COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Appeal Pursuant to § 1-1-113(3), C.R.S. District Court, City and County of Denver, 2023CV32577	
Petitioner-Appellees/Cross-Appellants: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN, v. **Respondent-Appellee:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State, v. **Intervenor-Appellees:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, an unincorporated association, and DONALD J. TRUMP.	
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BRIEF OF *AMICUS CURIAE* FREE SPEECH FOR PEOPLE IN SUPPORT OF PETITIONERS-APPELLANTS NORMA ANDERSON, ET AL.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) because at 4,747 words it contains less than 4,750 words.

I acknowledge that this brief may be stricken if it does not comply with the requirements of C.A.R. 28, 29, and 32.

s/ Anna N. Martinez
Anna N. Martinez, CO Atty. Reg. No. 37756

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INTEREST OF *AMICUS CURIAE*

Free Speech For People (FSFP) is a national, non-partisan nonprofit public interest organization that litigates and advocates on democracy issues including voting rights, campaign finance, and accountability for insurrectionists.

In 2022, FSFP was counsel in the first cases filed under Section 3 of the Fourteenth Amendment in 150 years; two were cited in briefing below. *See Cawthorn v. Amalfi*, 35 F.4th 245 (4th Cir. 2022); *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Ofc. of State Admin. Hrgs. May 6, 2022). Currently, in other states, FSFP is counsel in Section 3 challenges to a candidate's eligibility to appear on 2024 presidential primary and general election ballots. Those challenges have included discussion of the "political question doctrine." *See, e.g., LaBrant v. Benson*, No. 23-000137-MZ (Mich. Ct. Claims Nov. 14, 2023), *appeal filed*, No. 368628 (Mich. App. Nov. 15, 2023), *emergency bypass filed*, No. 166373 (Mich. Nov. 16, 2023). This Court's resolution of the political question doctrine issue could affect FSFP's

ongoing litigation elsewhere, and this brief will assist the Court in elucidating the issues surrounding that doctrine.[1]

SUMMARY OF ARGUMENT

The political question doctrine does not bar this Court from adjudicating presidential candidates' constitutional qualifications. This narrow doctrine applies primarily when the Constitution textually commits decision of a question to another branch of government, or the question is not amenable to judicial resolution because it does not involve judicially manageable standards. Neither applies.

The Constitution does not commit adjudication of presidential candidates' qualifications to Congress. Rather, Article II grants states plenary power to appoint presidential electors "in such Manner as the Legislature thereof may direct"; in Colorado, the legislature has directed a process that includes the candidacy challenge procedure of C.R.S. § 1-4-1204(4). After states appoint electors, Congress's role under

[1] As a nonprofit, FSFP does not have a parent corporation or issue stock. No party or party's counsel authored the brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person other than FSFP or its counsel contributed money to fund preparing or submitting the brief.

the Twelfth Amendment is to *count* electoral votes. *See* U.S. Const. amend. XII. The Constitution does not assign Congress the task of judging presidential candidates' qualifications; if Congress has any implicit power to do so, it is not exclusive.

In this respect, Section 3 of the Fourteenth Amendment does not differ from other presidential qualifications in Article II or the Twenty-second Amendment. Section 3 does not mention a role for Congress in adjudicating disqualification—only in removing it. And Section 5 of the Fourteenth Amendment, which authorizes Congress to pass additional enforcement legislation, does not exclusively commit resolution of Section 3 questions to Congress. If Section 5 did that, then it would do the same for Section *1*, and neither this Court nor any other could decide equal protection or due process questions. Nor does it matter that Section 3 only prohibits disqualified individuals from "hold[ing]" office without explicitly barring them from *running* for office. Colorado has chosen, in accordance with its Article II authority to appoint presidential electors "in such Manner as the Legislature thereof may direct," to specify a procedure under C.R.S. § 1-4-1204(4) by which its

process for appointing electors (an election) excludes from consideration candidates who are not constitutionally eligible to hold the office. Nothing in the Constitution *requires* states to appoint electors for candidates who do not meet constitutional qualifications.

The questions here are judicially manageable. They involve interpretation of words in the Constitution ("engage," "insurrection," "office," "officer," etc.) and application of law to facts. That is what courts do.

Finally, none of the political question doctrine's prudential factors apply here.

ARGUMENT

I. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR ADJUDICATING PRESIDENTIAL CANDIDATES' QUALIFICATIONS.

