No. 23-719

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF FOR RETIRED STATE SUPREME COURT JUSTICES AS AMICI CURIAE SUPPORTING RESPONDENTS

CHARLES N. NAUEN
LOCKRIDGE GRINDAL NAUEN PLLP
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401
(612) 339-6900
cnnauen@locklaw.com

RONALD A. FEIN
Counsel of Record
JOHN C. BONIFAZ
BEN T. CLEMENTS
COURTNEY HOSTETLER
FREE SPEECH FOR PEOPLE
1320 Centre St. #405
Newton, MA 02459
(617) 244-0234
rfein@freespeechforpeople.org

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE

Amici are retired state supreme court justices who seek to ensure that state courts retain their ability to enforce the Fourteenth Amendment without special permission from Congress, that states may adjudicate candidate eligibility challenges; and that state court judges and staff are protected from threats and political violence:[1]

Paul H. Anderson (Associate Justice, Minnesota Supreme Court, 1994-2013);

Fernande Duffly (Associate Justice, Massachusetts Supreme Judicial Court, 2011-2016);

James Exum, Jr. (Associate Justice, North Carolina Supreme Court, 1975-1986; Chief Justice, 1986-1994);

Joseph Grodin (Associate Justice, California Supreme Court, 1982-1987);

James Nelson (Associate Justice, Montana Supreme Court, 1993-2013);

Robert Orr (Associate Justice, North Carolina Supreme Court, 1995-2004);

Peggy Quince (Associate Justice, Florida Supreme Court, 1999-2008 and 2010-2019; Chief Justice, 2008-2010).

SUMMARY OF ARGUMENT

The Supremacy Clause requires state courts to enforce federal constitutional provisions where they apply to

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[1] No party's counsel authored the brief in whole or part or made a monetary contribution to fund preparation or submission of the brief. No party besides amici or their counsel contributed monetarily to preparation or submission of the brief. Counsel of record received advance notice of intent to file this brief.

state-law causes of action. And state courts have continuously enforced Section 1 of the Fourteenth Amendment—including the Equal Protection and Due Process Clauses—since Reconstruction. In this respect, Section 3, like the presidential qualifications established in Article II, operates like Section 1: state courts do not require congressional permission to enforce it.

Under the Electors Clause, states' plenary power to appoint presidential electors allows states to condition appointment on their voting only for constitutionally eligible candidates. This necessarily includes power to decide whether candidates are eligible. Neither the Twelfth nor the Twentieth Amendment, nor any other constitutional provision, commits this determination exclusively to Congress or strips states of their power.

State courts have a particular interest in vindicating Section 3's purpose: protecting the republic from insurrectionists returning to power. Trump exemplifies this risk by repeatedly threatening judges, judicial employees, and others involved in the court system. Declining to apply Section 3 for fear of Trump-incited mob violence would not prevent that violence; it would simply shift its burden to thousands of justices, judges, and court staff, and would invite more chaos, violence, and insurrection.

ARGUMENT

I. States do not require federal legislation to enforce Section 3.

A. State courts do not need congressional permission to enforce the Fourteenth Amendment.

State courts must apply the Constitution. U.S. Const. art. VI, § 2 (U.S. Constitution is "the supreme

Law of the Land; and the Judges in every State shall be bound thereby"). This Court has "consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990); *Claflin* v. *Houseman*, 93 U.S. 130, 136 (1876); *Robb* v. *Connolly*, 111 U.S. 624, 637 (1884) (Harlan, J.) ("Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the [C]onstitution of the United States . . . ."). Indeed, if federal law applies to a state law cause of action, state courts *must* apply it. See *Howlett* v. *Rose*, 496 U.S. 356, 367 (1990) ("The Supremacy Clause makes [federal law] 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure."); *Testa* v. *Katt*, 330 U.S. 386, 389-93 (1947).

When state-court civil plaintiffs raise federal constitutional claims through state law causes of action, courts do not first demand a federal statute authorizing them to consider the claims. Instead, they review the claims on their merits. See*, e.g.*, *Dallman* v. *Ritter*, 225 P.3d 610, 619 (Colo. 2010) (First Amendment); *Jankovich* v. *Ill. State Police*, 78 N.E.3d 548, 552 (Ill. App. Ct. 2017) (Second Amendment); *N.Y. Horse & Carriage Ass'n* v. *City of New York*, 545 N.Y.S.2d 439, 443-44 (N.Y. Sup. Ct. 1989) (Fourth Amendment); *McCabe* v. *Dep't of Registration & Educ.*, 413 N.E.2d 1353, 1358-59 (Ill. App. Ct. 1980) (Fifth Amendment). Sometimes, a federal constitutional question arises as a defense in a state proceeding, but as these cases illustrate, state courts routinely adjudicate affirmative federal constitutional claims raised by civil plaintiffs where state law supplies a cause of action.

In fact, this Court has developed doctrines of *preference* for state court adjudication of federal constitutional questions. See*, e.g.*, *Allen* v. *McCurry*, 449 U.S. 90, 105 (1980) (prior state court judgment on federal constitutional question binds federal courts by estoppel); *Younger* v. *Harris*, 401 U.S. 37, 40-41 (1971) (federal court cannot ordinarily enjoin pending state court criminal proceeding based on federal constitutional claims).

