DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203	DATE FILED: October 25, 2023 4:37 PM
Petitioners: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN, v. **Respondents:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP, and **Intervenor:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, and DONALD J. TRUMP.	▲ COURT USE ONLY ▲
Attorneys for Petitioners: Mario Nicolais, Atty. Reg. # 38589 KBN Law, LLC 7830 W. Alameda Ave., Suite 103-301 Lakewood, CO 80226 Phone: 720-773-1526 Email: mario@kbnlaw.com Martha M. Tierney, Atty. Reg. # 27521 Tierney Lawrence Stiles LLC 225 E. 16th Ave., Suite 350 Denver, CO 80203 Phone: 303-356-4870 Email: mtierney@tls.legal Eric Olson, Atty. Reg. # 36414 Sean Grimsley, Atty. Reg. # 36422 Jason Murray, Atty. Reg. # 43652 Olson Grimsley Kawanabe Hinchcliff & Murray LLC 700 17th Street, Suite 1600 Denver, CO 80202	Case Number: 2023CV032577 Division/Courtroom: 209

Phone: 303-535-9151
Email: eolson@olsongrimsley.com
Email: sgrimsley@olsongrimsley.com
Email: jmurray@olsongrimsley.com

Donald Sherman*
Nikhel Sus*
Jonathan Maier*
Citizens for Responsibility and Ethics in Washington
1331 F Street NW, Suite 900
Washington, DC 20004
Phone: 202-408-5565
Email: dsherman@citizensforethics.org
Email: nsus@citizensforethics.org
Email: jmaier@citizensforethics.org

**Pro hac vice* admission pending

PETITIONERS' SUPPLEMENTAL BRIEF ON THE TWENTIETH AMENDMENT AND THE ELECTORAL COUNT REFORM ACT OF 2022

Petitioners submit this supplemental brief in response to the Court's October 18, 2023 Order. As previewed in the parties' October 20 response to the Court's Order, this brief addresses the Court's legal questions relating to Section 3 of the Twentieth Amendment and the 2022 revisions to the Electoral Count Act, 3 U.S.C. § 15. The Twentieth Amendment and the Electoral Count Act both address issues that may arise *after* the states' electors have voted. Neither of these provisions address, much less negate, states' authority to enforce constitutional qualifications for the presidency during the earlier processes of granting ballot access to presidential primary *candidates* or in selecting presidential *electors*. *See* U.S. Const. art. II, § 1.

I. Section 3 of the Twentieth Amendment

The Twentieth Amendment is a "'technical amendment,'" "generat[ing] little legal commentary or public comment"; it has never been the "subject of a Supreme Court decision and has rarely been interpreted by lower courts." Ed Larson, *The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment*, 2012

Utah L.R. 707, 709-10 (2012) (quoting Akhil Reed Amar, America's Constitution: A Biography 428 (2005)). The Twentieth Amendment was the lame duck amendment—it sought to address certain issues that might arise during the period after the presidential and congressional elections in November and before the newly elected members take office in January. *See id.* at 746-47. It shortened the duration between the election and the elected official taking office, ensured that the newly elected Congress will be in office in case an election is thrown to the House of Representatives, and extended the Constitution's succession plan from the president to the president-elect. *See id.* at 746-51.

Section 3 provides that "if the *President elect* shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified." U.S. Const. amend. XX, § 3 (emphasis added). By its plain terms, Section 3 only applies *post-election*, once there is a "President elect." Nothing in the Amendment does what Trump supposes it does here: reserve to Congress the exclusive right to enforce constitutional qualifications of the presidency, including Section 3 of the Fourteenth Amendment. Nor does it strip states of the power to evaluate *candidate* qualifications for ballot access purposes.

