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 AMICUS CURIAE OF EDWARD B. FOLEY, BENJAMIN L. GINSBERG, AND RICHARD L. HASEN IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Constitutional provisions and statutes

Other authorities

INTERESTS OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT*

Amici often do not see eye to eye on matters of law or policy. But they join together in this brief to make a single, urgent point: A decision from this Court leaving unresolved the question of Donald Trump's qualification to hold the Office of President of the United States under Section 3 of the Fourteenth Amendment until after the 2024 election would risk catastrophic political instability, chance disenfranchising millions of voters, and raise the possibility of public violence before, on, and after November 5, 2024. And the grounds for avoiding the merits are not credible: Colorado manifestly had the authority to determine Mr. Trump's legal qualification for the office he seeks, and this Court has jurisdiction to review that federal-law decision on its merits.

To punt on the merits would invite chaos while risking great damage to the Court's reputation and to the Nation as a whole. The country is more polarized today than at any other time in living memory—certainly more than in December 2000, when this Court last decided a case with a direct impact on the outcome of a presidential election. Controversy over the 2020 election led millions of Americans to doubt the integrity of the electoral system and ultimately culminated in the storming of the U.S. Capitol on January 6, 2021. Political tensions have not eased in the time since. Quite the opposite: political discourse has stoked further public skepticism of the electoral system since January 2021. *Amici* thus file this brief, not only to demonstrate that the Court *can* reach the

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* No counsel for any party authored this brief in whole or in part and no entity or person aside from *amici* or their counsel made any monetary contribution to the preparation or submission of this brief. *Amici* join this brief in their personal and not institutional capacities.

merits of Mr. Trump's qualification under Section 3, but that it *should* do so, or else risk political instability not seen since the Civil War.

The possible scenarios if the Court fails to resolve the Section 3 question once and for all are alarming. If Mr. Trump wins an electoral-vote majority, it is a virtual certainty that some Members of Congress will assert his disqualification under Section 3. That prospect alone will fan the flames of public conflict. But even worse for the political stability of the Nation is the prospect that Congress may actually vote in favor of his disqualification after he has apparently won election in the Electoral College. Neither Mr. Trump nor his supporters, whose votes effectively will have been discarded as void, are likely to take such a declaration lying down.

Even if Mr. Trump did willingly stand aside, it is wholly unclear who would be inaugurated as President on January 20, 2025—would it be Mr. Trump's running mate, pursuant to the Twentieth Amendment? Would it be Mr. Biden, pursuant to a Twelfth Amendment election in the House? Or would it be some alternate candidate thrown into the mix in the heat of the political battle? The chance that there would be no clear answer come Inauguration Day 2025—and that the country thereby would be thrown into a possibly catastrophic constitutional crisis—is disturbingly high.

Amici have devoted their careers to the study and practice of election law, earning independent reputations as preeminent experts in the field. Although they often disagree on matters of policy and ideology, *amici* share a deep-seated conviction that free and fair elections bolster voter confidence and trust in the political process. *Amici* also share an expert understanding of the constitutional

system for elections, which not only places responsibility for administering federal electoral contests first in the hands of the States, but also leaves an essential role for this Court "to say what the law is." *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803).

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Benjamin L. Ginsberg has spent his career working in the trenches of Republican politics. He practiced law for 38 years before retiring in 2020. During that time, he represented numerous political parties, political campaigns, candidates, members of Congress and state legislatures, governors, and others in matters including federal and state campaign finance laws, redistricting, ethics and gifts rules, pay-to-play laws, election administration, government investigations, communications law, and election recounts and contests. He represented four of the past six Republican presidential nominees (including, through his former law firm, President Trump's 2020 campaign). He played a central role in the 2000 Florida recount. Mr. Ginsberg also co-chaired the bipartisan 2013 Presidential Commission on Election Administration.

Richard L. Hasen is Professor of Law and Political Science at UCLA School of Law, where he directs the Safeguarding Democracy Project, which aims to preserve free and fair elections in the United States. Professor Hasen is an internationally recognized expert in election law, and author of many books on elections and election law including, most recently, *A Real Right to Vote* (Princeton University Press 2024). From 2001-2010, he served as founding co-editor of the quarterly peer-reviewed publication, *Election Law Journal*. He is the author of over 100 articles on election law issues, published in numerous journals including the *Harvard Law Review*, *Stanford Law Review* and *Supreme Court Review*. He was elected to The American Law Institute in 2009.