In *federal* court, the availability of relief under the Constitution depends on statutory or implied private rights of action. See*, e.g.*, 42 U.S.C. 1983; *Egbert* v. *Boule*, 596 U.S. 482, 486 (2022). But *state* courts do not require specific congressional statutes to enforce federal constitutional rights through applicable state law procedures.[2] See *ASARCO* v. *Kadish*, 490 U.S. 605, 617 (1989) (state courts can "render binding judicial decisions that rest on their own interpretations of federal law"). Except where Congress grants federal courts exclusive jurisdiction, state courts must apply and enforce federal constitutional provisions when properly invoked under state law.

That understanding was settled long before the Fourteenth Amendment. See *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 339-42 (1816). Unsurprisingly, state courts began adjudicating civil claims under the Fourteenth Amendment soon after its passage, without special authorization from Congress. See*, e.g.*, *Van Valkenburg* v. *Brown*, 43 Cal. 43 (Cal. 1872) (affirmative claim under Section 1's Privileges and Immunities Clause); *Cory* v. *Carter*, 48 Ind. 327 (Ind. 1874) (Equal

[2] Amicus Claremont Institute contends (Amicus Br. 13-14) that neither the Supremacy Clause nor Section 3 creates an implied private right of action. Amici agree. But state legislatures can (as Colorado has here) create private rights of action in state court. See Colo. Rev. Stat. §§ 1-1-113, 1-4-1204.

Protection Clause); *City of Portland* v. *City of Bangor*, 65 Me. 120 (Me. 1876) (Due Process Clause). With this Court's approval, this practice has continued to the present time. See*, e.g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 460-61 (1981) (reviewing state supreme court decision affirming injunction under Equal Protection Clause); *Sands Bethworks Gaming, LLC* v. *Penn. Dep't of Revenue*, 207 A.3d 315, 324 (Pa. 2019) (upholding Fourteenth Amendment claim); *Passalino* v. *City of Zion*, 928 N.E.2d 814, 816 (Ill. 2010) (similar); *In re Candidacy of Indep. Party Candidates Moore* v. *Kiffmeyer*, 688 N.W.2d 854, 856-57 (Minn. 2004) (similar). Indeed, *Brown* v. *Board of Education* arose partly from a Delaware state court case deciding plaintiffs' Fourteenth Amendment claim. See *Gebhart* v. *Belton,* 91 A.2d 137, 139-40 (Del. 1952)*,* aff'd sub nom. *Brown* v. *Bd. of Educ.,* 349 U.S. 294 (1955). The Fourteenth Amendment is thus "self-executing" in the sense that state courts may enforce it through state law causes of action, without need for any federal statute.

B. Nothing in the Fourteenth Amendment suggests Section 3 requires federal legislation.

1. Section 3 states a direct prohibition, not an authorization. It says: "*No person shall be* a [Member of Congress or presidential elector] *or hold* any office" after breaking the oath and engaging in insurrection. (Emphasis added.) "It lays down a rule by saying what shall be. It does not *grant a power* to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself." William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 17-18) (emphasis in original), https://

papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 (last revised Sept. 19, 2023). It parallels other constitutional qualifications that require no special implementing legislation. See U.S. Const. art. I, § 2, cl. 2 ("*No Person shall be* a Representative" who does not meet age, citizenship, and residency requirements); *id.* art. I, § 3, cl. 3 (same for Senators); *id.* art. II, § 1, cl. 5 ("*No Person . . . shall be* eligible to the Office of President" who does not meet age, citizenship, and residency requirements); *id.* amend. XII ("*no person* constitutionally ineligible to the office of President *shall be* eligible to that of Vice-President") (emphases added).

Likewise, Section 3's prohibitory language parallels Section 1. See *id.* amend. XIV, § 1 ("*No State shall make or enforce any law* which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive* any person of life, liberty, or property, without due process of law; *nor deny* to any person within its jurisdiction the equal protection of the laws.") (emphases added).

State courts do not need congressional legislation to enforce the Due Process or Equal Protection Clauses. In fact, the Fourteenth Amendment constitutionalizes these protections precisely so they do *not* depend on the whims of Congress. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1095 (1866) (Rep. Hotchkiss) (arguing for constitutional protection of civil rights because "We may pass laws here to-day, and the next Congress may wipe them out"). Section 1 is in this sense "self-executing." *City of Boerne* v. *Flores,* 521 U.S. 507, 522-24 (1997) ("Section 1 of the new draft Amendment imposed self-executing limits on the States . . . . As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."); *Civil Rights*

Cases, 109 U.S. 3, 20 (1883) ("[The Thirteenth] amendment, *as well as the Fourteenth*, is undoubtedly self-executing without any ancillary legislation . . . .") (emphasis added).[3]

As with Section 1, the Framers did not leave Section 3 to the whims of "the next Congress" which could pass or repeal legislation by bare majority. Instead, they removed any possible doubt that Section 3 is self-executing, by expressly providing that only a bicameral *two-thirds* vote could remove disqualification.

In contrast, constitutional provisions that require affirmative congressional action for enforcement contain no direct prohibition; they merely *authorize* Congress to act. For example, Article I authorizes Congress "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States." U.S. Const. art. I, § 8, cl. 6. This neither prohibits counterfeiting, nor establishes a punishment; it authorizes Congress to "provide for" such punishment. The Treason Clause *defines* treason and authorizes Congress "to declare [its] Punishment," but does not itself impose consequences for treason. *Id.* art. III, § 3. The Impeachment Clause defines impeachable offenses, *id.* art. II, § 4, but the Constitution expressly and exclusively leaves the House to decide whether to impeach, *id.* art. I, § 2, cl. 5, and the Senate to decide whether to convict, *id.* art. I, § 3, cl. 6.