The political question doctrine is a "narrow exception." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012). It concerns "'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a *bona fide* controversy as to whether some action

denominated 'political' exceeds constitutional authority." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Rather, a court "has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 U.S. at 194 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821)). And the doctrine does not apply simply because a presidential election is involved. *McPherson v. Blacker*, 146 U.S. 1, 23 (1892) ("It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature . . . . But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising . . . .").

Baker identified six relevant factors, but recent Supreme Court precedent focuses on two: (1) whether the issue is textually committed to another branch of government, or (2) lacks judicially manageable standards for resolution. *See Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484, 2494 (2019) (citing only second factor); *Zivotofsky*, 566 U.S. at 195 (citing only first two factors).

A. Appointment of presidential electors is committed to states, not Congress.

The Electors Clause textually commits to the *states* plenary power to appoint presidential electors in the manner they choose. *See* U.S. Const., art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."). This power is plenary. *Moore v. Harper*, 600 U.S. 1, 37 (2023) ("[I]n choosing Presidential electors, the Clause 'leaves it to the legislature exclusively to define the method of effecting the object.'") (citation omitted); *Chiafalo v. Washington*, 591 U.S. ___; 140 S. Ct. 2316, 2324 (2020) (Electors Clause gives states "far-reaching authority over presidential electors"); *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("the state legislature's power to select the manner for appointing electors is plenary"); *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (Electors Clause "has conceded plenary power to the state legislatures in the matter of the appointment of electors").

This plenary power includes conditioning appointment of electors on their candidate's meeting constitutional criteria. *Lindsay v. Bowen*,

750 F.3d 1061, 1063 (9th Cir. 2014) (state's interest in "protecting the integrity of the election process" allows it to enforce "the lines that the Constitution already draws") (citations and quotation marks omitted); *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) ("a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office"); Derek Muller, *Scrutinizing Federal Election Qualifications*, 90 Ind. L.J. 559, 604 (2015) ("[B]ecause the legislature[] may choose the manner by which it selects its electors, it follows that it may restrict the discretion of the election process through an ex ante examination of candidates' qualifications.").

But the Constitution does not expressly commit that power to Congress. To the contrary, while Article I explicitly authorizes and directs Congress to judge qualifications of incoming *Senators and Representatives*, U.S. Const., art. I, § 5, cl. 1 ("Each House shall be the Judge of the . . . Qualifications of its own Members . . . ."), neither Article II nor any other constitutional provision explicitly authorizes—

let alone directs—Congress to judge presidential candidates' qualifications. The Twelfth Amendment authorizes Congress to *count electoral votes*; it does not explicitly authorize Congress to *judge presidential qualifications. See* U.S. Const., amend. XII. Similarly, the Twentieth Amendment provides a contingency procedure "if the President elect shall have failed to qualify," but does not textually commit the question of candidate eligibility to Congress. *Id.* amend. XX.[2]

Even if Congress holds some unwritten residual authority to judge presidential candidates' qualifications, that implicit authority is certainly not *exclusive*. *See* Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. at 605 ("Unlike the robust history of the power of the legislature to adjudicate the qualifications of its own members and the textual language ensuring that each house of Congress is the 'sole' judge of the qualifications of its members, the power of Congress to examine the qualifications of executive candidates is, at the very best, debatable, and certainly not exclusive.").

[2] The same logic applies to Congress's power to set the time for choosing electors. *See* U.S. Const. art. II, § 1, cl. 4.

B. Leading precedent confirms that states may adjudicate presidential candidates' constitutional eligibility.

In 2012, then-Judge (now Justice) Gorsuch, writing for the Tenth Circuit, upheld the Colorado Secretary of State's exclusion of a constitutionally ineligible candidate. The Tenth Circuit "expressly reaffirm[ed] [that] a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F. App'x at 948. Justice Gorsuch's conclusion cannot be reconciled with Intervenor-Appellant/Cross-Appellee (hereafter "Appellee")'s theory that *only Congress* may decide whether a presidential candidate is constitutionally eligible.

In 2014, the Ninth Circuit explicitly rejected the idea that the Constitution commits presidential candidates' qualification determinations exclusively to Congress:

> *[N]othing in the Twentieth Amendment states or implies that Congress has the exclusive authority to pass on the eligibility of candidates for president.* The amendment merely grants Congress the authority to determine how to proceed *if* neither the president elect nor the vice president elect is

> qualified to hold office, a problem for which there was previously no express solution. . . . Candidates may, of course, become ineligible to serve after they are elected (but before they start. their service) due to illness or other misfortune. Or, a previously unknown ineligibility may be discerned after the election. 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.*

Lindsay, 750 F.3d at 1065 (emphasis in original and added).

