State of Minnesota
In Supreme Court

Joan Growe, Paul Anderson, Thomas Beer, David Fisher, Vernae Hasbargen, David Thul, Thomas Welna, and Ellen Young,

Petitioners,

v.

Steve Simon, Minnesota Secretary of State,

Respondent,

v.

Republican Party of Minnesota,

Respondent.

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INTRODUCTION

This action under Minn. Stat. § 204B.44, arguing that Donald J. Trump is disqualified from the presidency of the United States under Section 3 of the Fourteenth Amendment ("Section 3"), is ready for adjudication. Petitioners have standing; the case is ripe; and Section 3 does not require federal implementing legislation. Further, Section 3 bars an insurrectionist from the presidency, and applies to a person who has previously taken an oath as president of the United States.

ARGUMENT

I. THE LEGISLATURE CONFERRED STANDING UPON ANY INDIVIDUAL, INCLUDING PETITIONERS, TO FILE A PETITION TO PREVENT AN ERROR IN THE CONDUCT OF AN ELECTION.

In Minnesota, standing means "a sufficient stake in a justiciable controversy to seek relief from a court." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). Plaintiffs can acquire standing in two ways: (1) if they have "suffered some injury in fact," or (2) if they are beneficiaries of some legislative enactment granting standing. *Id*. The Supreme Court has held that Minn. Stat. § 204B.44 constitutes a legislative grant of standing and that it "broadly confers" standing on "any individual" to allege a ballot error. *Schiff v. Griffin*, 639 N.W.2d 56, 59 (Minn. Ct. App. 2002); *see also League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 645 n.7 (Minn. 2012); *Clifford v. Hoppe*, 357 N.W.2d 98, 100 n.1 (Minn. 1984) (finding registered voter had sufficient interest in election to bring petition); *Moe v. Alsop*, 180 N.W.2d 255, 257 (Minn. 1970). Indeed, few § 204B.44 cases even discuss standing, and most note that standing was uncontested. In *League*, an amicus questioned the League of

Women Voters' standing as a petitioner. The Court reaffirmed § 204B.44's broad grant of standing and held that organizations, along with the individual petitioners, could maintain the dispute. *Id*.

Here, Petitioners alleged that they are registered voters in Minnesota, and intend to vote in the presidential primary and general election in 2024. Petition ¶¶ 28-35. Moreover, at least one Petitioner, David Thul, intends to vote in the Republican primary. *Id.* ¶ 33. There is no question under § 204B.44's broad grant of standing that Petitioners have standing to bring this claim. *See Clifford*, 357 N.W.2d at 100 n.1.

Moreover, this § 204B.44 petition is the appropriate vehicle for this challenge, as the Secretary himself has acknowledged. The statute allows any individual to file a petition to correct errors which have occurred or are about to occur including "an error . . . in the placement or printing of the name or description of any candidate . . . on any official ballot, including the placement of a candidate on the official ballot who is not eligible to hold the office for which the candidate has filed," Minn. Stat. § 204B.44, subd. (a)(1), or "any wrongful act, omission, or error of any election judge, municipal clerk, county auditor, canvassing board or any of its members, the secretary of state, or any other individual charged with any duty concerning an election," *id.* subd. (a)(4). Allowing Trump to appear on the ballot notwithstanding his constitutional ineligibility is precisely the type of error § 204B.44 is intended to address. Indeed, in his response to

the petition, Respondent Simon repeatedly stated Trump's eligibility should be determined through the current ballot-error petition pursuant to Minn. Stat. § 204B.44.[1]

II. THIS MATTER PRESENTS A JUSTICIABLE AND RIPE CONTROVERSY.

This Court has "original jurisdiction in such remedial cases as are prescribed by law, and appellate jurisdiction in all cases." Minn. Const. art VI, § 2. The Legislature granted the Court original jurisdiction over petitions to correct "errors, omissions, or wrongful acts" in the conduct of an "election for state or federal office." Minn. Stat. § 204B.44. This Court "do[es] not issue advisory opinions and [it] do[es] not 'decide cases merely to establish precedent.'" *Schowalter v. State*, 822 N.W.2d 292, 298 (Minn. 2012) (quoting *Matter of Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989)). Instead, the Court "require[s] the presence of a justiciable controversy as essential to [its] exercise of jurisdiction." *Schowalter*, 822 N.W.2d at 298.

