No. 23-696

In the Supreme Court of the United States

COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,
Petitioner,

v.

NORMA ANDERSON, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Colorado

REPLY BRIEF IN OPPOSITION TO RESPONDENTS ANDERSON AND GRISWOLD

MICHAEL W. MELITO
MELITO LAW LLC
ROBERT A. KITSMILLER
PODOLL & PODOLL, P.C.
[redacted]

CHRISTINA A. COMPAGNONE
OLIVIA F. SUMMERS
GARRETT A. TAYLOR
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

JAY ALAN SEKULOW
Counsel of Record
JORDAN A. SEKULOW
STUART J. ROTH
ANDREW J. EKONOMOU
JANE SERENE RASKIN
WALTER M. WEBER
CECILIA NOLAND-HEIL
BENJAMIN P. SISNEY
NATHAN MOELKER
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Counsel for Petitioner

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INTRODUCTION

In their response briefs, both Respondents concede this case is certworthy:

> [T]his Court should . . . grant certiorari. This case is of utmost national importance. And given the upcoming presidential primary schedule, there is no time to wait for the issues to percolate further.

Response at 2. While the Anderson Respondents (hereafter Anderson) disagree (naturally) on the merits, that is not an argument against plenary review. And the merits here are of overwhelming importance.

Anderson's position—embraced by the Colorado Supreme Court—is that the *states* dictate who runs for *federal* office. This turns the Fourteenth Amendment—adopted to limit states and empower Congress—upside down. A self-executing Section Three, moreover, empowers each of the 50 states to decide for themselves who is disqualified, a recipe for electoral chaos perfectly illustrated by this case and by Maine's recent decision to disqualify President Trump.

The distorted and inflammatory factual discussion in Anderson's Response is irrelevant to the legal questions before this Court. The only relevant facts arise in the two contexts where President Trump was investigated for insurrection. First, the United States House of Representatives passed an article of impeachment against President Trump in connection

with the events of January 6, 2021, based on an alleged violation of Section Three. H. Res. 24 (117th Cong.). The Senate tried and acquitted President Trump. Second, the Department of Justice conducted a wide-ranging criminal investigation into the events of January 6, 2021, first under the United States Attorney for the District of Columbia and later under Special Counsel John L. "Jack" Smith, appointed by the Attorney General to continue the ongoing investigation into "whether any person or entity unlawfully interfered with the transfer of power following the 2020 election or the certification of the Electoral College vote held on or about January 6, 2021." 1 The Special Counsel indicted President Trump for his conduct on January 6, *but the charges did not include insurrection* under 18 U.S.C. 2383. *See United States v. Trump*, ECF No. 1, No. 1:23-cr-00257-TSC (D.D.C. filed Aug. 1, 2023). In fact, the Department of Justice has not charged a single person with insurrection under 18 U.S.C. 2383 despite its nearly three-year investigation into the events of January 6.[2]

Anderson is correct that "[t]his case presents the ideal vehicle" for this Court to address the *constitutional* questions presented. (And. Br. In Res. 21). This case is not the ideal vehicle for addressing

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1 *Appointment of a Special Counsel*, DEP'T OF JUST. (Nov. 18, 2022), https://www.justice.gov/opa/pr/appointment-special-counsel-0.

2 *30 Months Since the Jan. 6 Attack on the Capitol*, DEP'T OF JUST., (Oct. 6, 2023), https://www.justice.gov/usao-dc/30-months-jan-6-attack-capitol.

tendentious factual questions like insurrection—even were that question presented here.

Petitioner disagrees with Anderson's redrafting of the Questions Presented. Anderson's focus on whether "state law provides a cause of action" (And. Resp. Br. i) adds nothing and is argumentative. Under the Supremacy Clause, state law cannot override Congress's authority over qualification and disqualification requirements or add requirements for federal candidates not authorized by Congress. Likewise, Anderson's reframing the third issue as seeking the "right to override state law," *id.*, is argumentative and fails to recognize that Petitioner makes an as-applied, not facial, claim. Respondent Griswold has not urged this Court to rephrase any of the questions presented by Petitioner.