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[3] *Ownbey* v. *Morgan* held only that Delaware *did not violate* the Due Process Clause; its use of "self-executing" bears no relation to the usage in this case. See 256 U.S. 94, 110-12 (1921). Here, Colorado *did* enforce the Fourteenth Amendment; Trump and his amici contend that Colorado *cannot do so* without federal legislation.

Authorizing language typically provides that Congress "may" or "shall" do something "by Law", *e.g.*, *id.* art. I, § 2, cl. 3; *id.* art. I, § 4, cl. 1-2, or that Congress "shall have Power" to do something, *e.g.*, *id.* art. I, § 8, cl. 1; *id.* art. III, § 3, cl. 2; *id.* art. IV, § 3, cl. 2. But Section 3 enacts its own disqualification—"No person shall be . . . or hold"—and, like other provisions of the Fourteenth Amendment, does not require congressional action before states may implement it. Rather, the only exclusive role Section 3 grants Congress is power to *remove* disqualification—a power which Congress has not exercised for Trump.[4]

2. Section 5's authorization of congressional legislation does not make Section 3 unenforceable without legislation. See *id*. amend. XIV, § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").[5] This provision authorizes federal legislation but does not require it. As this Court recognized soon after the amendment's enactment—in a dispute over the scope of Congress's Section 5 enforcement power—"the Fourteenth [Amendment],

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[4] Amicus Republican National Committee (RNC) cites (Amicus Br. 18) a badly out-of-context quote from Rep. Thaddeus Stevens involving an earlier draft of Section 3 that would have banned ex-Confederates from voting. See Cong. Globe, 39th Cong., 1st Sess. 2460, 2544 (1866). Stevens admitted this earlier draft would require implementing legislation; Congress abandoned that draft. See *id*. at 2544, 2869. The RNC also complains (Amicus Br. 10) that the Fourteenth Amendment was designed to limit state power. But Article II grants states plenary power over appointing electors. See Part II.A, *infra*. The RNC's dispute is not with Section 3, but with the Electoral College.

[5] Section 5 is occasionally misquoted as "Congress shall have *the* power." If anyone might misinterpret "the" power as meaning *exclusive* power, the fact that Section 5 does not say that refutes the argument.

is undoubtedly self-executing *without any ancillary legislation*." *Civil Rights Cases*, 109 U.S. at 20 (emphasis added).

Section 5 applies to the entire Fourteenth Amendment, including Section 1's Due Process and Equal Protection Clauses. If Section 5 meant states could not adjudicate questions under Section 3 without congressional legislation, then it would *also* mean states could not adjudicate Due Process or Equal Protection Clause questions without congressional legislation—but they can and do. See Part I.A, *supra*.

The Thirteenth and Fifteenth Amendments further confirm this reading. Their first sections create direct prohibitions. U.S. Const. amend. XIII, § 1 (slavery or involuntary servitude); *id.* amend. XV, § 1 (deprivation of vote on account of race, color, or previous servitude). Their second sections provide: "Congress shall have power to enforce this article by appropriate legislation." *Id.* amend. XIII, § 2; *id.* amend. XV, § 2. But no one contends that if Congress failed to legislate, then Section 1 of the Thirteenth or Fifteenth Amendment would be unenforceable. Indeed, state courts *directly* adjudicate claims under these amendments' substantive sections, see*, e.g.*, *Moss* v. *Superior Ct.*, 950 P.2d 59, 72-73 (Cal. 1998) (Thirteenth Amendment), and have done so since immediately after their adoption, *e.g.*, *Wood* v. *Fitzgerald*, 3 Or. 568, 577 (1870) (Fifteenth Amendment). Rather, the legislation clause "empowered Congress to do *much more*" than what the amendments themselves do. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (emphasis added); see also *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 197 (2009) (Section 1 of Fifteenth Amendment is "self-executing").

Section 5 of the Fourteenth Amendment is nearly verbatim identical to Section 2 of the Thirteenth and

Fifteenth Amendments, and the Fourteenth Amendment's legislation clause stands in precisely the same relationship to the insurrectionist disqualification clause as the Thirteenth and Fifteenth Amendments' legislation clauses stand to their substantive prohibitions. The same legislation clause—which indisputably does *not* preempt independent judicial enforcement of the Thirteenth Amendment's ban on slavery, the Fourteenth Amendment's protections of equal protection and due process, or the Fifteenth Amendment's ban on race-based deprivation of the vote—cannot somehow act in an entirely different way to preempt independent judicial enforcement of Section 3.

C. *Griffin's Case* is wrong and does not apply to state court proceedings.

1. *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869), openly contradicts the plain meaning of the Constitution's text. Chief Justice Chase (riding circuit) acknowledged that the "literal construction"—what today would be called the plain meaning—of Section 3 disqualified the Virginia judge who had sentenced the habeas petitioner. *Id*. at 24. Noting that the judge's counsel "seemed to be embarrassed by the difficulties" supposedly presented by that plain meaning, Chase expounded upon the "great inconvenience" of applying it, sympathizing with various "calamities which have already fallen upon the people of these [ex-Confederate] states." *Id.* at 24-25. But courts cannot disregard the Constitution's plain text due to "inconvenience." See *NLRB* v. *Noel Canning*, 573 U.S. 513, 600 (2014) (Scalia, J., concurring in the judgment) (criticizing constitutional interpretation that rejects plain meaning due to "embarrassing inconveniences"). Section 3 was intended to exclude oath-breaking insurrectionists from public office—even when inconvenient.