What little judicial authority exists on the Twentieth Amendment shows that it does not displace traditional state authority to enforce qualifications for presidential *candidates.* In *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014), the Ninth Circuit confronted the argument Trump raises here: that the Twentieth Amendment "prohibits states from determining the qualifications of presidential candidates." *Id.* at 1065. The Ninth Circuit squarely rejected this "Dormant Twentieth Amendment" theory, stating that "nothing in the Twentieth Amendment states or implies that Congress has the *exclusive* authority to pass on the eligibility of candidates for president." *Id*. The Court explained:

> The amendment merely grants Congress the authority to determine how to proceed *if* neither the president elect nor the vice president elect is qualified to hold office, a problem for which there was previously no express solution. *See* 75 Cong. Rec. 3831 (1932) (statement of Rep. Cable). *Candidates may, of course, become ineligible to serve after they are elected (but before they start their service) due to illness or other misfortune. Or, a previously unknown ineligibility may be discerned after the election.* 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.

Id. (emphasis added). For that reason, the Ninth Circuit affirmed the lower court's decision permitting the California Secretary of State to exclude a 27-year-old from a presidential primary ballot. *Id.*; *see also Peace and Freedom Party v. Bowen*, 912 F. Supp. 2d 905, 911-12 (E.D. Cal. 2012) (lower court decision holding that "state election officials can and do prohibit certain candidates from appearing on a ballot" and that "[n]othing in the legislative history of Section 3 suggests Congress intended to limit" that power). That same reasoning forecloses Trump's argument here.

The Twentieth Amendment's limited scope is confirmed by its text and legislative history. As noted, Section 3 only addresses a failure to qualify by "the President elect." U.S. Const. amend. XX. The House Report that accompanied the Amendment states unequivocally that the Amendment "uses the term 'President elect' in its generally accepted sense, as meaning the person who has received the majority of the electoral [college] votes, or the person who has been chosen by the House of Representatives in the event that the election is thrown to the House." H.R. Rep. No. 72-345, at 6 (1932). Thus, the Amendment only concerns the disqualification of one who has already been elected.

To underline the point, the House Report explicitly notes that the Amendment does not concern itself with disqualifications that occur *prior to* the electoral college vote. Rather, in the event of any disqualification "before the November elections," no constitutional amendment was

necessary because "[t]he electors, under the present Constitution, would be free to choose a [different] President." H.R. Rep. No. 72-345, at 5.[1] That is precisely what will happen here: if Trump is disqualified, voters like Petitioners will be free to focus their votes on qualified candidates, someone will win the Republican nomination for President, the general election will select among presidential electors pledged to qualified candidates, and there will be no succession crisis triggering the concerns of the Twentieth Amendment.

The Amendment focuses on "serious problems" involved in disqualifying someone *after* they have won the electoral college or House vote. H.R. Rep. 72-345, at 5-6. For example, if after the electoral college vote it "develop[s] that the President elect was not a native born citizen and therefore not legally qualified to be President," *Hearing Before the Comm. on the Election of President, Vice President and Reps. in Cong.,* 72 Cong., 1st Sess., on S.J. Res. 14, 72d Cong. 9 (1932) (statement of Rep. Lea), a genuine succession crisis is triggered. There is no other candidate for whom voters may simply switch their vote, and no ability for states to undo the election that has already occurred. One could also imagine situations where an ineligibility might arise for the first time after the electors have voted—for example, if the president-elect became incapacitated in a manner that left him or her unable to take the constitutionally-mandated oath of office. It is these situations the Twentieth Amendment addresses. *Cf. Kerchner v. Obama*, 669 F. Supp. 2d 477, 480, 483 n.5 (D.N.J. 2009) (in challenge brought to President Obama's

[1] Though the quoted section of the House Report is explicitly addressing the death of a candidate before the November election, *see id.*, the Report treats death as simply another type of disqualification no different than failure to meet constitutional qualification. *See id.* at 1 (stating Amendment addresses the "case where neither a President nor a Vice President has qualified before the time fixed for the beginning of the term, whether the failure of both to qualify is occasioned by the death of both … or by any other means"); *see also* 75 Cong. Rec. 3830 (Feb. 12, 1932) (Rep. Jeffers) ("causes of the failure … to qualify" include "resignation, death, inability, ineligibility, and so forth").

qualifications after he was inaugurated by plaintiffs who lacked standing in federal court, noting in a footnote that Twentieth Amendment provides for congressional resolution of a president elect's failure to qualify).