Regarding whether Section Three is self-executing, Anderson's claim that "there is no split of authority regarding the application of Section [Three]," (And. Resp. Br. 15) to President Trump is simply false. While of course, many federal courts have dismissed lawsuits like Anderson's for lack of constitutional standing, the Michigan Court of Claims did not merely address standing or Michigan law, but rejected similar claims based on the Fourteenth Amendment, concluding that "Congress is primarily responsible for taking actions to effectuate Section [Three]." *Labrant v. Benson*, No. 23-000137-MZ (Mich Ct. Cl.). Likewise, the Respondent's claim that federal courts have not addressed these questions is inaccurate. (Setting aside *Griffin's Case*.) *Castro v. New Hampshire Sec'y of State*, 2023 U.S. Dist. LEXIS 192925, 2023 WL

7110390 (D.N.H., Oct. 27, 2023), although affirmed by the First Circuit on standing grounds, concluded that these Fourteenth Amendment questions are constitutionally reserved to Congress.

ARGUMENT

I. The Anderson Respondents' Arguments That President Trump is Not an Officer are Not Supported by the Historical Evidence.

Turning to the officer issue, Respondents continue to conflate the various constitutional "officers." *But see* Pet. 12 ("It is undisputed that the presidency can be considered an 'office.' But Section Three does not disqualify all "officers" in a general sense. Instead, it only disqualifies 'officers of the United States.'"). Respondents cite sources, like JOHN BOUVIER, LAW DICTIONARY (1856), that refer generally to the President as an "officer." But they cite no source that would identify the President specifically as an "Officer of the United States." On the contrary, ample authority evidences that the President was never considered to be specifically an "Officer of the United States." For example, Justice Story concluded that "'civil officers of the United States' meant such as derived their appointment from and under the national government, and not those persons who, though members of the government, derived their appointment from the States, or the people of the States." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 793, at 560 (Thomas Cooley ed., 4th ed. 1878). Likewise, the very

Attorney General opinion that Respondents reference (And. Resp. Br. 18), goes on to emphasize that Section Three applies only to those "who had taken the prescribed oath," The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 158 (1867), to support the Constitution, an oath the President does not take.

In fact, the drafters specifically removed from Section Three language that would have included the President of the United States. *See* Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment* (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838, at 25. Representative McKee submitted a draft of Section Three and then later removed an explicit reference to the Presidency and Vice Presidency. *Id.; see* Cong. Globe., 39th Cong., 1st Sess. 919 (1866). As Professor Steven Calabresi emphasized, "Congress itself voted to strike the words president and vice president from Section 3 of the Fourteenth Amendment."[3]

Anderson's views of what Section Three *should* do, (And. Resp. Br. 18), do not change the original meaning of Section Three.

Anderson contends the Petitioner has waived the question of the whether the President is an "officer under the United States." Wrong. Petitioner addressed whether the President is an "officer under the United States" in Pet. 11 n.3. Likewise, it addressed this issue by establishing how Attorney

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3 Steven Calabresi, *Donald Trump and Section 3 of the 14th Amendment,* VOLOKH CONSPIRACY (Dec. 31, 2023), https://reason.com/volokh/2023/12/31/donald-trump-and-section-3-of-the-14th-amendment/.

General Stanberry limited the position of officers of the United States to those whose who have taken an oath to support the United States. Pet. 14 (citing The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 182, 203 (1867)). Whether for "Officer of the United States" or "Officer under the United States," President Trump did not take that oath.