2. Its constitutional interpretation is wrong. First, Chase relied on Section 5, which authorizes congressional legislation. See 11 F. Cas. at 26. But authorizing Congress to enact legislation does not deprive states of their inherent authority and obligation to enforce the Constitution. Then, Chase observed that Congress's exclusive role in removing disqualifications gives Congress "absolute control of the whole operation of the amendment." *Ibid*. But Section 3's grant of exclusive authority to Congress to *remove* disqualification (by two-thirds vote of each house), coupled with the absence of such authority regarding *disqualification itself*, refutes this.

3. It does not address *state* procedures in *state* court. Chase noted that "[t]o accomplish this ascertainment [of who is disqualified] and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." *Ibid*. But he never addressed why *state legislatures* could not establish such proceedings by law. Indeed, both sides' counsel essentially conceded that *quo warranto* could lie in state court against a state judge holding office in violation of Section 3. Compare *id.* at 14 (Griffin's counsel) with *id.* at 21 (Virginia judge's counsel). Instead, Chase simply assumed that "these can only be provided for by congress." *Id.* at 26. Even if true in federal court, that does not explain why a state court would need federal legislation to enforce the Fourteenth Amendment.[6]

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[6] John Marshall Harlan understood that states could enforce Section 3. On December 1, 1868—eighteen months before any federal law enforcing Section 3 in Kentucky—he wrote to Congress supporting a Kentucky resident's amnesty petition. See Cong. Globe, 40th Cong., 3d Sess. 1263 (1869). This would have been pointless if Section 3 were not already enforceable.

4. It was, in modern parlance, affirmed on other grounds. Per Chief Justice Chase, the full Court "unanimously concur[red] in the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus." *Id.* at 27. Chase did not state whether he presented his theory that Section 3 requires implementing legislation to the full Court before resorting to the de facto officer doctrine, which sufficed to resolve the case, but that omission suggests that the full Court did *not* support that view.[7]

D. The federal criminal insurrection statute does not preempt state authority to apply Section 3 in civil proceedings.

The federal criminal insurrection statute, 18 U.S.C. 2383, predates the Fourteenth Amendment. It derives from the Second Confiscation Act of 1862, which made it a crime to "incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof." *An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes*, § 2, Pub. L. 37-195, 12 Stat. 589, 590 (1862). This pre-Fourteenth Amendment statute could neither implement congressional authority under Section 5 nor preempt state authority to enforce Section 3.

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[7] Amicus Seth Barrett Tillman (Amicus Br. 5) claims that in *Ex parte Ward*, 173 U.S. 452 (1899), this Court cited *Griffin's Case* "favorably, on point, and as good law." The Court did cite *Griffin's Case* favorably—but *only* for the de facto officer ruling, *not* the proposition that Trump invokes here. See *Ward*, 173 U.S. at 454–56.

Historically, the statute played no role under Section 3—as preemption or otherwise. Before the Fourteenth Amendment was even proposed, President Johnson pardoned most ex-Confederates. See Pres. Andrew Johnson, *Proclamation Pardoning Persons who Participated in the Rebellion* (May 29, 1865), https://www.loc.gov/resource/rbpe.23502500. Congress's outrage helped motivate the development of the Fourteenth Amendment and Section 3's insistence that only Congress could remove disqualification. See Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 94-95 (2021). In 1868, Johnson pardoned *all remaining* ex-Confederates, without exception. Pres. Andrew Johnson, Proclamation No. 179, *Granting Full Pardon and Amnesty for the Offense of Treason Against the United States During the Late Civil War* (Dec. 25, 1868), https://www.loc.gov/resource/rbpe.23602600. Thus, the criminal insurrection statute ensnared *zero* people.

If the statute occupied the field of insurrection disqualification, then *no one* would have been disqualified after December 25, 1868. Yet state courts continued to apply Section 3; ex-Confederates continued to seek congressional amnesty; and Congress, eventually, enacted broad amnesties in 1872 and 1898. See Magliocca, *supra*, at 111-27. No one in any of the judicial decisions enforcing Section 3, nor in *Griffin's Case*, nor in congressional or public debates regarding amnesty, suggested that the criminal insurrection statute preempted states from enforcing Section 3 against individuals not charged under that statute.

II. The Constitution authorizes states to adjudicate presidential candidates' qualifications.

A. The Electors Clause grants states plenary power to appoint electors, and condition appointments on electors voting for eligible candidates.

The Electors Clause empowers states to appoint presidential electors in the manner they choose. See U.S. Const., art. II, § 1, cl. 2. This power is plenary absent some other constitutional constraint. *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.") (cleaned up); *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) (legislature's power is "plenary"); *McPherson* v. *Blacker*, 146 U.S. 1, 35 (1892) (similar).

This plenary power includes conditioning electors' appointment on their candidates' meeting constitutional eligibility criteria.[8] *Lindsay* v. *Bowen*, 750 F.3d 1061, 1063 (9th Cir. 2014) (for presidential primary ballot, state's interest in "protecting the integrity of the election process" allows it to enforce "the lines that the Constitution already draws") (cleaned up); *Hassan* v. *Colorado*, 495 Fed. Appx. 947, 948 (10th Cir. 2012) (Gorsuch, J.) ("[A] state's legitimate interest in protecting the integrity and practical functioning of the

[8] States cannot *add to* the constitutional qualifications for president. See *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 800-04 (1995). But this case does not involve an additional qualification—it involves a qualification from the Constitution itself.

political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office."); Derek T. Muller, *Scrutinizing Federal Electoral 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.").