Amici take no position on the question whether Mr. Trump is disqualified from the presidency under Section 3 of the Fourteenth Amendment. Reasonable arguments can be made on both sides of that question, and those issues are amply briefed by the parties and other friends of the Court. *Amici* offer their views here for a more basic point: The Court has the power to resolve the question presented, and it must do so *now*.

ARGUMENT

This brief first explains, as a matter of election-law basics, that Colorado had the authority to determine Mr. Trump's eligibility under Section 3 to hold the Office of President. Second, it shows why this Court's failure to resolve the merits of that question now would be extraordinarily dangerous for the Nation.

Amici acknowledge that their arguments employ strong language. They do not do so lightly, and it would be a mistake to dismiss it as histrionics. Not since the Civil War has the United States confronted such a risk of

destabilizing political unrest, and perhaps never has this Court been in such a clear position to head it off.

A. States may resolve an office-seeker's eligibility under Section 3, and this Court may review such decisions on their merits

Justice Samour's dissenting opinion below, together with the petition and the *amicus* briefs filed in its support, have argued that States have no authority to determine a candidate's constitutional qualifications to hold office under Section 3 before placing him on the ballot. Eliding basic differences between federal and state-law causes of action and offering no basis for distinguishing Section 3 from any other constitutional qualifications for office, they assert that a candidate's ineligibility to hold office under Section 3 may be decided only after Congress has enacted a statute (saying what, who knows?), potentially after the election has been held (regardless that it may produce a winner who is ineligible to hold the office).

Both of those contentions are as meritless as they are reckless. To obtain a place on the ballot, a candidate for President of the United States must meet a multitude of state-specific election requirements and deadlines—typically including that the candidate must actually be *qualified* to hold the office. For instance, most States would deny ballot access to a candidate for President under the age of 35 years or who already had served two terms. This makes sense: A state has an interest in assuring that its voters do not throw away their votes on a candidate who ultimately would be ineligible to serve in office. A holding from this Court that Colorado was powerless to make a judicially-reviewable, pre-election decision concerning Mr. Trump's disqualification under Section 3 would turn our federalist electoral system upside down.

1. Section 3 does not require a congressional enactment to be effective

To begin, Section 3 does not require a congressional enactment to be effective any more than do the qualification provisions for President contained in Article II. Section 3 speaks in clear terms: It disqualifies from holding federal office anyone "who, having previously taken an oath * * * to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same." U.S. Const. amend. XIV, § 3. That language constitutes an independently operative legal bar; it requires no federal legislative action for a state election official or a state court to enforce it, as long as the state legislature has exercised its authority under Article II to authorize its own officials to make this determination.

Similar language is found in the Constitution's other requirements for office, and never before has congressional intervention been thought necessary for enforcement. For example, Article II, Section 1, Clause 5 disqualifies persons from holding the office of President "who shall not have attained to the Age of thirty five Years." State election officials and state courts need no congressional direction on what it means to be "the Age of thirty five Years" to bar an eighteen-year-old from appearing on a ballot for President.

Similarly, the Twenty-Second Amendment bars anyone from being "elected to the office of the President more than twice." Again, state election officials and state courts need no congressional direction on what it means to have been "elected to the office" to bar a candidate from a third term. State officials similarly may keep individuals who are not natural born citizens off the presi-

dential election ballot. See, *e.g.*, Abraham Kenmore, *Longshot presidential candidates tossed off South Carolina ballots sue*, Rhode Island Current (Jan. 8, 2024), archived at perma.cc/C64S-E5P4 (presidential candidate Cenk Uygur sued the South Carolina Democratic Party and state officials for keeping him off the ballot because he is not a natural-born citizen).

Just so here. State election officials and state courts need no congressional direction to enforce Section 3. They, no less than Congress, have the competence and obligation to interpret and apply the provision within the constraints of state and federal law—subject to ultimate judicial review before this Court and its determination of what constitutes insurrection.

This understanding of the Fourteenth Amendment is confirmed by early congressional practice. Section 3 both disqualifies insurrectionists from office and empowers Congress to "remove such disability" by "a vote of two-thirds of each House." The word "removed," both today and at the time of the Civil War, means "taking away something that *already exists* rather than forestalling something yet to come." *Cawthorn* v. *Amalfi*, 35 F.4th 245, 258 (4th Cir. 2022) (citing *Dr. Webster's Complete Dictionary of the English Language* 1116 (Chauncey A. Goodrich & Noah Porter, eds., 1864)) (emphasis added).