Likewise, in 2016, the Pennsylvania Commonwealth Court expressly rejected the political question doctrine's applicability. It concluded, after closely reading Article II and the Twelfth Amendment, that "determination of the eligibility of a person to serve as President has not been textually committed to Congress." *Elliott v. Cruz*, 137 A.3d 646, 650–651 (Pa. Commw. 2016), *aff'd*, 134 A.3d 51 (2016).

For these reasons, a leading scholar of the history of challenges to presidential candidates' constitutional qualifications has concluded that "[u]nless the state's process independently breaches some other constitutional guarantee—such as an election law that severely

restricts a voter's rights but is not narrowly drawn to advance a compelling state interest—then the state's examination of a presidential candidate's qualifications is permissible." Muller, *Scrutinizing Federal Election Qualifications*, 90 Ind. L.J. at 604.

Below, Appellee tried to limit this precedent to cases with undisputed facts. But this supposed distinction is immaterial, inaccurate, and unavailing for Appellee. States' power to appoint presidential electors "in such Manner as the Legislature thereof may direct," and to exclude from their ballots candidates who do not meet constitutional qualifications, cannot depend on the existence (or not) of a factual dispute. If (as Appellee claims) all questions of presidential candidate qualifications were textually committed to Congress, then states would not be able to exclude *any* candidates as ineligible. And Appellee cannot identify a single word in the Constitution supporting his concocted division of labor (states can decide "easier" questions, but only Congress can decide "harder" questions) in a system that assigns states plenary authority to appoint electors and Congress the authority to *count* those electors' votes. Rather, states have in fact adjudicated

factual disputes over presidential candidates' qualifications. *See, e.g., Ankeny v. Governor of Ind.*, 916 N.E.2d 678 (Ind. App. 2009) (adjudicating presidential candidate's qualifications); *Purpura v. Obama*, No. A-4478-11T3, 2012 WL 1949041 (N.J. Super. App. Div. May 31, 2012) (similar); Derek Muller, *"Natural Born" Disputes in the 2016 Presidential Election*, 85 Fordham L. Rev. 1097, 1103–06 (2016) (collecting multiple similar cases).

Moreover, it is unclear how courts would determine which candidate challenges are "disputed" and which "undisputed," or that this supposed distinction would favor Appellee. For example, the ostensibly objective question of whether someone is a natural born citizen can, depending on the circumstances and location of the person's birth, raise unsettled legal and complex, unfamiliar factual issues. While the issue of whether a person engaged in insurrection can certainly raise complicated factual issues, in Appellee's case, the evidence of his engagement in insurrection is overwhelming, publicly available, and familiar to most Americans. Further, before the issue was raised in these proceedings, bipartisan majorities of the House and

the Senate and multiple federal judges had already recognized Appellee's essential role in the insurrection. Most importantly, the House's January 6 Committee had completed its comprehensive investigation and issued detailed factual findings on which the court below properly relied (in part) in reaching its own determination that Appellee engaged in insurrection.

C. Appellee relies on unpersuasive decisions where the issues were not properly joined.

Appellee relies on unpersuasive authority—mainly unpublished decisions dismissing challenges by *pro se* plaintiffs who failed to cite readily available and highly relevant authority. *See, e.g., Castro v. N.H. Sec'y of State*, __ F. Supp. 3d __, 2023 WL 7110390, *9 (D.N.H. Oct. 27, 2023) ("Critically, Castro does not present case law that contradicts the authority discussed above—nor has the court found any."), *aff'd on other grounds sub nom. Castro v. Scanlan*, __ F.4th __, 2023 WL 8078010, *5 (1st Cir. Nov. 21, 2023) (confining analysis to standing and noting "the limited nature of the arguments that [Castro] makes about the more

generally consequential political question issue").[3] Indeed, *not one* of the cases upon which Appellee relies involved a properly filed challenge under a well-established state candidacy challenge procedure like C.R.S. § 1-4-1204. Nearly all were filed in *federal* court, where plaintiffs lacked *both* Article III standing *and* a statutory cause of action. Even those filed in state courts did not cite or use procedures developed by state legislatures for candidacy challenges.[4] It is therefore unsurprising that these courts—nearly all of which dismissed the challenges for standing, mootness, or other jurisdictional defects and addressed the political question doctrine (if at all) in dictum—failed to recognize the state's plenary power to "appoint, in such Manner as the Legislature

[3] The *Castro* district court's failure to find, cite, and apply relevant and (still valid) authority such as *Lindsay* and *Hassan* is partly explained by the fact that the case was litigated by a *pro se* plaintiff who failed to cite that authority. That does not apply here.

