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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-Appellee**: Colorado Republican State Central Committee, an unincorporated association, **Intervenor Appellant/Cross Appellee**: Donald J. Trump.	▲Court Use Only▲
Attorney for Amicus Curiae: Ian Speir, #45777 Covenant Law PLLC 13395 Voyager Pkwy., Suite 130-732 Colorado Springs, CO 80921 Telephone: (719) 464-7357 ian@covtlaw.com	Supreme Court Case No.: 2023SA300

Brief of Professor Derek T. Muller as *Amicus Curiae* in Support of Neither Party

CERTIFICATE OF COMPLIANCE

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

The brief complies with the applicable word limits set forth in C.A.R. 29(d), and in this Court's Order of Court dated November 21, 2023, in that it contains 4,740 words.

The brief complies with the content and format requirements of C.A.R. 28(a)(2) & (3), 29(c), and 32.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, 29, and 32.

Respectfully submitted,

Covenant Law PLLC

s/ Ian Speir
Ian Speir, #45777

Attorney for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Derek T. Muller is a Professor of Law at Notre Dame Law School. His research focuses on election law, particularly the role of states in the administration of federal elections. He has written extensively about topics that are at issue in this case, and his scholarship long predates this controversy. Some of those pieces include:

- *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559 (2015), which evaluates whether states hold the power to review the qualifications of presidential candidates;
- *'Natural Born' Disputes in the 2016 Presidential Election*, 85 FORDHAM L. REV. 1097 (2016), which evaluates how state courts and state election officials went about reviewing the qualifications of presidential candidate Ted Cruz and others who were challenged for being ineligible to serve as president; and

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

- *Weaponizing the Ballot*, 48 FLA. ST. U. L. REV. 61 (2021), which looks at the scope of state power to exclude presidential candidates on the ballot.

Professor Muller filed amicus briefs in support of no party in *Cawthorn v. Amalfi*, 35 F.4th 245 (4th Cir. 2022), and *Greene v. Secretary of State*, 52 F.4th 907 (11th Cir. 2022), on distinct but related issues of state power to adjudicate the qualifications of congressional candidates. *See Cawthorn*, 35 F.4th at 272 & 274 n.10 (Richardson, J., concurring in the judgment) (citing Professor Muller's scholarship). He also filed a brief in support of neither party in *Growe v. Simon*, A23-1354 (Minn. 2023), another Section 3 challenge to former president Donald Trump's candidacy.

Professor Muller's interest in the case is public in nature. As a scholar of election law, he would like to see the case decided in a way that fits with the best reading of the United States Constitution and existing precedent, and in a way that ensures proper adjudication of future disputes in contested election cases.

SUMMARY OF ARGUMENT

States hold the power to adjudicate the qualifications of presidential candidates. But states have no obligation to evaluate the qualifications of presidential candidates, and states may choose to permit openly unqualified candidates to appear on the ballot.

This brief describes historical state practices and how those longstanding practices comport with the Constitution, particularly the power of state legislatures under Article II, Section 1, Clause 2 to direct the manner of appointing presidential electors. This brief takes no position on substantive legal or factual questions surrounding Section 3 of the Fourteenth Amendment. But as a precursor to any substantive analysis of Section 3, this Court should reach three legal conclusions.

First, a state legislature is permitted under the United States Constitution to provide mechanisms for the review of the qualifications of presidential candidates and for the exclusion of ineligible candidates. Second, a state election official has no obligation—indeed, no authority—to investigate the qualifications of presidential candidates or exclude ineligible presidential candidates from the ballot, unless state law

authorizes such power. Third, this Court should carefully scrutinize whether the Colorado legislature has provided mechanisms for state courts to review qualifications, and this Court should evaluate the permissible contours of the exercise of those mechanisms in this case. In my (Professor Muller's) judgment, Colorado law likely does not permit review, and the trial court's interpretation of state law should be closely scrutinized on appeal.