II. The Anderson Respondents' Arguments That the Fourteenth Amendment is Self-Executing are Incorrect.

Anderson's self-execution argument is fundamentally flawed. They cite the *Civil Rights Cases*, 109 U.S. 3, 20 (1883), and *City of Boerne v. Flores*, 521 U.S. 507, 522, 524 (1997), to claim self-execution. But as the Petitioner explained, this argument fundamentally misunderstands this Court's precedent:

> In support of its assertion that the Fourteenth Amendment is self-executing, it cited *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). Pet. App. 79a-80a. But, as the Fourth Circuit carefully explained in *Cale v. Covington*, 586 F.2d 311, 316-17 (4th Cir. 1978) in direct response to the same argument, *The Civil Rights Cases* addressed whether the Fourteenth Amendment provides a self-executing *defense*, which it does. In some circumstances the Fourteenth Amendment is self-executing as a *shield*, providing a constitutional defense even if not explicitly

> provided for by law. But in no circumstance is the Fourteenth Amendment a self-executing *sword*.

Pet. at 17-18. Anderson disregarded *Cale* and ignored Petitioner's arguments thoroughly articulating why the Fourteenth Amendment is not a self-executing sword. They also ignored the cases, like *Ownbey v. Morgan*, 256 U.S. 94 (1921), where this Court made these principles clear.

This same sword/shield applies to Section One of the Fourteenth Amendment. It protects individual rights absent specific statute and can be used as a shield without enabling legislation. But for individuals to have a cause of action under Section One, they must follow the parameters of the law Congress establishes: 42 U.S.C. § 1983, which provides the exclusive vehicle for civil claims under Section One of the Fourteenth Amendment. *See, e.g.*, *Sweat v. City of Fort Smith*, 265 F.3d 692, 696 (8th Cir. 2001); *Cedar-Riverside Associates, Inc. v. City of Minneapolis*, 606 F.2d 254 (8th Cir. 1979); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1273 n.3 (5th Cir. 1994). The simple existence of a constitutional provision in Section One of the Fourteenth Amendment does not in itself create a cause of action.

This distinction may be most clearly enunciated through an example. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964), defendant NYT in a state defamation proceeding argued successfully to this Court that the First Amendment through the Fourteenth protected NYT's conduct. In other words, the Fourteenth Amendment was a self-executing

shield. If NYT had preemptively sued Sullivan, arguing that Section One of the Fourteenth Amendment alone gave it a cause of action to protect its First Amendment rights, that suit would have failed. Instead, NYT would need to use § 1983, the exclusive method Congress has established to seek vindication of First Amendment rights. State courts could only hear a Section Three claim if Congress granted them that authority. As Justice Samour explained, "When a party wishes to assert its Fourteenth Amendment rights offensively, however, it must bring a cause of action under legislation enacted by Congress, such as Section 1983." Pet. App. 274a.

As another example, Anderson cites the Supremacy Clause to justify their case. (And. Br. in Res. 20-21). But this Court has made the same sword/shield principles clear about the Supremacy Clause: *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015). The Supremacy Clause can serve as an automatic preemptive defense, a shield. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864 (2000). But it "certainly does not create a cause of action. It instructs courts what to do when state and federal law clash but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." *Armstrong*, 575 U.S. at 325. In other words, it provides a powerful shield but no sword to litigants. An automobile manufacturer could defend in litigation because a state tort law was preempted, *see Geier*, but the Supremacy Clause does not give that manufacturer a cause of action to challenge the state law.

Anderson argues that the removal provision in Section Three, under which Congress may remove disqualification by a supermajority, means that enforcement legislation is unnecessary. This does not follow. That Congress has authority to remove the effect of something is irrelevant to whether it has authority to apply it. Only Congress can lower federal taxes. This does not give someone else authority to raise them. On the contrary, the process for Congress to remove the disability by two-thirds vote confirms that Section Three "gives to [C]ongress absolute control of the whole operation of the amendment." *Griffin's Case*, 11 F. Cas. 7, 26 (Cir. Ct. 1869).

