties, who *alone* determine which candidates will be on the party's ballot." *Id.* at 494–95 (emphases added). It is not clear whether

the Court foreclosed itself as an avenue for challenges to candidacies qualifications in a presidential primary.

A close reading of the statutory text and this Court's application of Section 204B.44(a) is in order before applying it to presidential elections. The past practice and tradition in Minnesota should counsel special caution. On the one hand, avowedly unqualified candidates have appeared on the Minnesota ballot. On the other hand, the fact that the Secretary of State routinely listed avowedly ineligible candidates on the ballot says little about the *judiciary's* power to review the qualifications of candidates pursuant to Section 204B.44.

B. What standard of judicial review applies to disputes over qualifications?

Judicial review of the qualifications of a candidate requires a prior determination of the standard of review: what burden of proof must petitioners show, and how should courts evaluate the evidence?

Many state election tribunals review qualifications quite deferentially, given limited time and resources. *See, e.g.*, New Hampshire Ballot Law Commission, Barack Obama Qualification Decision, 2011-4 ("Absent an obvious defect in a filing for office (such as residency in a district different from that in which a candidate has filed, etc.), the Commission is limited to a review of the sufficiency of the filing of a candidate. After such

review, and absent such a showing, there is absolutely no basis to reject President Obama's declaration of candidacy or to deny him a place on the 2012 Presidential Primary Ballot."). That is, in some states, absent fairly obvious evidence to the contrary, presidential candidates will not be excluded from the ballot.

This Court has, in the past, sent qualifications disputes to a referee and given deference to the referee's factual and credibility findings. *See Studer v. Kiffmeyer*, 712 N.W.2d 552, 558 (Minn. 2006) (per curiam). But it is not clear that deference to the factual findings of a single referee for a *presidential* candidate—a circumstance with "enormous time pressures and media firestorms"—is appropriate. *Cf. id.* at 560 (Anderson, J., concurring). And the standard of proof for petitioners to succeed in this case, *regardless* of any deference to factual findings, is an important, separate inquiry.

I am not aware of any case in which a *factual* dispute over a presidential candidate's eligibility has resulted in a candidate being disqualified. (Such a case may exist—proving a negative is difficult.) I do not know that this should preclude a state from reviewing a candidate's eligibility, at least in theory. But it suggests that a state legislature

empowering a factfinder to disqualify a presidential candidate on a disputed factual issue ought to have appropriate procedures in place to thoroughly and expeditiously evaluate the candidate's qualifications. This is particularly true as presidential candidates are often not residents of the state and are running campaigns in dozens of states simultaneously. How that relates to the legislature's directive, or how that is balanced in the complexity of a state's regulatory system, remains a matter for this Court's careful consideration.

C. Are the mechanisms to evaluate the qualifications of presidential candidates adequately tailored to the state's interests and do not unduly burden voters' opportunity to associate with the preferred candidate of their choice?

State power over the manner of administering a presidential primary is not unlimited. The Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992) establish a "flexible standard" to review whether state restrictions on ballot access are unduly burdensome. *See De La Fuente*, 940 N.W.2d at 492–97. Courts examine how strong the state's interests are and compare those interests to the severity of the burden placed upon candidates and voters. Without delving into a full evaluation on the merits, this brief only notes that laws restricting ballot access, including

laws that scrutinize the qualifications of presidential candidates, must survive the *Anderson-Burdick* test.

The Supreme Court has said that the state's interest in regulating presidential elections is actually weaker than other types of elections:

> Furthermore, in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.

Anderson, 460 U.S. at 795. And as noted previously, states have routinely permitted unqualified candidates to appear on the ballot.

That said, states like Minnesota, that bind their presidential electors to vote for the presidential and vice presidential candidates they pledge to support, may have a stronger interest than other states. *See* Minn. Stat. § 208.46. And states undoubtedly have a legitimate interest in preventing confusion among voters by excluding marginal—or unqualified—candidates. *See Williams v. Rhodes*, 393 U.S. 23, 33 (1968); *Hassan v. Colorado*, 495 Fed. App'x 947, 948–49 (10th Cir. 2012).

Balanced against the state's interest is the magnitude of the burden of the law. Scrutiny of the qualifications of presidential candidates can take different forms and impose different burdens. Laws that require presidential candidates to affirm under penalty of perjury that they are eligible to serve in office appear to be minimally intrusive. Laws that require candidates to produce a copy of a birth certificate to demonstrate that they are a natural born citizen and meet the age requirement are slightly more burdensome. *See* Muller, *Weaponizing*, 48 FLA. ST. U. L. REV. at 127–28 n.430. Rules in a presidential election that empower a state court to "order the candidate to appear and present sufficient evidence of the candidate's eligibility," Minn. Stat. § 204B.44(b), appear to be more burdensome still, particularly for non-residents who are simultaneously campaigning in other states. This Court should carefully weigh the state's interest against the magnitude of the burden placed upon candidates before adjudicating the qualifications of presidential candidates.