ARGUMENT

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

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

Consistent with this broad power to direct the manner of appointing electors, state legislatures have developed different mechanisms over the years. For instance, states may add qualifications to presidential electors, such as requiring electors live in the state. *Chiafalo*, 140 S.Ct. at 2324. States may require electors to take a pledge to vote for specific presidential and vice presidential candidates. *Ray v. Blair*, 343 U.S. 214, 227–30 (1952). States may strip electors of their office or fine them for disobeying that pledge. *Chiafalo*, 140 S.Ct. at 2328; *Colorado Department of State v. Baca*, 140 S.Ct. 2316 (2020) (per curiam) (mem.). States allow electors to choose replacements in their body when a vacancy arises. *Cf.* 3 U.S.C. § 4.

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

B. Since at least 1968, states have occasionally exercised the power to review the qualifications of presidential candidates and to exclude

ineligible candidates from the ballot. And exclusions have routinely survived judicial scrutiny.

California excluded Eldridge Cleaver from the ballot in 1968. Cleaver was the 33-year-old nominee of the Peace and Freedom Party.[2] He challenged the exclusion in state court, which rejected his challenge.[3] Cleaver petitioned for certiorari to the United States Supreme Court. Without comment, the Court rejected the petition. *Cleaver v. Jordan*, 393 U.S. 810 (1968). A denial of a petition for writ of certiorari says little, if anything, about the merits. But it demonstrates the fact that a state did exclude a candidate from the ballot for failure to meet the qualifications for office. And intriguingly, California excluded Cleaver even though Cleaver would *become* eligible during the four-year term of office.

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

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

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

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

Review of qualifications of candidates and exclusion of ineligible candidates continues to this day. States routinely exclude ineligible candidates. In 2008, for instance, Róger Calero, a Nicaraguan national, was the Socialist Workers Party nominee for president. In some states, Calero's name appeared on the ballot. In others, a stand-in candidate, James Harris, appeared in Calero's place in states where Calero was excluded from the ballot.[4] In 2012, Abdul Hassan, who was not a natural born citizen, could not attest that he met this qualification for office and

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

sued in an attempt to appear on the ballot. Hassan's claims failed in Iowa, Montana, New Hampshire, and Colorado.[5] Also in 2012, Peta Lindsay, a 27-year-old nominee for the Peace and Freedom Party, was excluded from the California ballot, a decision upheld in federal court. *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014).

Challenges to candidacies of John McCain, Barack Obama, and Ted Cruz routinely arose. Many challenges were dismissed because courts lacked jurisdiction to decide the claims. But a few election boards and courts reached the merits and concluded that these candidates were "natural born citizens," eligible to serve as president.[6]

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[5] *See Hassan v. Iowa*, 2012 WL 12974068 (S.D. Iowa Apr. 26, 2012), *aff'd*, 493 F. App'x 813 (8th Cir. 2012); *Hassan v. Montana*, 2012 WL 8169887 (D. Mont. May 3, 2012), *aff'd*, 520 F. App'x 553 (9th Cir. 2013); *Hassan v. New Hampshire*, 2012 WL 405620, at *4 (D.N.H. Feb. 8, 2012); *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1201 (D. Colo.), *aff'd*, 495 F. App'x 947 (10th Cir. 2012).

[6] *See, e.g.*, *Ankeny v. Governor of Ind.*, 916 N.E.2d 678, 688 (Ind. Ct. App. 2009); *Farrar v. Obama*, OSAH-SECSTATE-CE-1215136-60-MALIHI (Ga. Office of State Admin. Hearings Feb. 3, 2012); *Joyce v. Cruz*, 16 SOEB GP 526 (Ill. State Bd. of Elections Jan. 28, 2016); Transcript of Proceeding at 23, Challenge to Marco Rubio, Cause No. 2016-2 (Ind. Election Comm'n Feb. 19, 2016), https://perma.cc/T5RL-26P4 (by a vote of 3-1, Indiana Election Commission rejected a motion to exclude Cruz from the ballot); *Williams v. Cruz*, OAL Nos. STE 5016-16, STE 5018-16