Notably, even with respect to the disqualifications of presidents-elect that are within its coverage, the Amendment is silent as to who decides. A House Report accompanying an earlier draft of the Amendment—one that omitted the "failed to qualify" language—noted the omission was driven, in part, by the lack of determination about "[w]hat constitutes 'inability,' and *who is to determine the question*, under the present Constitution," saying the questions "will probably never be decided." H.R. Rep. No. 70-309, at 6 (1928) (emphasis added).[2] Although the 1932 Congress decided to include this omitted provision, it never addressed the question posed by the 1928 Congress. Rather, it treated disqualification as an occurrence that could independently "develop." *Hearing on S.J. Res. 14*, 72 Cong. 9. The Amendment's indeterminacy on the identity of the decision-maker for even a post-electoral college vote disqualification demonstrates that it has no bearing on the "someone or something" that decides qualifications *before* the November election. Order Re: Donald J. Trump's Mot. to Dismiss Filed Sept. 29, 2023, at 15 (Oct. 25,

[2] The House Report speaks of "inability" rather than "qualify" because the drafters understood the terms as interchangeable, and were intending through their use of "failed to qualify" to cover the grounds for disqualifying presidents for "Inability" that then operated in the Constitution. *See* H.R. Rep. No. 72-345 at 6 (stating amendment extends "sixth paragraph of section 1 of Article II of Constitution" provision for "case of the removal, death, resignation, or inability of the President" to the "President elect"); *Hearing on S.J. Res. 14*, 72 Cong. 9 (Statement of Rep. Lea) (asserting "qualify" "cover[s] all cases" including "insan[ity]," "kidnap[ping]," and "not [being] a native born citizen"); 75 Cong. Rec. 3830 (Feb. 12, 1932) (Rep. Jeffers) ("causes of the failure … to qualify" include "inability"); U.S. Const. art. II, § 1, cl. 6. With respect to presidential inability, the concern about who is to decide eventually led to the Twenty-Fifth Amendment. *See* U.S. Const. amend. XXV, §§ 3, 4 (authorizing president himself, or vice president with agreement of the majority of principal executive officers, to declare the president unable to discharge duties). The Twenty-Fifth Amendment still does not address the question for presidents-elect, however.

2023).

Trump's professed reading—one that would treat the Twentieth Amendment as the sole and preferred means to address disqualifications of those campaigning to become the "President elect"—would lead to absurd results. For example, the first sentence of Section 3 of the Twentieth Amendment concerns the possibility that "the President elect shall have died." Under Trump's reading, this sentence must be read to apply to the death not only of the person who has already received the most electoral college votes, but also to any candidate in the running. States would thus be stripped of any power to exclude a *dead candidate* from their ballots. The only solution for the candidate's mortality would be to run the election with the dead candidate on the ballot, regardless of the confusion caused, with the promise that a winning dead candidate's vice president would ascend to the office on Inauguration Day. The text, history, and precedent of the Twentieth Amendment provides no support for such an extraordinary conclusion.

Indeed, if Trump's reading were correct, the relative silence of the Twentieth Amendment would be shocking. If the Amendment eliminated states' traditional roles in overseeing elections, including presidential elections, and conferred sole authority on Congress to decide after the elections have run whether millions of voters wasted their vote on an unqualified candidate, and if it meant states must permit anyone and everyone a place on the ballot, then one might expect the Twentieth Amendment to be the subject of at least one Supreme Court decision and to receive more than a footnote mention in a small handful of scholarly works (none of which assert the Amendment impacts states' regulation of elections). The silence with respect to the Twentieth Amendment is deafening for such a supposedly consequential provision.