This comports with the Clause's history: a compromise between competing visions of who should choose presidential electors. See *McPherson*, 146 U.S. at 28. For years, many state legislatures directly appointed presidential electors; Colorado did so as recently as 1876. See *id.* at 29-33. An eighteenth or nineteenth century legislature that planned to appoint electors directly could require those electors to vote for specific candidates. *Chiafalo*, 140 S. Ct. at 2323-24. And it could have *first* authorized a committee to examine whether candidates met constitutional eligibility requirements—*e.g.*, Chester Arthur, who was dogged by rumors of foreign birth[9]—*before* appointing electors, so the legislature would not waste electoral votes on ineligible candidates. And since a legislature could direct a *committee* to examine candidates' constitutional qualifications before appointing electors, it likewise can authorize a *court* to adjudicate that question.

Nothing has stripped states of that power. In states like Colorado, legislatures have specified that electors will be selected by popular vote, but have empowered

[9] See, e.g., Nat'l Portrait Gallery, *Chester Arthur: A Birthplace Controversy, 1880*, https://npg.si.edu/blog/chester-arthur-birthplace-controversy-1880 (last visited Jan. 26, 2024).

their courts, as is their prerogative, to screen constitutionally ineligible candidates.[10]

B. The political question doctrine does not bar states from adjudicating presidential candidates' qualifications.

The political question doctrine constrains the jurisdiction of *federal courts*, not of states. "[I]t 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* v. *Carr*, 369 U.S. 186, 210 (1962); *Rucho* v. *Common Cause,* 588 U.S. __, 139 S. Ct. 2484, 2500 (2019) (describing "a political question beyond the competence of the *federal courts*") (emphasis added).[11] If the political question doctrine applied here, then finding this case nonjusticiable in federal court would deprive *this* Court of jurisdiction, leaving the Colorado Supreme Court's judgment intact.

Even if the political question doctrine applied to a state's actions, it is a "narrow exception." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 194-95 (2012). It concerns "'political questions,' not . . . '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*, 369

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[10] States also retain inherent authority to bind electors to vote for eligible candidates. States retain "all powers that the Constitution does not withhold from them." *Chiafalo*, 140 S. Ct. at 2334 (Thomas. J., concurring in the judgment) (cleaned up); see U.S. Const. amend. X.

[11] For example, *Baker* explained how in *Worcester* v. *Georgia*, 31 U.S. 515 (1832), "despite the consequences in a heated federal-state controversy and the opposition of the other branches of the National Government," the political question doctrine had not rendered the case nonjusticiable. *Baker*, 369 U.S. at 215 n.43.

U.S. at 217. Rather, a court "has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 U.S. at 194-95 (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*, 146 U.S. at 23 ("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 [C]onstitution and laws of the United States, and this is a case so arising . . . .").

Baker identified six relevant factors, but this Court has recently focused on whether the issue (1) is textually committed to another branch of government, or (2) lacks judicially manageable standards for resolution. See *Rucho*, 139 S. Ct. at 2494 (citing only second factor); *Zivotofsky*, 566 U.S. at 195 (citing only first two factors).

1. Appointment of presidential electors is textually committed to states, not Congress. As discussed above, the Electors Clause establishes states' authority to limit electoral appointments to only those electors who will vote for constitutionally eligible candidates. That necessarily includes power to determine whether particular candidates are eligible.

Conversely, the Constitution does *not* expressly commit that power to Congress. While Article I explicitly authorizes Congress to judge qualifications of incoming *members*, 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 candidate eligibility. The Twelfth Amendment authorizes Congress to *count electoral votes*; it does not explicitly authorize Congress to *judge presidential qualifications*. See *id*. amend. XII. Similarly, the Twentieth Amendment provides a contingency procedure "if the President elect shall have failed to qualify," but does not commit adjudication of eligibility to Congress or anyone else. *Id.* amend. XX, § 3.

Even if Congress holds some unwritten power to judge presidential candidates' qualifications, that power is not *exclusive*. See *Lindsay,* 750 F.3d at 1065 ("[N]othing in the Twentieth Amendment states or implies that Congress has the *exclusive* authority to pass on the eligibility of candidates for president."); *Hassan*, 495 Fed. Appx. at 948-49; Muller, *supra*, at 605 ("[T]he power of Congress to examine the qualifications of executive candidates is, at the very best, debatable, and certainly not exclusive.").

2. Section 3 involves judicially manageable standards. Interpreting constitutional text and applying that text to (sometimes disputed) facts is precisely what courts do. Like "due process" and "equal protection," the meanings of "engage" and "insurrection" are judicially discoverable. Indeed, the terms "insurrection" and "engage" are *more* clearly defined than terms like "due process" and "equal protection."

"Insurrection" was interpreted and defined repeatedly by courts, law dictionaries, and other authoritative legal sources before, during, and after Reconstruction. See*, e.g.*, *The Reconstruction Acts*, 12 U.S. Op. Att'y Gen. 141, 160 (1867) (language in similarly-worded statute "comprehend[ed] not only the late rebellion, but every past rebellion or insurrection . . . in the United States"); Pres. Abraham 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."), https://avalon.law.yale.edu/19th_century/lieber.asp; Webster's Dictionary (1830) ("combined resistance to . . . lawful authority . . ., with intent to the denial thereof").

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) ("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) ("[v]oluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary"), appeal dismissed sub nom. *Worthy* v. *Comm'rs*, 76 U.S. (9 Wall) 611 (1869); 12 U.S. Op. Att'y Gen. at 161-62 (similar).