D. Does an adjudication of a qualification that Congress might alleviate in the future constitute an additional (and impermissible) qualification for federal office?

Finally—and perhaps most challenging of all—is the issue of additional qualifications. One unsettled issue with respect to Section 3 of the Fourteenth Amendment is whether exclusion from the ballot at this time, well ahead of Inauguration Day, serves as an additional qualification for a presidential candidate.

States may not add qualifications to presidential candidates. *See Chiafalo*, 140 S.Ct. at 2324 n.4; *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). Section 3 provides that "Congress may by a vote of two-thirds of each House, remove such disability." A candidate who is ineligible today could be eligible by January 20, 2025. And Section 3 provides that a person may not "hold any office," but says nothing about eligibility to run as a candidate for office.

The state's power to direct the manner of appointment surely extends to regulate candidacies for office and ballot access rules. And, as this brief has argued, that power extends to judging the qualifications of presidential candidates and excluding ineligible candidates from the ballot. But if a state judges qualifications prematurely, it could

inadvertently add qualifications for candidates for office. That is, if a state requires that a candidate demonstrate he is eligible *today*, that may impose an additional qualification if the candidate is, or could be, eligible by Inauguration Day or some time during the four-year presidential term of office.

But this places states in a hard position. On the one hand, if a state may not judge the qualifications of a candidate based on the best information they have at hand today, the state risks its electoral votes being rejected in Congress. *See, e.g.*, Zoe Tillman, *Trump's Presidential Run Faces Legal Challenges Over His Role in Jan. 6 'Insurrection,'* BLOOMBERG, Nov. 16, 2022, https://www.bloomberg.com/news/articles/2022-11-16/donald-trump-s-candidacy-risks-ballot-challenges-over-jan-6-insurrection-role ("Asked if Congress could refuse to certify a Trump electoral win on Section 3 grounds, Wasserman Schultz said she didn't know if lawmakers 'would be in a position to do that but it certainly wouldn't be something that should be ruled out.'"). On the other hand, if a state prematurely excludes a candidate from the ballot, the candidate might later become eligible, and the state has functionally disqualified an eligible candidate.

It is worth noting that states have excluded candidates who could never become eligible during the term of office, such as a Nicaraguan national or a 27-year-old candidate. But states have gone farther. Consider again the example of Eldridge Cleaver, the 33-year-old would turn 35 within the four-year presidential term of office. The Twentieth Amendment provides, "If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified . . . ." In theory, an ineligible candidate would simply stand aside as the vice president acts as president until the president qualifies for office. Nevertheless, California kept Cleaver off the ballot in 1968. *Accord Lindsay*, 750 F.3d at 1065 ("The Twentieth Amendment addresses such contingencies. Nothing in its text or history suggests that it precludes state authorities from excluding a candidate with a known ineligibility from the presidential ballot.").

To my knowledge, this issue of additional qualifications for presidential candidates is not seriously contemplated in any judicial opinions. My own thoughts here are hesitant and tentative. But it is an

important threshold issue that must be addressed before reaching the merits of any Section 3 claim.

CONCLUSION

Amicus respectfully submits that states hold the power to adjudicate the qualifications of presidential candidates. Judging qualifications takes place only after the legislature has created a mechanism to do so. Minnesota has not created a mechanism for the Secretary of State to judge qualifications. But it is possible, subject to some important threshold questions, that it has empowered this Court to do so.

Respectfully submitted,

Dated: October 6, 2023

s/Charles Shreffler

Charles Shreffler (#0183295)
DAKOTA LAW PLLC
16233 Kenyon Ave., Ste. 200
Lakeville, MN 55044
(612) 872-8000
cshreffler@dakotalawpllc.com

Counsel for Amicus Curiae Prof. Derek T. Muller

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this document conforms to the requirements of the applicable rules, including Minnesota Rule of Appellate Procedure 132.01, subds. 1 and 3(c)(1), is produced with a proportional font of Century Schoolbook, size 14, and the length of this document is 6,600 words. This document was prepared using Microsoft Word for Mac Version 16.77.1.

Dated: October 6, 2023

s/Charles Shreffler

Charles Shreffler (#0183295)
DAKOTA LAW PLLC
16233 Kenyon Ave., Ste. 200
Lakeville, MN 55044
(612) 872-8000
cshreffler@dakotalawpllc.com

Counsel for Amicus Curiae Prof. Derek T. Muller