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 OF *AMICUS CURIAE* LARRY KIDD IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Larry Kidd is a resident of Jackson, Ohio. He has owned several small businesses in Ohio, and was a member of the official Ohio delegation for President Donald Trump for the 2020 Republican National Convention.

Mr. Kidd files this brief to encourage this Court to enforce the correct interpretation of the Fourteenth Amendment, and to ensure that voters in all 50 states will have the ability to select the candidate of their choice in the 2024 presidential election. Mr. Kidd believes in the promise of America and the principles enshrined in the United States Constitution. He has a strong interest in preserving the right of every voter to cast a ballot for the candidate of his or her choosing.

As a business owner, Mr. Kidd has seen ill-considered executive actions negatively impact his business and the well-being of his employees and customers. As a result, in addition to his duty as an American to support the right to vote, he has a strong business interest in ensuring that voters in all 50 states have the ability to vote for the presidential candidate whom they believe will have the best program to improve the nation's economy.

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or his counsel make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case arises from an attempt to exclude a presidential candidate from a state's 2024 presidential primary ballot. There have been several similar attempts in recent months. *Amicus curiae* respectfully submits that these attempts are not only legally unsupported, but also harmful to voters and to our political system. The decision of the Colorado Supreme Court risks further escalation as candidates and their supporters seek to have each other excluded from the ballot.

"Voters, not lawyers, choose the President." *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 391 (3d Cir. 2020). That is not just an adage. The "Constitution's design … leave[s] the selection of the President to the people, through their legislatures, and to the political sphere." *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curium). Thus, this Court has rightly warned against intervening in "the most intensely partisan aspects of American political life." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Yet here, the Colorado Supreme Court did exactly that. The court interfered with a presidential election—excluding a former President from the state's primary ballot—based on a novel and incorrect interpretation of the Fourteenth Amendment.

The Colorado Supreme Court's decision should be reversed for numerous reasons. *Amicus curiae* Larry Kidd writes separately to emphasize that Section

Three of the Fourteenth Amendment is not a self-executing authority to be used offensively against candidates for federal office. Indeed, as Justice Samour underscored in his dissent, "the majority's ruling that Section Three is self-executing [is] the most concerning misstep" in the decision. Pet. App. 128a, ¶ 278 (Samour, J., dissenting).

Amicus curiae respectfully submits that the decision below is at odds with longstanding precedent and is inconsistent with historic practice. As this Court indicated more than century ago, "it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy." *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921). Rather, it is long established that the provisions of Section Three can be enforced only as provided for by Congress. *See In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869). Yet Congress has not provided a private cause of action under Section Three. Additionally, the decision below overlooks the historical record, including the practice of Congress deciding the process for determining disqualifications. *See* Pet. App. 143a-145a, ¶¶ 314-318 (Samour, J., dissenting).

The Colorado Supreme Court's decision is legally erroneous. Importantly, it also risks significant harm to our political processes. Justice Samour correctly recognized in his dissent that the decision invites a "standardless system in which each state gets to adjudicate Section Three disqualification cases on an ad hoc basis." Pet. App. 160a, ¶ 348 (Samour, J., dissenting). If allowed to stand, the decision could

invite a race to the bottom, with candidates and their supporters seeking to improperly exclude competitors from the ballot, rather than leaving elections to the people.

ARGUMENT

I. Section Three Of The Fourteenth Amendment Is Not A Self-Executing Authority To Be Used Offensively Against Candidates for Federal Office.

Section Three of the Fourteenth Amendment is not a self-executing authority to be used offensively against candidates for federal office. The Colorado Supreme Court erred in concluding otherwise, and that error formed the foundation for the court's decision. Specifically, the court concluded that "Section Three is self-executing in the sense that its disqualification provision attaches without Congressional action." Pet. App. 54a, ¶ 106. Thus, the court found that "implementing legislation from Congress is unnecessary" for a state to proceed with disqualification. Pet. App. 54a, ¶ 107.

Respectfully, the Colorado Supreme Court's holding is inconsistent with the constitutional text; with historic practice; and with longstanding case law. These precedents include, among others, a decision by Chief Justice Salmon P. Chase that was decided just after the adoption of the Fourteenth Amendment. *See In re Griffin*, 11 F. Cas. at 26 (holding that the enforcement of the provisions of

Section Three "can only be provided for by congress").[2] In short, the Colorado Supreme Court's decision is wrong on multiple levels. As Justice Samour argued in dissent, "the majority's ruling that Section Three is self-executing [is] the most concerning misstep" in the decision. Pet. App. 128a, ¶ 278 (Samour, J., dissenting).