Unlike *Rucho*, which held that broad principles of "fairness" implicit in equal protection were not judicially manageable, see 139 S. Ct. at 2500, this case does not require interpreting implicit values (like fairness), nor arbitrarily dividing a continuous spectrum. Rather, it involves interpreting explicit terms ("engage" and "insurrection") that were well defined when the amendment was enacted and were construed soon after its ratification.

3. None of *Baker*'s final three prudential factors apply here. *First*, 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" due respect

is Colorado's legislature. Different entities control different stages of the presidential selection process. 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 legislature has chosen to appoint electors via a process that includes empowering courts to hear ballot access challenges. After electors cast their votes, Congress will take the lead in *counting* votes. *Id.* amend. XII. Colorado's use of a judicial process to help ensure it appoints electors only for constitutionally eligible candidates does not disrespect Congress.

Second, 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 are appointed, that need might arise. But the election is nine months away. No political decision has been made, nor will be made any time soon.

Third, there is no "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Ibid*. The Constitution obligates "*Each State*" to appoint electors "in such Manner as *the Legislature thereof may direct*." U.S. Const., art. II, § 1, cl. 2 (emphases added). The states are not different "departments" of the federal government, and interstate differences in Electoral College processes are not

an "embarrassment"[12]—they are the result of separate sovereigns whose courts may interpret federal law differently unless this Court pronounces a uniform rule. As between this Court and Congress, there is no potential for multifarious pronouncements. If this Court rules that Trump is, in fact, disqualified, Congress can (if it chooses) remove that disqualification. This is no more embarrassing than when this Court renders an opinion and Congress responds by passing a statute. See*, e.g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694 (2014). And, unsurprisingly, *Baker* says nothing about different state courts deciding matters differently; the doctrine is meant to protect the *federal* government's branches from each other.

For this reason, federal and state appellate courts have consistently rejected or declined to adopt this political question theory. The Ninth and Tenth Circuits have confirmed states' authority to exclude constitutionally ineligible candidates from their ballots. See *Lindsay*, 750 F.3d at 1065 (confirming state's authority to remove ineligible candidate from presidential primary ballot, and explicitly rejecting the idea that the Constitution commits presidential candidates' qualification determinations exclusively to Congress); *Hassan*, 495 Fed. Appx. at 948. Conversely, no federal or state

[12] The sky does not fall when even famous presidential candidates appear on some states' ballots but not others. In 2012, four major Republican candidates (Rick Perry, Rick Santorum, Newt Gingrich, and Jon Huntsman) were excluded from Virginia's Republican primary ballot. See *Perry* v. *Judd,* 840 F. Supp. 2d 945, 953 (E.D. Va. 2012) (upholding exclusion), aff'd*,* 471 F. App'x 219 (4th Cir. 2012) (denying emergency motion). In the 2020 general election, multiple states excluded Kanye West from their ballots. See*, e.g.*, *State ex rel. West* v. *LaRose*, 161 N.E.3d 631 (Ohio 2020) (upholding exclusion).

appellate court has *ever* adopted this political question argument.[13]

C. No contrived distinction between "qualifications" and "disqualifications," or "easy" and "hard" cases, strips states' powers.

States' power to adjudicate cannot turn on whether Section 3 is characterized as a "qualification" or "disqualification." These terms are mirror images. Nothing materially distinguishes the presidential "qualifications" in Article II from the Fourteenth (or Twenty-Second) Amendment's "disqualifications." They are phrased in parallel. U.S. Const. art. II, § 1, cl. 5 ("*No Person . . . shall* be eligible to the Office of President. . . ."); *id.* amend. XIV, § 3 ("*No person shall* . . . hold any office . . . under the United States . . . ."); *id.* amend. XXII, § 1 ("*No person shall* be elected to the office of the President . . ."). One might equally say that Article II, the Fourteenth Amendment, and the Twenty-Second Amendment declare qualifications or that—per their negative phrasing—they disqualify anyone who does *not* meet these criteria from the presidency.

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[13] Trump's amici cite various unpublished state and federal *trial* court decisions that were affirmed on other grounds. State and federal appellate courts have consistently and expressly declined to indulge any trial court suggestion that the political question doctrine preempts state authority to adjudicate presidential candidates' qualifications. See *Castro* v. *Scanlan*, 86 F.4th 947, 953 (1st Cir. 2023) (declining to decide political question issue discussed below); *Grinols* v. *Electoral College*, 622 Fed. Appx. 624, 625 n.1 (9th Cir. 2015) (similar); *Kerchner* v. *Obama*, 612 F.3d 204, 209 n.3 (3d Cir. 2010) (similar); *Davis* v. *Wayne Cnty. Election Comm'n*, __ N.W.2d __, 2023 WL 8656163, at *16 n.18 (Mich. Ct. App. Dec. 14, 2023) (similar), *leave to appeal denied sub nom. LaBrant* v. *Sec'y of State*, No. 166470 (Mich. Dec. 27, 2023) (mem.).

Attempts to distinguish "qualifications" from "disqualifications," claiming that states may adjudicate one but not the other, are sophistry.[14]

Likewise, states' power to condition appointment of electors on their voting for eligible candidates cannot turn on the supposed difficulty of adjudication. None of *Baker*'s factors turn on the existence of factual or legal disputes, and no constitutional principle says that "harder" cases are nonjusticiable. See Baude & Paulsen, *supra*, at 22 ("More difficult it may be, to interpret and apply the disqualification of Section Three than the disqualifications of age, citizenship, and residency. But the fact of difficulty is a non sequitur. . . . The Constitution says what it says and we must try to apply it as best we can.").