[4] For example, in *Strunk v. New York State Bd. of Elections*, 35 Misc. 3d 1208(A), 2012 WL 1205117 (N.Y. Sup. Ct. 2012), *order aff'd, appeal dismissed*, 126 A.D.3d 777 (N.Y. App. Div. 2015), the plaintiff did not use the objection procedure provided by the New York legislature. *Cf.* N.Y. Elec. Law § 6-154. Instead, he filed a "lengthy, vitriolic, baseless diatribe against defendants, but most especially against the Vatican, the Roman Catholic Church, and particularly the Society of Jesus." *Strunk*, 2012 WL at *2. This cannot be compared to a well-pleaded candidacy challenge under C.R.S. § 1-4-1204(4).

thereof may direct, a Number of Electors," when the plaintiffs did not employ a procedure in the "Manner as the Legislature thereof" had directed.

Appellee's cases fall into four main categories that demonstrate why they are not useful authority here.

1. Post-election cases seeking to annul the results of elections already held. Most of Appellee's cases involved *post-election* attempts to enjoin the Electoral College and/or Congress, claiming remedies that do not exist. *See Berg v. Obama,* 586 F.3d 234 (3d Cir. 2009) (seeking post-inauguration relief after failing earlier to enjoin Electoral College and Congress); *Grinols v. Electoral Coll.*, No. 2:12-CV-02997-MCE, 2013 WL 2294885, at *1 (E.D. Cal. May 23, 2013) (post-election lawsuit seeking to enjoin Electoral College, Congress, and others), *aff'd on other grounds*, 622 F. App'x 624 (9th Cir. 2015); *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373 (S.D. Miss. Mar. 31, 2015) (RICO action seeking in first instance to "decertify or annul" presidential primary results); *Kerchner v. Obama*, 669 F. Supp. 2d 477, 479 (D.N.J. 2009) (complaint filed on

inauguration day, seeking order "to remove the President from office" or compel him to prove his qualifications for his office), *aff'd on other grounds*, 612 F.3d 204 (3d Cir. 2010). Unlike those cases, this action relies on a pre-election candidacy challenge procedure that the legislature enacted to help perform its Article II duty to appoint electors "in such Manner as the Legislature thereof may direct."[5]

2. Cases that do not even discuss or purport to apply the political question doctrine. Next, Appellee relies on cases that did not even discuss the political question doctrine, but instead barred ballot access challenges on inapplicable or otherwise baseless grounds. *See Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008) (not citing political question doctrine; stating that judicial review "should occur only *after* the electoral and Congressional processes" (emphasis added) and citing *Texas v. United States*, 523 U.S. 296, 300–02 (1998), which concerns *ripeness*); *Keyes v. Bowen*, 189 Cal. App. 4th

[5] Appellee claims that "the holdings in these cases apply with equal force to a candidate for president as to a president." Appellee Br. at 22. But while *Congress* holds the power to remove a sitting president, U.S. Const. art. I, § 2, cl. 5 (House has "sole Power of Impeachment"), *states* hold the power to appoint electors. *Id.* art. II, § 1, cl. 2.

647, 659–61 (2010) (not addressing political question doctrine; dismissing entirely on state law grounds).

3. Cases that were decided or affirmed on unrelated grounds. Of the cases that Appellee cites that even discussed the political question doctrine, most did so as an aside in an order dismissing for lack of standing. Crucially, appellate courts have carefully affirmed on other grounds *without* addressing trial courts' political question musings. *See Castro*, 2023 WL 8078010, at *5 ("[w]e confine our analysis, however, to the issue of standing"; declining to adopt district court's political question analysis and noting "like the Supreme Court, '[o]ur court has been similarly sparing in its reliance on the political question doctrine'") (citation omitted); *Grinols,* 622 F. App'x at 625 n.1 ("While the district court based its decision on several alternative holdings, we reach only the issue of mootness."); *Kerchner*, 612 F.3d at 209 n.3 (noting that district court decided "as an alternate holding" that political question doctrine applied, but "we need not discuss that issue"); *Berg*, 586 F.3d at 242 (stating sole holding as

"Because there is no case or controversy, we will affirm the District Court's order dismissing Berg's action.").