C. This approach fits the Constitution's text and structure. To start, there is no "textually demonstrable constitutional commitment of the issue" to another body. *Baker v. Carr*, 369 U.S. 186, 217 (1962).[7] Furthermore, I have expressly argued in other cases that states lack the power to judge the qualifications of *congressional* candidates. *See* Muller, *Scrutinizing*, 90 IND. L.J. at 594–98. But while the Constitution expressly vests the power to be "*the*" judge of congressional elections in each house of Congress, U.S. CONST. art. I, § 5, cl. 1, there is no such power for presidential elections.

(N.J. Office of Admin. Law Apr. 13, 2016); *Elliot v. Cruz*, 137 A.3d 646, 658 (Pa. Commw. Ct. 2016), *aff'd*, 134 A.3d 51 (Pa. 2016).

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

That means states are not excluded from the range of actors who may judge qualifications. Voters, for instance, might judge the qualifications of candidates and decide not to vote for candidates if they believe the candidates are ineligible. Presidential electors might judge the qualifications of presidential candidates, as might Congress when it convenes to count electoral votes. *See* Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1538–39 (2021). But none of them hold the *exclusive* power to judge qualifications, and certainly nothing purports to oust states from exercising a similar power.

State power over the "manner" of appointing electors is broad. Recall that a state legislature may choose to keep this power to itself and appoint electors. That has not happened since Colorado did so in 1876.[8] State legislatures have preferred to empower the people of the state to choose presidential electors. And in doing so, surely the state legislature

[8] SVEND PETERSEN, A STATISTICAL HISTORY OF THE AMERICAN PRESIDENTIAL ELECTIONS WITH SUPPLEMENTARY TABLES COVERING 1968-1980, at 45 (1981). Indeed, the Colorado Constitution expressly empowers the people to choose presidential electors in every election after 1876. *See* COLO. CONST. Sch. §§ 19–20.

can limit the people's choice to only eligible presidential candidates, as the legislature holds the greater power of choosing the electors itself.

The state's interest in ensuring that voters and electors choose only eligible candidates is heightened in a presidential election. In the past, Congress has refused to count electoral votes when electors voted for an ineligible candidate.[9] A state risks losing its representation in the Electoral College—the mechanism to express the state's preferences in a presidential election—if Congress refuses to count those votes. States may rightly take precautions to ensure that only votes cast for eligible candidates will be sent to Congress.

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

The Supreme Court has long held that the right to vote in a *congressional* primary is protected by the federal Constitution. *See United States v. Classic*, 313 U.S. 299, 314–22 (1941). And a state-run

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

primary is state action subject to federal constitutional limitations. *See, e.g.*, *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932). That said, "[t]he States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates." *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975).

Strictly speaking, the presidential primary process is further removed from the presidential election than a typical primary. The presidential primary is one step in the selection of delegates from the state to a party's presidential nominating convention. After that nominating convention, the party's preferred presidential candidate appears on the ballot in all states—and unlike a typical primary, a candidate who lost a state's presidential primary for a party may nevertheless appear as the nominee of that party on the general election ballot.

Still, three important principles guide the conclusion that states can exclude ineligible candidates from the presidential primary ballot. *First*, the state may administer its presidential primary election as it sees fit. *See Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 120–21 (1981) (noting that Wisconsin may choose to run an "open"

presidential primary). *Cf. Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215–16 n.6 (1986) (holding that state placed an impermissible burden on political party with primary rules that clashed with party's associational preferences and distinguishing *Democratic Party*). *Second*, the state is bound by federal constitutional limitations in how it conducts its presidential primary as if it were any other election. *See, e.g.*, *Yang v. Kosinski*, 960 F.3d 119, 130–34 (2d Cir. 2020); *Duke v. Smith*, 13 F.3d 388, 394 (11th Cir. 1994). *Third*, the presidential nominating convention is free to ignore state presidential primary results that run afoul of the party's rules. *See Democratic Party*, 450 U.S. at 126.