In 1868, Congress enacted two statutes to remove Section 3's disability from hundreds of Confederate supporters assumed to have been insurrectionists. It notably did so without first making findings about who counted as an insurrectionist or more generally establishing a standard or procedure for applying Section 3. See Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Commentary 87, 112 (2021)

(citing Act of June 25, 1868, ch. 70, § 3, 15 Stat. 73, 74; and Act of June 19, 1868, ch. 62, 15 Stat. 360). The same lawmakers responsible for the Fourteenth Amendment thus evidently believed that Section 3 barred insurrectionists from office without implementing legislation, or else there would have been no disability to "remove."

There are many and varied historical arguments supporting the authority of state legislatures to enforce Section 3 without need of prior congressional enactment. Consider, for example, that prior to the Seventeenth Amendment's adoption in 1913, U.S. Senators were chosen by each State's legislature. The notion that a state legislature considering the candidacy for Senator of a known insurrectionist could not disqualify the candidate under Section 3 absent federal congressional action borders on risible. The case of Clement Vallandigham's 1868 candidacy for U.S. Senator from Ohio demonstrates the point. See Edward B. Foley, *1868 and 2024: The Relevance of the Past to the Present* (Jan. 11, 2024), archived at perma.cc/BJR8-K53A.

2. It is irrelevant whether Congress created a cause of action to enforce Section 3

In his dissenting opinion below, Justice Samour concluded (Pet. App. 144a) that a congressional enactment is necessary because without it, there is no federal "civil cause of action to challenge [a candidate's] eligibility to appear on [a State's] presidential primary ballot." That is true as far as it goes, but it misunderstands how election rules are enforced.

Every cycle, state election officials determine as a matter of course the eligibility of candidates to appear on the ballot for federal office, pursuant to their authority under Article I, Section 4 and Article II, Section 1, Clause

2 of the U.S. Constitution. They make these determinations by following the state statutes and regulations that govern the administration of federal elections, applying the relevant legal standards as they see them. No federal cause of action is needed.

Nor do aggrieved citizens require a federal cause of action to petition for enforcement of constitutional election rules in state court. This is just such a case: Respondents initiated their claims in *state* court under a *state-law* cause of action to enforce Colorado's Election Code, which incorporates the requirements of the Federal Constitution. See Pet. App. 12a, 45a n.11.

In this case, the Colorado Supreme Court held that Colorado law provides the necessary cause of action for the pre-election adjudication of the Section 3 issue. See Pet. App. 29a-45a. It would beggar belief to say that state courts are powerless to enforce state election codes any time the controversy implicates an issue of federal constitutional law that has not been made the subject of a federal cause of action. On the contrary, the framers of the Fourteenth Amendment assuredly understood that "the State courts * * * have concurrent jurisdiction in all cases arising under the laws of the Union." *Claflin* v. *Houseman*, 93 U.S. 130, 138 (1876); see also *id.* at 133 (rejecting the contention that "the State courts having no jurisdiction over" a claim that "arises purely and solely out of the provisions of an act of Congress").

3. Section 5 has no negative inference

Section 5 of the Fourteenth Amendment does not call for a different result. That provision states only that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." As this Court long ago said, that language "is a positive grant of

legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966). But it is fundamental that the "mere grant of * * * a power to Congress d[oes] not imply a prohibition on the states to exercise the same power." *Missouri Pacific Rail Co.* v. *Larabee Flour Mills*, 211 U.S. 612, 621 (1909) (dormant Commerce Clause case concerning rail regulations) (quoting *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851)).

The only power granted to Congress that has ever been held to imply a withdrawal of power from the States is the power to regulate interstate commerce, and then only in narrow circumstances when state regulation discriminates against or unduly burdens interstate markets. Of the so-called dormant Commerce Clause, many Members of this Court have "authored vigorous and thoughtful critiques." *Tennessee Wine & Spirits Retailers Association* v. *Thomas*, 139 S. Ct. 2449, 2460 (2019). This is not the time to extend that doctrine's questionable rationale.

Moreover, concurrent state enforcement authority is especially sensible in the Section 3 context because the disability imposed by the clause applies to *both* state and federal offices. It would make little sense that a State seeking to enforce the rules of eligibility for its own offices must await a federal statute.

All this said, our "deeply rooted presumption in favor of concurrent state court jurisdiction" over matters of federal law is "rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim." *Tafflin* v. *Levitt*, 493 U.S. 455, 459 (1990).