4. Cases that have been superseded in their own circuits.

Even if the pre-2014 California federal district court decisions in *Robinson* or *Grinols* could be interpreted as addressing the political question doctrine, they were superseded by *Lindsay*, which explicitly rejected the idea that resolution of presidential candidates' qualifications is exclusively committed to Congress. *See* 750 F.3d at 1065. Notably, in *Grinols*, the trial court decision preceded *Lindsay*, but then after *Lindsay*, the Ninth Circuit affirmed *Grinols* on mootness alone. *See Grinols,* 622 F. App'x at 625 n.1.

Appellee also claims that Section 3 adjudication is uniquely committed to Congress. But the only role that Section 3 commits to Congress is *removing* disqualification. *See* U.S. Const., amend. XIV, § 3 ("But Congress may by a vote of two-thirds of each House, remove such disability."). And Section 5 of the Fourteenth Amendment, which says that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article," does not assign exclusive

authority to Congress to decide Fourteenth Amendment questions. Section 5 applies to Sections 1 and 3 equally. Congress's power to enact additional legislation under Section 5 does not mean that all Section 1 Equal Protection Clause or Due Process Clause claims are non-justiciable political questions—no one thinks that. Likewise, Congress's power to enact additional legislation under Section 5 does not mean that all Section 3 claims are non-justiciable political questions.

D. Section 3 involves judicially manageable standards.

Interpreting constitutional text and applying that text to (sometimes disputed) facts is precisely what courts do. The meanings of "engage" or "insurrection" are judicially discoverable, just as the meanings of "due process of law" and "equal protection of the laws" are judicially discoverable. In fact, the Fourteenth Amendment's key framer explained during congressional debates *precisely how* to construe these terms. Asked to define "due process of law," Representative John Bingham replied: "[T]he courts have settled that long ago, and the gentleman can go and read their decisions." Cong. Globe, 39th Cong., 1st Sess. 1089 (1866).

The same logic applies to Section 3's language. For example, "insurrection" was interpreted and defined repeatedly by courts, law dictionaries, and other authoritative legal sources before, during, and after Reconstruction. *See, e.g.,* District Court Op. ¶¶ 234-36; John Bouvier, *A Law Dictionary* (15th ed., 1883) (defining "insurrection" as "rebellion," and "rebellion" as including "forcible opposition and resistance to the laws and process lawfully issued"); *The Reconstruction Acts* (May 24, 1867), 12 U.S. Op. Att'y Gen. 141, 160 (1867) (opining that, in similarly-worded statute, "[t]he language here comprehends not only the late rebellion, but every past rebellion or insurrection . . . in the United States"); President Lincoln, *Instructions for the Gov't of Armies of the United States in the Field*, Gen. Orders No. 100 (Apr. 24, 1863), art. 149 ("Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view."). This constitutional term can be judicially interpreted using traditional tools of constitutional construction.

Likewise, the judicial interpretation of "engage" under Section 3 has been settled for 150 years. *See United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (defining "engage" as "a voluntary effort to assist the Insurrection . . . and to bring it to a successful [from insurrectionists' perspective] termination"); *Worthy v. Barrett*, 63 N.C. 199, 203 (1869) (defining "engage" as "[v]oluntarily aiding the rebellion by personal service or by contributions, other than charitable, of anything that was useful or necessary"), *appeal dismissed sub nom. Worthy v Comm'rs*, 76 U.S. (9 Wall) 611 (1869); *see also The Reconstruction Acts*, 12 U.S. Op. Att'y Gen. at 161-62 (opining that, in similarly-worded statute, "engage" includes "persons who . . . have done *any overt act* for the purpose of promoting the rebellion"). Both modern courts that construed "engage" under Section 3 last year applied the same *Worthy-Powell* standard. *See New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, *19-20 (N.M. 1st Jud. Dist., Sept. 6, 2022) (applying *Worthy-Powell* standard), *appeal dismissed*, No. S-1-SC-39571 (N.M. Nov. 15, 2022), *cert. filed*, May 18, 2023; *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-

Beaudrot (Ga. Ofc. of State Admin. Hrgs. May 6, 2022), slip op. at 13-14 (applying *Worthy-Powell* standard), *available at* http://bit.ly/MTGOSAH, *aff'd sub nom. Rowan v. Raffensperger*, No. 2022-CV-364778 (Ga. Fulton Cty. Sup. Ct. July 25, 2022). The district court applied this standard. *See* District Court Op. ¶¶ 254-56. It is not judicially unmanageable—it has been, and continues to be, judicially managed.