Sometimes, a state's ordinary rules exclude serious candidates from the ballot. *See, e.g.*, *Perry v. Judd*, 471 Fed. App'x 219 (4th Cir. 2012). And sometimes, states examine the qualifications of presidential primary candidates like Ted Cruz. If the state has the power to review qualifications and exclude ineligible candidates in the general election, it likewise has that power in the primary election, too.

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

A state legislature may permit review of the qualifications of presidential candidates. But states do not have an obligation to investigate the qualifications of presidential candidates and prevent ineligible candidates from appearing on the ballot. And election officials certainly hold no independent authority to go forth and investigate the qualifications of candidates without express legislative authorization.

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

Many ineligible candidates have appeared on the ballot over the last 130 years, mostly underage candidates. James Cranfill, for instance, was the 33-year-old vice presidential candidate for the Prohibition Party in 1892. Eldridge Cleaver in 1968 was the Peace and Freedom Party's presidential candidate in 1968, also just 33, and appeared on the ballot

in some states. The list goes on: Michael Zagarell, Linda Jenness, Andrew Pulley, Larry Holmes, Gloria La Riva, Róger Calero, Arrin Hawkins, and Peta Lindsay have all appeared on the ballots of at least some states, into the twenty-first century, despite being underage or not a natural born citizen. (In all of these cases, states have excluded ineligible candidates where there is no factual or legal doubt about their ineligibility. A 27-year-old or a Nicaraguan national are indisputably ineligible to be president.) *See* Muller, *Scrutinizing*, 90 IND. L.J. at 600.

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

It is no response that state officials take an oath to uphold the Constitution and therefore have an independent obligation to enforce the qualifications of presidential candidates. State election officials do not act unless they have authorization, express or implied, of state law or the state constitution to administer federal elections. In rare instances,

federal law imposes an obligation on state election officials. *See, e.g.*, 3 U.S.C. § 5. But tasks are parceled out to different federal or state actors in our constitutional system. And courts have agreed that election officials have no such independent obligation to investigate qualifications. *See, e.g.*, *McInnish v. Bennett*, 150 So.3d 1045, 1046 (Ala. 2014) (mem.) (Bolin, J., concurring specially) ("I write specially to note the absence of a *statutory framework* that imposes an affirmative duty upon the Secretary of State to investigate claims such as the one asserted here, as well as a procedure to adjudicate those claims."); *Ankeny*, 916 N.E.2d at 681 ("[W]e note that the Plaintiffs do not cite to any authority recognizing that the Governor has a duty to determine the eligibility of a party's nominee for the presidency.").

III. The Colorado legislature likely has not empowered state courts to review the qualifications of presidential candidates.

Colorado law has not empowered the Secretary of State to review the qualifications of presidential candidates. *See* Final Order, ¶ 224, *Anderson v. Griswold*, 2023CV32577, Nov. 17, 2023. But Colorado law may empower a court to do so. I use the term "may" deliberately. This

Court should proceed cautiously because a variety of legal difficulties arise when judging the qualifications of presidential candidates. In my judgment, Colorado law likely has not empowered state courts to review the qualifications of presidential candidates.

To start, this Court should take care to ensure that it does not exceed "the bounds of ordinary judicial review" to the extent a judicial interpretation of state law violates the Presidential Electors Clause. *Cf. Moore v. Harper*, 600 U.S. 1, 36 (2023) (standard for Article I, Section 4, Clause 1, the Elections Clause). The "Legislature" of the State of Colorado—including the people acting by initiative, *see Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015)—is empowered to direct the appointment of presidential electors, and, to the extent the state's presidential primary relates to that power, this Court should ensure that its interpretation comports with this directive.