A. Section Three Can Only Be Enforced As Provided For By Congress.

Section Three of the Fourteenth Amendment provides that "[n]o person shall … hold any office … who, having previously taken an oath … as an officer of the United States … to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same." U.S. CONST., amend. XIV, § 3. Section Five of the Fourteenth Amendment further provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST., amend. XIV, § 5.[3] Thus, by its plain terms, the Fourteenth Amendment leaves it to Congress to determine how Section Three will be enforced.

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[2] *See also* Brief of *Amici Curiae* States of Indiana, West Virginia, 25 Other States, and the Arizona Legislature in Support of Petitioner at 13 (filed Jan. 5, 2024) (arguing that the Colorado Supreme Court "ignored many cases that say the Fourteenth Amendment is not self-executing").

[3] Section Three also specifies that "Congress may by a vote of two-thirds of each House, remove such disability." U.S. CONST., amend. XIV, § 3.

Chief Justice Salmon P. Chase directly addressed this question while riding circuit only a few months after the Fourteenth Amendment was ratified. In the case *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869), Chase held that only Congress may provide the means of enforcing Section Three. *See* 11 F. Cas. at 26. He rejected the notion that the Fourteenth Amendment "operat[es] directly, without any intermediate proceeding … upon all persons within the category of prohibition …." *Id.* at 23. Rather, Chief Justice Chase found that the Due Process Clause forecloses the argument that Section Three automatically disqualifies someone from office without a trial. He concluded that the constitutional provisions protecting due process "are inconsistent in their spirit and general purpose with a provision which, at once without trial, deprives a whole class of persons of offices held by them …." *Id.* at 26.

Chief Justice Chase further explained that the question of whether Section Three is self-executing is answered by the text of the Fourteenth Amendment itself. "The fifth section qualifies the third …. And the final clause of the third section itself is significant. It gives to congress absolute control of the whole operation of the amendment." *Id.* Chase found it "beyond reasonable question" that "the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislation of congress in its ordinary course." *Id.*

Griffin is strong persuasive authority. It relies on the constitutional text, it was authored by a Chief Justice of this Court, and it was decided roughly contemporaneously with the ratification of the constitutional language itself. Although *Griffin* is not binding on this Court, the decision is certainly entitled to more deference than it received from the court below. The Colorado Supreme Court specifically recognized *Griffin*'s holding. *See* Pet. App. 52a, ¶ 103 ("*Griffin's Case* concludes that Congressional action is needed before disqualification attaches ….") . Yet the court shrugged *Griffin* aside, saying "this one case does not persuade us." Pet. App. 53a, ¶ 103.

Respectfully, the persuasive authority of *Griffin* outweighs the Colorado Supreme Court's novel interpretation of the Fourteenth Amendment. In any event, however, *Griffin* is hardly alone. Subsequent cases have consistently recognized and followed Chief Justice Chase's reasoning. *See, e.g.*, *Rothermel v. Meyerle*, 136 Pa. 250, 20 A. 583 (Pa. 1890) ("[I]t has also been held that the fourteenth amendment, as indeed is shown by the provision made in its fifth section, did not execute itself.") (citing *In re Griffin*, 11 F. Cas. at 26); *State v. Buckley*, 54 Ala. 599, 616-17 (Ala. 1875); *see also Hansen v. Finchem*, No. CV-2022-004321, Apr. 21, 2022 Order at 8 (Maricopa Cnty. Sup. Ct. 2022) ("[I]n accordance with the United States Constitution, Plaintiffs have no private right of action to assert claims under the Disqualification Clause.").[4]

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[4] *See generally Hansen v. Finchem*, 2022 WL 1468157, at *1 (Ariz. May 9, 2022) (noting that because "Section 5 of the

The decision below also disregards decisions of this Court indicating that the Fourteenth Amendment is not universally self-executing. *See, e.g.*, *Ownbey*, 256 U.S. at 122 ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy."); *Ex parte Virginia*, 100 U.S. 339, 345 (1879) (emphasizing that the Reconstruction amendments "derive much of their force" from Section Five, and concluding that "legislation is contemplated to make the amendments fully effective").

The Colorado Supreme Court relies on *The Civil Rights Cases*, 109 U.S. 3 (1883), in support of its conclusion that the Fourteenth Amendment is self-executing. However, this misses the mark. *The Civil Rights Cases* addressed whether the Fourteenth Amendment provides a self-executing defense—a shield that provides a constitutional defense even if not provided for by law. *See* 109 U.S. at 20 (explaining that portions of the Fourteenth and Fifteenth Amendments that "abolished[ed] slavery[] and established universal freedom" were "self-executing"). By contrast, the decision below would allow Section Three to be used offensively against candidates for federal office, as a sword rather than a shield.

Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause," this suggests that state law "does not provide a private right of action to invoke the Disqualification Clause against the Candidates").

The Fourth Circuit rejected this same argument in *Cale v. Covington*, 586 F.2d 311 (4th Cir. 1978). The *Cale* court distinguished between the "the protection the Fourteenth Amendment provided of its own force as a shield" on one hand, and its offensive use on the other. *See id.* at 316. With respect to the latter, the court found "that the Congress and Supreme Court of the time were in agreement that affirmative relief under the amendment should come from Congress." *Id.* The Fourth Circuit specifically cited *Griffin*, noting that Chief Justice Chase had "held that the third section of the Fourteenth Amendment, concerning disqualifications to hold office, was not self-executing absent congressional action." *Id.*

B. The Decision Below Is Inconsistent With Historical Practice.

Amicus curiae recognizes that *Griffin*, *Rothermel*, and *Cale* are not binding on this Court. However, their persuasive authority is further underscored by the historical record. Specifically, only a short time after ratification of the Fourteenth Amendment, Congress enacted the Enforcement Act for the purpose of providing a mechanism for enforcing Section Three. *See* Enforcement Act of 1870, ch. 114, 16 Stat. 140, 143-44.

Justice Samour explains this part of the historical record in his dissent from the decision below. *See* Pet. App. 143a-145a, ¶¶ 314-318 (Samour, J., dissenting). Among other provisions, the Enforcement Act provided a quo warranto action for determining

disqualification, and provided for criminal prosecution for someone who knowingly accepts or holds office in violation of Section Three. *See id.* Speaking in favor of the Act, and referring to Section Three, Senator Lyman Trumbull stated, "'The Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution.'" Pet. App. 144a, ¶ 315 (Samour, J., dissenting) (quoting Cong. Globe, 41st Cong., 1st Sess. 626 (1869)). Senator Trumbull "later reiterated this point as he explained that '[s]ome statute is certainly necessary to enforce the constitutional provision.'" *Id.* (quoting Cong. Globe, 41st Cong., 1st Sess. 626 (1869)).

In short, Congress adopted enforcement legislation close in time to both ratification of the Fourteenth Amendment and the *Griffin* decision. This strongly suggests that such legislation was necessary to enforce Section Three. As Justice Samour further explains, the quo warranto provision was repealed in 1948. *See* Pet. App. 144a-145a, ¶ 316 (citations omitted). Additionally, although 18 U.S.C. § 2383 provides for disqualification, "President Trump has never been charged with, let alone convicted of, violating it." Pet. App. 146a, ¶ 319 (Samour, J., dissenting).

Justice Samour recognized in his dissent that the decision below invites a "standardless system in which each state gets to adjudicate Section Three disqualification cases on an ad hoc basis." Pet. App. 160a, ¶ 348 (Samour, J., dissenting). If allowed to

stand, the decision could create a race to the bottom, with candidates and their supporters seeking to improperly exclude competitors from the ballot, rather than leaving elections to the people.

This concern is not merely hypothetical. Other states have considered similar challenges to former President Trump's eligibility. *See, e.g.*, *Growe v. Simon*, 997 N.W.2d 81 (Minn. Nov. 8, 2023); *Davis v. Wayne Cnty. Election Comm'n*, 2023 WL 8656163 (Mich. Ct. App. Dec. 14, 2023), *appeal denied sub nom. LaBrant v. Sec'y of State*, 998 N.W.2d 216 (Mich. 2023). Nor is this limited to consideration by the courts. Maine's Secretary of State has ruled that the former President "is not qualified to hold the office of the President under Section Three of the Fourteenth Amendment."[5] Lawmakers in several states have also suggested excluding President Biden from their states' ballots.[6]

Respectfully, we should not sacrifice the stability of our political system for the Colorado Supreme Court's novel and incorrect application of Section Three. *Compare Storer v. Brown*, 415 U.S. 724, 736

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[5] *In re Challenges of Rosen to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States*, at 1 (Dec. 28, 2023), available at https://www.maine.gov/sos/news/2023/Decision%20in%20Challenge%20to%20Trump%20Presidential%20Primary%20Petitions.pdf (visited Jan. 16, 2024).

[6] *See, e.g.*, Dobkin, *Republicans Pull Trigger on Plan to Remove Joe Biden from Ballots*, Newsweek (Dec. 22, 2023), available at https://www.newsweek.com/republicans-pull-trigger-plan-remove-joe-biden-ballots-1855042 (visited Jan. 16, 2024).

(1974). The decision below is erroneous, and should be reversed.

CONCLUSION

For the reasons set forth above, the decision of the Supreme Court of Colorado should be reversed.

Respectfully submitted,

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