If all eligibility questions were textually committed to Congress, then—*contra Lindsay* and *Hassan*—states could not exclude *any* candidates as ineligible, even on undisputed facts. Nothing in the Constitution supports a concocted division of labor wherein states can decide "easier" questions, but Congress must decide "harder" questions. Rather, it assigns states plenary authority to appoint electors and Congress authority to *count* those electors' votes.

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[14] States might assign the burden of proof differently depending on the qualification challenged. Here, Colorado assigned the challengers the burden to prove Trump's engagement in insurrection, and they met it.

D. A state legislature may enact a process for adjudicating the qualifications of candidates who are "running" for office, even if the Constitution only bars insurrectionists from "holding" office.

Trump argues that Section 3 only bars disqualified individuals from *holding* office, not from *running for* or *being elected to* that office. But this is also true of Article II's age, citizenship, and residency requirements, for which courts have confirmed states' authority to exclude ineligible candidates from ballots, including primary ballots. See *Lindsay*, 750 F.3d at 1063-64 (upholding exclusion of underage candidate from presidential primary ballot); *Hassan,* 495 Fed. Appx. at 948-49; see also *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (noting that a political party is not "absolutely entitled to have its nominee appear on the ballot as that party's candidate" because "[a] particular candidate might be ineligible for office"). The Tenth Circuit rejected this argument in *Hassan*. Like Trump, Hassan argued that "[e]ven if Article II properly holds him ineligible to *assume the office* of president," it was unlawful "for the state to deny him a *place on the ballot.*" 495 Fed. Appx. at 948 (emphasis in original). The Tenth Circuit rejected this distinction, concluding 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.*" *Ibid.* (emphasis added). Likewise, while Section 3 *itself* only prohibits disqualified individuals from *holding* office, states may limit their appointment of electors—and, hence,

ballots used to select those electors—to candidates eligible to take office.[15]

Trump claims that Section 3 differs from Article II's requirements because Congress *might, in theory*, remove his disqualification. But he has not even asked Congress to do so. This Court does not decide cases based on fanciful scenarios that are "conjectural or hypothetical." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up).

Under Trump's view, if a disqualified insurrectionist seeks the presidency, the issue could only be resolved *after* the general election—either by Congress at the counting of electoral votes, on January 6, 2025, or by persons unknown (the Chief Justice?) at noon on January 20, 2025. Trump's contention that election officials and the courts cannot enforce Section 3 unless and until a disloyal insurrectionist has successfully run for an office from which he is currently disqualified,

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[15] The fact that this is a *presidential primary* election is irrelevant. Primaries using state-prepared ballots and state-run elections are not strictly internal party processes. When political parties choose to use the election machinery of the state, they are subject to constitutional requirements. See *Smith* v. *Allwright*, 321 U.S. 649 (1944) (exclusion of African-Americans from party primary violated Fifteenth Amendment); *Nixon* v. *Condon*, 286 U.S. 73 (1932) (state Democratic Party's action amounted to delegation of state power and was invalid under Fourteenth Amendment); *Nixon* v. *Herndon*, 273 U.S. 536 (1927) (statute barring African-Americans from participation in Democratic primary violated Fourteenth Amendment). Just as the state cannot delegate to a party or its membership the effective "right" to discriminate based on race, the state cannot delegate to a party the effective "right" to list ineligible candidates on the state-printed presidential primary ballot. At minimum, states clearly have the authority to remove ineligible candidates from presidential primary ballots. See *Lindsay*, 750 F.3d at 1065.

then belatedly and unsuccessfully asked Congress to remove the disability, invites chaos and perhaps another insurrection. Right now, he is not constitutionally qualified to hold office; Colorado acted within its authority to exclude him from the ballot.

E. Banning state adjudication would render all constitutional qualifications for president merely advisory and invite a showdown on January 6.

The position that states cannot protect their ballots from ineligible candidates renders *all* presidential constitutional qualifications merely advisory. Congress is only called upon to adjudicate a presidential candidate's eligibility if the candidate either received a majority of electoral votes or came sufficiently close that real or pretended irregularities put the counting of electoral votes into play. An objection based on the candidate's ineligibility would require "separate concurring votes of each House." 3 U.S.C. 15(d)(2)(C)(ii). Since one chamber can defeat an objection, and a presidential candidate rarely wins without his party also taking *one* chamber, *all* constitutional qualifications for the presidency would be merely advisory. Under this view, if a two-term president seeks a third term, no state can exclude him from its ballot; as long as his party controls one chamber, neither states nor Congress nor this Court could enforce the Twenty-Second Amendment to prevent third or fourth terms.

Further, Trump claims that allowing states to adjudicate eligibility of presidential candidates would "unleash chaos and bedlam." Pet. Br. 2. But Trump's view would *maximize* "chaos and bedlam" by postponing adjudication of a candidate's eligibility until either January 6, 2025—the anniversary of the bloody

insurrection that gave rise to this matter—or January 20, 2025 at high noon.[16]

III. Section 3 was enacted to prevent the threats that Trump presents to state and federal courts.

Trump's ongoing threats against state and federal courts before and after January 6 highlight the hard-learned lesson that motivated Section 3. As Senator Grimes explained, "the man who has once violated his oath will be more liable to violate his fealty to the Government in the future." Cong. Globe, 39th Cong., 1st Sess. 2916 (1866).