The trial court found two particular statutory terms useful in determining it had jurisdiction: "The Election Code states that the presidential primary process is intended to 'conform to the requirements

of federal law,' which includes the U.S. Constitution. C.R.S. § 1-4-1201. Further, C.R.S. § 1-4-1203(2)(a) provides that political parties may participate in a presidential primary only if the party has a 'qualified candidate.'" Final Order, ¶ 222. The Court then continued, "the Election Code gives this Court that authority" to review the qualifications of presidential primary candidates.

Respectfully, neither "federal law" nor "qualified candidate" are best read to empower Colorado state courts to judge presidential candidate qualifications.

1. The "federal law" language comes from a "declaration" of intent in the statute. It provides, "it is the intent of the people of the State of Colorado that the provisions of this part conform to the requirements of federal law and national political party rules governing presidential primary elections." C.R.S. § 1-4-1201. "Federal law" is nowhere defined, but the trial court assumed it includes the totality of the United States Constitution. That is an error. The term "federal law" is best understood more narrowly.

Start with the verb that precedes it: "conform." The provision does not attempt to "implement" or "enforce" federal law, but to "conform" to it. That verb suggests an effort to harmonize a new presidential primary statute with existing federal law that might otherwise conflict.

The Denver Metro Chamber of Commerce launched the ballot initiative that would become C.R.S. § 1-4-1201 in 2016. In its white paper on engaging "independent voters," it explained that a semi-open primary—which would permit unaffiliated voters to affiliate with the Republican or Democratic parties in a presidential primary—could face legal challenges: "But courts in some states have ruled it violates the political parties' private right of association, so any such measure must be carefully designed."[10]

The line of federal right of association cases is extensive—and complicated. *See, e.g.*, *Cousins*, 419 U.S. 477 (1975); *Democratic Party*, 450 U.S. 107 (1981); *Tashjian*, 479 U.S. 208 (1986); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *California*

[10] "Independent Voters," Denver Metro Chamber of Commerce, https://denverchamber.org/policy/policy-independent-voters-white-paper/.

Democratic Party v. Jones, 530 U.S. 567 (2000); *Clingman v. Beaver*, 544 U.S. 581 (2005). "Federal law" is best understood to mean that the state's new presidential primary would "conform" with—that is, would comply with—federal law relating to the associational interests of parties. And it is a prefatory statement of intent, not an affirmative authorization of judicial power.

This interpretation of "federal law" is bolstered by the clause that follows, "governing presidential primary elections." A postpositive modifier like this clause attaches to both "federal law" and "national political party rules." *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 147–51 (2012). And the federal law "governing presidential primary elections" is directed at the issues relating to associational rights of parties, not all issues related to elections.

2. The term "qualified candidate" appears here: "Except as provided for in subsection (5) of this section, each political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election." C.R.S. § 1-4-1203(2)(a).

The term "qualified candidate" does not stand in isolation. The statute provides, "a qualified candidate entitled to participate in the presidential primary pursuant to this section." The phrase "entitled to participate in the presidential primary pursuant to this section" describes how a candidate is "qualified." And a candidate qualifies, pursuant to C.R.S. § 1-4-1204(1), by being a "bona fide candidate for president" and submitting a "statement of intent." It does not refer to a candidate who meets the qualifications under the United States Constitution.

Furthermore, the condition of "qualified candidate" attaches to the *party* in C.R.S. § 1-4-1203(2). The party is "entitled to participate in the Colorado presidential party" if it has a "qualified candidate." If a party fails to secure *any* qualified candidate, it may not participate in the primary. That is the remedy that would run with a violation of C.R.S. § 1-4-1203—not disqualification of a candidate from appearing on the ballot. And no one disputes that the party will have other candidates who participate in the primary.