In short, the Twentieth Amendment did not disturb the State's "far-reaching authority" to

direct the means of appointing presidential electors. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020); U.S. Const. art. II, § 1. States retain their "legitimate interest in protecting the integrity and practical functioning of the political process," including their power "to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding Colorado's decision to exclude presidential primary candidate from the ballot over failure to meet qualifications); *see also Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (upholding state election board's exclusion of presidential candidate who did not meet age requirement).

II. The Electoral Count Reform Act of 2022

Congress enacted the Electoral Count Reform Act of 2022 ("ECRA") in response to the events of January 6, 2021, and former President Trump's unprecedented efforts to overturn the 2020 election results. According to the bill's sponsors, the ECRA "reform[ed] and modernize[ed] the outdated Electoral Count Act of 1887 to ensure that electoral votes tallied by Congress accurately reflect each state's vote for President" by adopting "clear procedures that maintain appropriate state and federal roles in selecting the President and Vice President of the United States as set forth in the U.S. Constitution."[3] Among other things, the ECRA:

- Affirmatively states that the constitutional role of the vice president, as the presiding officer of the joint session of Congress on January 6th, "shall be limited to performing solely ministerial duties," and that the vice president "shall have no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over" electors. 3 U.S.C. § 15(b).

- Includes several reforms to ensure Congress can identify a single, conclusive slate of

[3] Press Release, Senator Susan Collins, *Senators Introduce Reforms to the Electoral Count Act of 1887* (July 20, 2022), https://www.collins.senate.gov/newsroom/senators-introduce-reforms-to-the-electoral-count-act-of-1887; *see also* Senator Susan Collins, *Electoral Count Reform Act of 2022 One Pager*, https://www.collins.senate.gov/imo/media/doc/one_pager_on_electoral_count_reform_act_of_2022.pdf (summarizing key changes).

electors from each state, including by charging each state's governor (unless state law specifies otherwise) with submitting the certificate of ascertainment identifying that state's electors, providing for expedited judicial review of any challenge by an aggrieved presidential candidate to a state's certificate identifying its electors, and requiring Congress to defer to slates of electors submitted by a state's executive pursuant the judgments of state or federal courts. *See id.* § 5.

- Raises the threshold to lodge an objection to electors to at least one-fifth of the House and Senate and specifies the permissible grounds for such objections (none of which concern qualifications for the presidency), to reduce the likelihood of frivolous objections. *See id.* § 15(d)(2)(B).

As this Court has recognized, nothing in the ECRA expressly authorizes Congress to evaluate a president-elect's qualifications during its January 6th joint session. To the contrary, "it appears that Congress has disavowed any ability it once had to consider objections other than" those specified in the statute—"including any [objections] regarding the constitutional qualifications of the President-elect." Order Re: Donald J. Trump's Mot. to Dismiss Filed Sept. 29, 2023, at 17 (Oct. 25, 2023). And the statute certainly does not *exclusively commit* that function to Congress or *preempt* state ballot access laws authorizing candidate eligibility challenges. In fact, the statute's expedited judicial review procedure includes a *non*-preemption provision, which states that the subsection "shall *not* be construed to preempt or displace any existing State or federal cause of action." 3 U.S.C. § 5(d)(2)(B) (emphasis added). This provision reinforces that Congress did not intend to "preempt the field" in any way pertinent here. *See Arizona v. United States*, 567 U.S. 387, 399 (2012) (field preemption only applies where a congressional "intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive … that Congress left no room for the States to supplement it' or where there is a 'federal interest … so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

Notably, the same Congress that passed the ECRA introduced a different Electoral Count Act reform bill that *would have* authorized objections at the January 6th joint session if a state's "electoral votes were cast for a candidate who is ineligible for the office of President or Vice President pursuant to," among other provisions, "section 3 of the Fourteenth Amendment." H.R. 8873, 117th Cong., 2d Sess., at 32-33 (Sept. 19, 2022). That bill did not become law, and the ECRA, enacted several months later, includes no reference to presidential qualifications.