This case is unlike *Rucho*. That case questioned whether broad principles of "fairness" presumably embodied in the Equal Protection Clause were judicially manageable:

> The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context.. . . . Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. . . . And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?"

Rucho, 139 S. Ct. at 2500.

But this case does not require interpretating implicit values (like fairness) that may be embodied in abstract constitutional text ("equal protection of the laws"), nor arbitrarily dividing a continuous spectrum. Rather, it involves interpretating explicit constitutional terms ("engage," "insurrection," and "rebellion") that were defined when the amendment was enacted and were construed by courts applying the amendment soon after its ratification.

E. Prudential factors do not divest the court's jurisdiction.

None of *Baker*'s final three factors apply here.

1. There is no "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. The branch of government due respect here is the Colorado General Assembly, which has plenary power to appoint presidential electors, and has chosen to empower the Colorado courts to hear challenges to candidate eligibility. The presidential selection process proceeds in steps; at different stages,

different branches of government lead. In the first (current) stage, states have plenary authority to appoint electors "in such Manner as the Legislature thereof may direct." U.S. Const., art. II, § 1, cl. 2. Colorado's General Assembly has chosen to appoint electors via a process that includes ballot access challenges. C.R.S. § 1-4-1204(4). After the electors have cast their votes, Congress will then take the lead in *counting* votes. *See* U.S. Const., amend. XII. Colorado's use of a judicial process to help ensure that it appoints electors only for constitutionally eligible candidates does not disrespect Congress.

Nor does the fanciful possibility that two-thirds of both houses *might theoretically* grant Appellee amnesty will prevent Colorado from exercising its plenary power to appoint electors in the manner directed by its legislature. First, that possibility is purely speculative—Appellee has not even *requested* congressional amnesty. Speculative or imaginary possibilities do not divest states' Article II power, and this Court does not "decide a case on a speculative, hypothetical, or contingent set of facts." *Galvan v. People*, 476 P.3d 746, 757 (Colo. 2020) (internal quotations omitted). Second, this Court's exercise of its legislatively-

conferred authority to limit the ballot to constitutionally qualified candidates would not preclude Congress from later removing Appellee's Section 3 disability. Congress could remove the disability tomorrow, or after this or another court rules Appellee ineligible to appear on the ballot, thereby enabling him to appear on the ballot despite his engagement in insurrection.

2. There is no "unusual need for unquestioning adherence to a political decision already made," *Baker*, 369 U.S. at 217, nor could there be at this stage. *After* electors have been appointed, that need might arise. But appointment of electors is almost a year away. No political decision has been made, nor will be made any time soon.

3. There is no "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id*. If Colorado or another state rules that Appellee is disqualified under Section 3, he may appeal that decision to the U.S. Supreme Court, which can render a final decision. And "various departments" does not mean "various state courts." State courts *regularly* rule on questions that could also be decided by courts in other states; no one claims, e.g.,

that Colorado courts cannot decide a First or Second Amendment question merely because California or Texas courts might rule differently. Rather, state courts interpret and apply the Constitution to their best ability, subject to U.S. Supreme Court review. And that Court can render rapid decisions on contested constitutional election issues. *See, e.g., Bush v. Gore*, 531 U.S. 98 (2000) (argued December 11, 2000, and decided the next day).

CONCLUSION

This case involves applying the Fourteenth Amendment to specific facts. It involves issues of nationwide interest—as do many other cases considered by Colorado courts. Its resolution may have political consequences—as do many other cases considered by Colorado courts. The Constitution grants Colorado the power to appoint its electors in the manner directed by the legislature; the legislature has empowered its courts to hear this challenge; nothing in the Constitution says otherwise. The case does not fall under the political question doctrine and this Court must decide it.

Respectfully submitted this 28th day of November, 2023

s/ Anna N. Martinez

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November 2023, a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* FREE SPEECH FOR PEOPLE (FSFP) IN SUPPORT OF PETITIONER-APPELLANTS NORMA ANDERSON, ET AL.** was electronically filed and served via Colorado Courts E-filing to the following:

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