Congress thus could enact legislation making enforcement of Section 3 an exclusive federal matter, as it has in other contexts implicating the complete preemption doctrine. See, *e.g.*, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). It has not done so here.

The key observation—which the dissent and petitioner fail to appreciate—is that *preemption* is the proper lens through which to evaluate whether a State's enforcement of Section 3 is permissible. And in the conceded absence of congressional action, there is no case for preemption here.

4. This Court has the power to review the decision below on its merits

Against this background, the Colorado Supreme Court plainly had the authority under the State's Election Code to resolve the question whether Mr. Trump is disqualified under Section 3. This Court, in turn, has the clear authority under 28 U.S.C. § 1257(a) to review that decision on its merits. The convoluted efforts to avoid that conclusion are out of step with text, history, and settled practice.

This should not be a controversial conclusion. Section 1257 gives this Court certiorari jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State * * * where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." 28 U.S.C. § 1257(a)), providing "jurisdiction to review state-court determinations that rest upon federal law" (*Oregon* v. *Guzek*, 546 U.S. 517, 521 (2006)).

For centuries, this Court has understood its jurisdiction to extend to state determinations of federal rights under the federal Constitution. *See, e.g.*, *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Here, the

Colorado Supreme Court's decision below rested expressly on an interpretation of the First Amendment and Section 3 of the Fourteenth Amendment. It thus concluded that Mr. Trump "engaged in insurrection" (Pet. App. 83a-100a) and rejected his free-speech defense (Pet. App. 100a-113a). This is precisely the sort of case that Congress intended Section 1257 to encompass.

Indeed, Section 1257 applies with particular force in the elections context. Just last term, the Court noted jurisdiction after North Carolina rejected an Elections Clause defense invoked by legislative defendants. See *Moore* v. *Harper*, 600 U.S. 1 (2023). The Court confirmed that the North Carolina Supreme Court's decision was reviewable under Section 1257. *Id.* at 16-17. In his concurrence, Justice Kavanaugh explained that even "a state court's interpretation of *state law* in a case implicating the Elections Clause is subject to federal court review." *Id.* at 38 (citing *Bush* v. *Palm Beach County Canvassing Board*, 531 U.S. 70, 76-78 (2000)). No less can be said here.

B. Failure to resolve the merits now would place the Nation in great peril

We appreciate fully that the Members of this Court would prefer not to be thrust into the midst of a presidential election like this. But there is no avoiding it. "[W]hen a federal court has jurisdiction, it also has a virtually unflagging obligation to exercise" its authority to resolve the legal questions put to it. *Mata* v. *Lynch*, 576 U.S. 143, 150 (2015) (cleaned up). A decision vacating the lower court's judgment on procedural or jurisdictional grounds, thus reinstating Mr. Trump on the ballot without deciding the merits of the disqualification question, would not reflect an admirable judicial modesty; it would instead mark a dangerous refusal by this Court to do its duty.

1. This Court's intervention on the merits is imperative now; delay risks catastrophe

It is unavoidable that the Court's decision in this case will influence the course of the 2024 election. And it would be a gamble to assume that President Biden will win reelection. If he does not, or if it is unclear whether he has won, the Court will be inviting, and almost surely thrusting itself into the middle of, post-election tumult and potential public violence.

Any contention that the time and place for determining Section 3's applicability is on January 6, 2025, after the election is concluded, invites disaster for the Nation. It is of course speculation how exactly the election would play out with an unresolved Section 3 cloud hanging over Mr. Trump's head, but none of the options is tolerable. Virtually all of them would lead to serious conflict both within Congress and among the general public. Consider the following very realistic scenarios.

a. Imagine Mr. Trump wins an electoral-vote majority, and Members of Congress assert Section 3 disqualification

If Mr. Trump ostensibly wins the Electoral College, it is a certainty that some Members of Congress will invoke Section 3 in an effort to prevent him from returning to the presidency. They will argue that only a majority of both houses is necessary for disqualification and that a majority of both houses *already* made a determination that Mr. Trump is disqualified under Section 3 when the House impeached him over the January 6 incursion and 57 senators voted to convict.

Whether or not this effort is successful, it would risk serious political instability between November 2024 and January 2025. It is admittedly impossible to predict with

confidence exactly what additional dominoes would fall if Mr. Trump's qualification is publicly tested in Congress. It is enough to acknowledge that the potential for violence—targeted against individual lawmakers and the government generally—is very real. That potential would be avoided by a pre-election answer in this case.