The ECRA sought to bring greater clarity to presidential transitions in the wake of a violent mob assault of Congress's last January 6th joint session. Reading the statute to make Congress's January 6th proceeding the *only* opportunity to enforce qualifications for the presidency—*after millions of voters chose a disqualified candidate in the general election*—would have calamitous results of the sort that the ECRA was designed to prevent. And the "Supreme Court has repeatedly held States are constitutionally empowered to mitigate" such "electoral 'chaos'" by policing their ballots of unqualified candidates *before* any votes are cast. *Cawthorn v. Amalfi*, 35 F.4th 245, 266 n.4 (4th Cir. 2022) (Wynn, J., concurring) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Thus, like the Twentieth Amendment, nothing in the ECRA could be construed to preclude this Court from hearing Petitioners' claim.

Date: October 25, 2023 Respectfully submitted,

/s/ Eric Olson
Eric Olson, Atty. Reg. # 36414
Sean Grimsley, Atty. Reg. # 36422
Jason Murray, Atty. Reg. # 43652
Olson Grimsley Kawanabe Hinchcliff & Murray LLC
700 17th Street, Suite 1600
Denver, CO 80202
Phone: 303-535-9151

Email: eolson@olsongrimsley.com
Email: sgrimsley@olsongrimsley.com
Email: jmurray@olsongrimsley.com

Mario Nicolais, Atty. Reg. # 38589
KBN Law, LLC
7830 W. Alameda Ave., Suite 103-301
Lakewood, CO 80226
Phone: 720-773-1526
Email: Mario@kbnlaw.com

Martha M. Tierney, Atty. Reg. # 27521
Tierney Lawrence Stiles LLC
225 E. 16th Ave., Suite 350
Denver, CO 80203
Phone: 303-356-4870
Email: mtierney@tls.legal

Donald Sherman*
Nikhel Sus*
Jonathan Maier*
Citizens for Responsibility and Ethics in Washington
1331 F Street NW, Suite 900
Washington, DC 20004
Phone: 202-408-5565
Email: dsherman@citizensforethics.org
Email: nsus@citizensforethics.org
Email: jmaier@citizensforethics.org
**Pro hac vice* admission pending

Counsel for Petitioners

CERTIFICATE OF SERVICE

I served this document on October 25, 2023, by Colorado Courts E-filing and/or via electronic mail as follows:

Michael T. Kotlarczyk
Grant T. Sullivan
LeeAnn Morrill
Colorado Attorney General's Office
mike.kotlarczyk@coag.gov
grant.sullivan@coag.gov
leeann.morrill@coag.gov

Attorneys for Secretary of State Jena Griswold in her official capacity as Colorado Secretary of State

Scott E. Gessler
Geoffrey N. Blue
Justin T. North
Gessler Blue LLC
gblue@gesslerblue.com
jnorth@gesslerblue.com
sgessler@gesslerblue.com

Jonathan Shaw
Mark P. Meuser
Jacob Roth
Dhillon Law Group, Inc.
jshaw@dhillonlaw.com
mmeuser@dhillonlaw.com
jroth@dhillonlaw.com

Attorneys for Donald J. Trump

Michael William Melito
Melito Law LLC
melito@melitolaw.com

Robert Alan Kitsmiller
Podoll & Podoll, P.C.
bob@podoll.net

Benjamin Sisney
Nathan J. Moelker
Jordan A. Sekulow
Jay Alan Sekulow

Jane Raskin
Stuart J. Roth
American Center for Law and Justice
bsisney@aclj.org
nmoelker@aclj.org
jordansekulow@aclj.org
sekulow@aclj.org
jraskin@raskinlaw.com
sroth@aclj.org

Andrew J. Ekonomou
aekonomou@outlook.com

Attorneys for Colorado Republican State Central Committee

/s/ Eric Olson
Counsel for Petitioners