3. Nowhere does the trial court explain where state law affirmatively empowers it to investigate qualifications. A challenge of an "alleged

impropriety," C.R.S. § 1-4-1204(4), cannot stand alone—it must refer to some other provision of law that is an impropriety. Likewise a "breach or neglect of duty or other wrongful act" must refer to some other provision of law that is a breach or is wrongful. The two stray phrases in C.R.S. §§ 1-4-1203 & 1204 are insufficient to empower the state judiciary.

Admittedly, my bias in presidential qualifications disputes has been in favor of narrow construction of statutes and caution in exercising jurisdiction. See Muller, *Scrutinizing*, 90 IND. L.J. at 610. It is why I qualify the interpretation of "likely" in this section. Even if this court disagrees with my interpretation of state law, it should carefully explain how state law empowers the state court to investigate qualifications.

4. One final reason for caution is an unsettled issue with respect to Section 3 of the Fourteenth Amendment: whether exclusion from the ballot at this time, well ahead of Inauguration Day, acts as an additional qualification for a presidential candidate.

States may not add qualifications to presidential candidates. *See Chiafalo*, 140 S.Ct. at 2324 n.4; *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). Section 3 provides that "Congress may by a vote of

two-thirds of each House, remove such disability." A candidate who is ineligible today could be eligible by January 20, 2025. And Section 3 provides that a person may not "hold any office" but says nothing about candidacy.

The state's power to direct the manner of appointment surely extends to regulate candidacies for office and ballot access rules. And, as this brief has argued, that power extends to judging the qualifications of presidential candidates and excluding ineligible candidates from the ballot. But if a state judges qualifications prematurely, it could inadvertently add qualifications for candidates for office. That is, if a state requires that a candidate demonstrate he is eligible *today*, that may impose an additional qualification if the candidate is, or could be, eligible by Inauguration Day or some time during the four-year presidential term of office.

But this places states in a hard position. On the one hand, if a state may not judge the qualifications of a candidate based on the best information they have at hand today, the state risks its electoral votes being rejected in Congress. *See, e.g.*, Zoe Tillman, *Trump's Presidential*

Run Faces Legal Challenges Over His Role in Jan. 6 'Insurrection,' BLOOMBERG, Nov. 16, 2022, https://www.bloomberg.com/news/articles/2022-11-16/donald-trump-s-candidacy-risks-ballot-challenges-over-jan-6-insurrection-role ("Asked if Congress could refuse to certify a Trump electoral win on Section 3 grounds, Wasserman Schultz said she didn't know if lawmakers 'would be in a position to do that but it certainly wouldn't be something that should be ruled out.'"). On the other hand, if a state prematurely excludes a candidate from the ballot, the candidate might later become eligible, and the state has functionally disqualified an eligible candidate.

It is worth noting that states have excluded candidates who could never become eligible during the term of office. But states have gone further. Consider again the example of Eldridge Cleaver, the 33-year-old who would turn 35 within the four-year presidential term of office. The Twentieth Amendment provides, "If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified . . . ." In

theory, an ineligible candidate would simply stand aside as the vice president acts as president until the president qualifies for office. Nevertheless, California kept Cleaver off the ballot in 1968. *Accord Lindsay*, 750 F.3d at 1065 ("The Twentieth Amendment addresses such contingencies. Nothing in its text or history suggests that it precludes state authorities from excluding a candidate with a known ineligibility from the presidential ballot.").

To my knowledge, this issue of additional qualifications for presidential candidates is not seriously contemplated in any judicial opinions. My own thoughts here are hesitant. But it is an important threshold issue that must be addressed before reaching the merits of any Section 3 claim.

CONCLUSION

Amicus respectfully submits that states hold the power to adjudicate the qualifications of presidential candidates. Judging qualifications takes place only after the legislature has created a mechanism to do so. But Colorado has not created a mechanism for the Secretary of State to judge qualifications. And it likely has not empowered state courts to do so.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On November 29, 2023, I served the foregoing by the Colorado Courts E-Filing System on:

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