In saying this, we acknowledge that if the Court were to affirm the Colorado Supreme Court's decision that Mr. Trump is disqualified from the ballot, public discord may also follow. But the degree of civil unrest from a *pre*-election disqualification is certain to be far less than following a disqualification after Mr. Trump has won a majority of electoral votes. It is much harder to accept having something taken away than it is to be denied the thing in the first place—a truism this Court has previously recognized in the electoral context. See *LULAC* v. *Perry*, 548 U.S. 399, 439-440 (2006).

b. Imagine Mr. Trump wins an electoral-vote majority and Congress declares him disqualified

Now suppose that a majority of both houses actually votes in favor of disqualification, and Mr. Trump—ostensibly having won a majority of electors—is declared ineligible to hold the office. The existing constitutional and statutory rules applicable in such a situation are dangerously unclear, and the risk of violence and instability would be overwhelming.

As a threshold point, there is no guarantee that Mr. Trump would accept a congressional disqualification. He likely would not—and, as he did on January 6, 2021, he may invite his supporters to resist with violence.

But even before that, it is unclear how a disqualification by Congress would play out. The Twelfth Amend-

ment calls for a Joint Session to conduct a count of electoral votes, but there is no playbook for when the candidate receiving a majority of votes is declared ineligible to occupy the office. For instance, if the votes for that candidate are nullified, denying any candidate a majority of the vote, would the election be sent to the House of Representatives under the Twelfth Amendment? [2]

The Electoral Count Reform Act of 2022 suggests so. As amended, 3 U.S.C. § 15(d)(2)(B)(ii)(II) permits objections to electoral votes on the ground that they are "not * * * regularly given." The term "not regularly given" historically has been understood to encompass electoral votes cast for a person who is not eligible to hold the office. See Derek Muller, *Electoral Votes Regularly Given*, 55 Georgia L. Rev. 1529, 1537 (2021).

The statute specifies that electoral votes "shall not be counted" if a procedurally proper objection is sustained by both the House and the Senate. 3 U.S.C. § 15(e)(1)(B). But it does not appear to permit the subtraction of votes invalidated as "not * * * regularly given" from the denominator for purposes of calculating a majority share of "the

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[2] In 1872, Horace Greeley, the Democratic party's nominee for President, died after citizens had cast their popular vote ballots to appoint electors in the States but before the electors met to cast their electoral votes. Greeley had won the popular vote in six States, earning 66 total electoral votes. Most of these electors cast their votes for alternate candidates. But three of Georgia's electors voted for Greeley. When the Joint Session of Congress met pursuant to the Twelfth Amendment to count the electoral votes, there was an objection on the ground that, being dead, Greeley was ineligible. This sparked considerable disagreement in Congress, and ultimately the two chambers diverged in their treatment of the votes. See 42 Cong. Globe 1285-1306 (1873). The disagreement here would be far worse and would likely be outcome determinative.

whole number of electors." See *id.* § 15(e)(2). If that is correct and Mr. Trump receives the majority of all electoral votes, his disqualification would mean that no qualified candidate receives a majority.

The election thus would be sent to the House under the Twelfth Amendment, which specifies that "if no person [wins a] majority" in the Electoral College, "the House of Representatives shall choose immediately, by ballot, the President." If Mr. Biden were the only other candidate who receives electoral votes, he would be the only candidate the House could select. He thus would be declared President-elect, despite that Mr. Trump will have won a majority of electoral votes cast.[3]

Such an outcome, although mandated by the plain terms of 3 U.S.C. § 15(e) and the Twelfth Amendment, would create two alarming problems. First, and perhaps more obvious, it would rile the Nation for the House to install in the presidency the *opponent* of the candidate who had won a majority of the electoral votes. Second, it would appear to place the ECRA and the Twelfth Amendment in conflict with the Twentieth Amendment, which provides that "the Vice President elect shall act as President" if the President-elect "shall have failed to qualify" to take the office by Inauguration Day.

All of this would leave it dangerously unclear who, following a disqualification of Mr. Trump, should serve as President. Throw into the mix Mr. Trump's certain refusal

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[3] It is also possible that one or more alternative candidates could receive votes in the Electoral College if Republicans invite "faithless" voting by electors from States that permit it. See *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2323 (2020) (holding that States may bar faithless electors). In that event, the House would have at least one other candidate to consider alongside Mr. Biden.

to accept any disqualification by Congress, and there would be no way to know who is entitled to act as President and commander-in-chief of the Armed Forces starting at noon on January 20. The consequences of that uncertainty would be existentially perilous to the United States, and they must be avoided if at all possible.[4]

c. Imagine no candidate wins an electoral-vote majority and the House declares Mr. Trump disqualified

Finally, imagine a less likely but still plausible scenario in which a third party candidate joins the race and wins sufficient electoral votes to deny any one candidate a majority in the Electoral College. Or similarly, imagine a 269-269 Electoral College tie between Mr. Trump and Mr. Biden. Here, the election would be sent the House under the Twelfth Amendment, and the question of Mr. Trump's disqualification under Section 3 could arise not just once, but twice: first in the Joint Session for counting the electoral votes, and then in the House during its Twelfth Amendment proceedings.