Anderson never discusses the actual meaning and language of Section Five, which gives Congress authority to enforce the Fourteenth Amendment. As Chief Justice Chase pointed out, that language is dispositive: "the necessity of [congressional legislation] is recognized by the amendment itself, in its fifth and final section[.]" *Id.*

Anderson's claims that historically state courts have disqualified officers through state procedures, enforcing Section Three, is misleading. They cite two cases: *Worthy v. Barrett*, 63 N.C. 199, 200-01 (1869), and *In re Tate*, 63 N.C. 308, 309 (1869). Neither case discussed the self-executing question at all. In North Carolina, a statute incorporated the requirements of the Fourteenth Amendment by reference, providing that "no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Art. XIV, shall qualify under this act or hold office in this State." *Worthy*, 63 N.C. at 200 (quoting Acts of 1868, Ch. 1, sec. 8). This statute

by its terms incorporated the provision of the Fourteenth Amendment as a standard for a *state* qualification statute, applicable to *state* officers, a statute well within a state's authority, unlike a federal qualification. No Colorado law exists that does the same thing, and if it did, it would apply only to state officers and could not, under *Thornton*, control presidential selection. *United States Term Limits v. Thornton,* 514 U.S. 779, 832 (1995).

Anderson argues that state courts, interpreting state law, have ample authority to determine federal constitutional qualifications. Not only would that claim enable electoral chaos; it would also directly contradict the Supremacy Clause and this Court's precedent. Pet. 25. State law cannot give states authority to supersede federal election qualifications.

III. This Court Should Protect the Petitioner's First Amendment Rights.

Finally, turning to the First Amendment issue, both Griswold and Anderson's responses make the same basic mistake: both misunderstand or misrepresent the First Amendment argument Petitioner advances. Griswold claims that Petitioner's argument is directly contrary to *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 357 (1997), and apparently a call for the reconsideration of that case, and Anderson likewise relies on *Timmons*. Petitioner is not attacking *Timmons*. Rather, as explained in the petition, *Timmons* is inapplicable here and does not justify the infringement on the Republican Party's rights for two independent reasons. First, *Timmons*

concerned a general election, not a primary. A primary is an internal, private decision, not a decision on behalf of the general public, and *Timmons*'s reasoning is inapplicable.

More fundamentally, *Timmons* concerned an objective requirement for appearing on a ballot for more than one party that was clear and apolitical. The other cited cases, such as *Lindsay v. Bowen*, 750 F.3d 1061, 1063–65 (9th Cir. 2014), or *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012), likewise involve exclusions based on straightforward requirements like age or naturalization. That does not open the door to *any* potential election regulation; this Court has upheld only "reasonable, politically neutral regulations." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). States may not exclude whomever they wish based on a constitutional fig leaf; the justification must be a reasonably neutral qualification. And of course, when it comes to federal elections, *Thornton* signifies that the qualification must originate from Congress. For example, the natural-born citizen requirement discussed in *Hassan* is clear and objective, neutral, and applicable across the board. "Insurrection" is inherently different. It is a politicized determination without standards or congressional authorization that will fluctuate wildly depending on politics. Anderson claims, "The Colorado Supreme Court did not impose any substantive requirement at all. The Constitution did." (And. Br. In Opp. 26). This is sophistry. The Colorado Supreme Court excluded a Republican candidate from the ballot, based on its interpretation of insurrection. That interpretation

does not become ipse dixit unassailable, simply because Respondents claim that it was.

CONCLUSION

This Court should grant the petition. Petitioner will abide by whatever timeline the Court may set.

Respectfully submitted,

MICHAEL W. MELITO
MELITO LAW LLC
ROBERT A. KITSMILLER
PODOLL & PODOLL, P.C.
[redacted]

CHRISTINA A. COMPAGNONE
OLIVIA F. SUMMERS
GARRETT A. TAYLOR
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

JAY ALAN SEKULOW
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JORDAN A. SEKULOW
STUART J. ROTH
ANDREW J. EKONOMOU
JANE SERENE RASKIN
WALTER M. WEBER
CECILIA NOLAND-HEIL
BENJAMIN P. SISNEY
NATHAN MOELKER
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Counsel for Petitioner

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