Trump illustrates this danger. He abuses court proceedings to intimidate court officials. In 2020, Trump and his allies filed over sixty court cases challenging election results. All courts, including this Court, categorically rejected Trump's baseless attempts to overturn

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[16] Amicus Peter Meijer (Amicus Br. 20-27) presents an "endless" but irrelevant parade of horribles. On January 6, 2021, a violent, armed mob acting on Trump's behalf and at his direction attacked the U.S. Capitol, defeated law enforcement, conquered the seat of our national government, nearly assassinated the vice president and congressional leaders, obstructed Congress, and disrupted the peaceful transfer of power. See*, e.g.,* Notes on Resentencing at 5, *United States* v. *Little*, No. 21-CR-315 (D.D.C. Jan. 25, 2024), ECF No. 73 (noting that the mob "interfered with a necessary step in the constitutional process, disrupted the lawful transfer of power, and thus jeopardized the American constitutional order," and that they "achieved this result through *force*"). Nothing in our history compares; not even the Confederacy reached the Capitol or disrupted the transfer of power. Courts can consider other challenges on their own merits when raised. Colorado correctly applied Section 3 on *these* facts; hypothetical (and frivolous) challenges about *unrelated* facts do not change that.

the election. See *Case Tracker*, Ohio State Univ., https://bit.ly/2020Cases (last visited Jan. 26, 2024).

But instead of accepting his losses, Trump exploited them to foment violence against courts and stoke the unrest that culminated in the insurrection. This includes Trump's inflammatory rhetoric in support of the "Million MAGA Marches" on November 14 and December 12, 2020, which focused on this Court, and Trump's public justification of his supporters' violence there as self-defense against "ANTIFA SCUM." Pet. App. 93a, 218a.

As the 2024 election approaches, Trump continues to exhort followers to target specific judges, prosecutors, court employees, and potential witnesses in his criminal and civil cases. In a decision partially upholding an order restraining Trump's speech about his federal criminal case for conspiring to overturn the 2020 presidential election through unlawful means, the D.C. Circuit described some of Trump's public attacks:

> The day after his initial court appearance, Mr. Trump posted on his social media account: "IF YOU GO AFTER ME, I'M COMING AFTER YOU!" He then shared with his over six million social media followers on Truth Social his view that the district court judge is a 'fraud dressed up as a judge[,]' 'a radical Obama hack[,] and a 'biased, Trumphating [*sic*] judge[.] He labeled the prosecutors in the case '[d]eranged[,]' '[t]hugs[,]' and '[l]unatics[.]

United States v. *Trump*, 88 F. 4th 990, 998 (D.C. Cir. 2023). His supporters swiftly responded with violent threats against the district court judge and other participants in the case. *Ibid.*

That case followed a dangerous pattern: Trump singles out judges, prosecutors, and court officials on

social media. They are immediately threatened. *Id.* at 1011. He has repeatedly and baselessly claimed that prosecutors, judges, and court officials are politically biased, maintaining a narrative of aggrievement that leads his supporters to threaten violence if he loses the election. See Op. & Order at 2, *United States* v. *Trump*, No. 23-CR-257 (D.D.C. Oct. 17, 2023), ECF No. 105 ("[W]hen [Trump] has publicly attacked individuals, including on matters related to this case, those individuals are consequently threatened and harassed. . . . [Trump] has continued to make similar statements attacking individuals involved in the judicial process, including potential witnesses, prosecutors, and court staff. . . [including] that particular individuals involved . . . deserve death.").[17] Unrepentant, Trump boasts that his followers "listen to [him] like no one else." *Trump*, 88 F.4th at 1018 (quoting Trump).

Trump's attacks on judges and court employees demonstrate his ongoing willingness to threaten, intimidate, and exhort his supporters to attack the court system with the same tactics and rhetoric that fueled the insurrection. While he remains on the ballot, he will continue to threaten court personnel and use court proceedings to inflame his supporters into violence.

This Court must not be swayed by fear of mob violence that Trump may incite upon its affirming Colorado's decision.[18] The Constitution and the rule of law demand enforcing Section 3. The arguments for

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[17] See Kierra Frazier, *The Violent Political Threats Public Officials Are Facing Amid Trump's Legal Woes*, Politico (Jan. 12, 2024), https://politi.co/3w2SUDq.

[18] Trump's own brief to this Court threatens "chaos and bedlam" unless this Court reverses the Colorado Supreme Court's judgment. Pet. Br. 2.

reversal are *political* arguments, not based on law but rather on threats and fears of supposedly adverse consequences. But those political arguments are for Congress, which can, by two-thirds bicameral vote, grant Trump amnesty. Until it does, he remains disqualified, and this Court—bound by the Constitution's plain text and original public meaning—cannot indulge such politics. Failing to enforce Section 3 out of fear Trump and his supporters' reactions would prostrate the Constitution before a mob.

Conversely, allowing Trump to appear on ballots despite his disqualification would avoid neither violence nor further insurrection. It would convey that our Constitution does not apply to individuals who threaten it, *precisely because* they threaten it. And because the 2024 election will likely involve dozens of contested court cases before and after Election Day, Trump's propensity to threaten and incite violence against court personnel means that allowing him onto ballots would endanger thousands of justices, judges, and court employees—and election workers and voters—nationwide.

CONCLUSION

The judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

CHARLES N. NAUEN
LOCKRIDGE GRINDAL NAUEN PLLP
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401
(612) 339-6900
cnnauen@locklaw.com

RONALD A. FEIN
Counsel of Record
JOHN C. BONIFAZ
BEN T. CLEMENTS
COURTNEY HOSTETLER
FREE SPEECH FOR PEOPLE
1320 Centre St. #405
Newton, MA 02459
(617) 244-0234
rfein@freespeechforpeople.org

Counsel for Amici Curiae

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