In this case, suppose one-fifth of each chamber signs a Section 3 objection in the Joint Session, triggering separate votes in each chamber under the ECRA. 3 U.S.C. § 15(d)(2). Now suppose that the House votes to sustain

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[4] The Nation came dangerously close to a similar situation in 1877, when the presidential election between Rutherford B. Hayes and Samuel Tilden remained unresolved until just two days before the date for the new President's inauguration. There was significant fear of simultaneous and conflicting inauguration ceremonies, with uncertainty over which presidential claimant the military was obligated to obey. See Edward B. Foley, *Ballot Battles: The History of Disputed Elections in the United States* 117, 148 (2016). The same dire risk may yet arise here if the Court does not reach the merits.

the objection, but the Senate does not. Under the ECRA, the objection would fail and Mr. Trump's electoral votes would be counted. At the end of the count, however, the election would proceed to the House under the Twelfth Amendment, where each State delegation is afforded a single vote.

To start, the House would need to establish rules for conducting the election. See U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the rules of its proceedings."). Democrats in the House would have a partisan incentive to adopt a rule provision first requiring a majority vote on each candidate's qualification to hold office. If they held a majority of the House, Democrats could sustain an objection to Mr. Trump's candidacy on Section 3 grounds and exclude him from the ballot in its Twelfth Amendment election.

This, too, would introduce a major constitutional crisis. Mr. Trump and his supporters may then contend that the House is not empowered to disqualify a candidate for President without the concurrence of the Senate. Democrats may alternatively contend that the majority of the House has the constitutional power to determine its own rules, as long as those rules permit each state delegation a single vote in the Twelfth Amendment election.

How would this constitutional crisis be resolved? Would the Court be called on to resolve the dispute, despite its nakedly political valence? Or would the tribal politics of the day invite resolution of the disagreement by violence? We all should shudder at that possibility. And the risk of this outcome—along with all the other deeply troubling scenarios like it—would be significantly reduced by this Court's resolution of the Section 3 question *now*, before the 2024 general election takes place.

2. The situation now is more perilous than in 2000, and putting off a decision (as it did then) would risk disenfranchising voters

Finally, it is worth contrasting the current situation with the aftermath of the 2000 election. As Florida conducted its recounts and litigation swirled, this Court initially returned the case to the Florida Supreme Court with the suggestion that it consider the question of whether Florida's procedures were constitutional. *Bush* v. *Palm Beach County Canvassing Board*, 531 U.S. 70 (2000). This unanimous punt kept the Court temporarily on the sidelines as the recount process and litigation continued; depending upon how the recount went, it was conceivable that this Court would avoid weighing in. Alas that was not to be. *Bush* v. *Gore*, 531 U.S. 98 (2000).

This time, however, kicking the can down the road would be far more fraught for the country. There is every reason to believe that disqualification challenges will continue to proliferate if this Court fails to give guidance. In the meantime, voters who cast their votes for Mr. Trump risk disenfranchisement for supporting a candidate who may later be held ineligible for office. Because they won't get a do-over, these voters deserve to know now whether their ballots for Mr. Trump will be counted.

Further, requiring Congress to take up the issue in an inherently political process, on the fourth anniversary of the U.S. Capitol riot, would be a tailor-made moment for chaos and instability. The pressure on Congress from all sides would be enormous, as would be the temptation to resolve the disqualification question not as a matter of the legal or factual merit, but as an exercise of political power. This Court stands between the potentially disastrous turmoil that would result and a comparatively peaceful

election administered consistent with the Constitution and the rule of law. It should not let this opportunity to stave off political instability pass.

CONCLUSION

The Colorado Supreme Court and this Court both have the power to resolve the question whether Donald Trump is disqualified by Section 3 of the Fourteenth Amendment to hold the Office of the President of the United States. The Nation desperately needs the Court to exercise that power immediately, in this case.

Respectfully submitted.

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