A justiciable controversy exists where "the claim (1) involves definite and concrete assertions of a right that emanates from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617-18 (Minn. 2007). All three criteria are satisfied here. First, the petition involves a definite and concrete assertion of a right emanating from a legal source—the right under § 204B.44 to

[1] *See, e.g.*, Simon Response to Petition at 7 ("[The Secretary] strongly agrees, though, that Minn. Stat. § 204B.44 is the proper process provided by state law for adjudicating whether a candidate is eligible to appear on Minnesota election ballots."); Petition ¶¶ 307-08.

file a petition with this Court to correct an error, omission, or wrongful act regarding the conduct of an election. Second, a genuine conflict exists between parties with tangible interests. Petitioners assert that Trump is ineligible to hold the Office of President and cannot appear on the presidential nomination primary or general election ballots, whereas Proposed Intervenor-Respondent Donald Trump for President 2024, Inc. ("Trump Campaign")[2] and Respondent Republican Party of Minnesota ("RPM") assert variously that Section 3 does not disqualify Trump from the presidency, and that Minnesota cannot exclude a candidate from the presidential primary ballot. Secretary Simon, meanwhile, denies that he may unilaterally exclude Trump from the ballot. *See* Trump Campaign Resp. to Petition at 4; RPM Mot. to Intervene at ¶ 6; Simon Resp. to Petition at 5. Finally, the material facts relevant to the fulcrum issue—whether Section 3 bars Trump from the presidency and he is thus ineligible to appear on the ballot—have already occurred and are capable of specific resolution by judgment. A determination of the issue would not constitute an advisory opinion.

A. <u>This Court's ripeness jurisprudence does not require certainty that Trump will appear on the ballot.</u>

Section 204B.44 authorizes a petition to correct "errors, omissions, or wrongful acts which have occurred or *are about to occur*." The plain language of the statute and this Court's precedents demonstrate that the Court should act now to prevent the error of allowing Trump onto the presidential nomination primary and general election ballots.

[2] Petitioners separately filed an opposition to the Trump Campaign's request to intervene. As described in that response, although Trump himself would be a proper respondent, the legally distinct Trump Campaign is not.

This matter is ripe for adjudication; any delay will severely prejudice Minnesota voters and cause unnecessary complications for election officials.

A review of the 109 cases on Westlaw citing § 204B.44 reveals not one petition that has been dismissed as unripe. While the Court has not directly addressed ripeness in the context of a challenge to a candidate's eligibility, in *Clark v. Pawlenty*, the Court held that laches barred the Petitioners' challenge for the primary election, but nonetheless proceeded to consider the merits of the petition for the *general* election:

> We could require petitioners to wait until the results of the primary are known before asserting their general election challenge, but even if the petition were then renewed expeditiously, the parties and the court would again be required to address the issues on an expedited basis to avoid the problems now at hand for the primary election. Moreover, our case-by-case practice of addressing the merits of ballot challenges even in the face of a valid laches argument recognizes the importance of providing clarity and certainty in the election process. Therefore, in the interest of judicial economy and to remove uncertainty from the election process, we turn to the merits of petitioners' claims.

755 N.W.2d 293, 303 (Minn. 2008). In short, the ballot did not have to be "set" for the general election for the Court to consider whether Justice Gildea's name was properly placed on the ballot and properly designated as an "incumbent." The Court determined it could decide the issue to avoid uncertainty in the upcoming election. Here, the fact that the Republican Party has not yet submitted the list of candidates for the presidential nomination primary ballot under Minn. Stat. § 207A.13, subd. 2(a), does not render this dispute merely hypothetical. The legislature granted this Court the power to correct not only errors in the conduct of elections which have occurred but also errors which "are

about to occur." Minn. Stat. § 204B.44(a). The Court does not need absolute certainty on ballot details to decide an eligibility challenge.

Furthermore, the Court has often considered challenges to potential ballot questions, based on procedural, form, and substantive grounds, rejecting arguments for delaying resolution of substantive questions until after the vote. *See Bicking v. City of Minneapolis*, 891 N.W.2d 304, 310 (Minn. 2017); *League of Women Voters Minn.*, 819 N.W.2d at 644; *Hous. & Redev. Auth. of Minneapolis v. City of Minneapolis*, 198 N.W.2d 531, 535-36 (Minn. 1972); *Winget v. Holm*, 244 N.W. 331, 332 (Minn. 1932) ("There can be no essential difference between submitting to the voters a candidate who has no legal right to appear on the ballot and submitting a proposed amendment to the Constitution in a form therein prohibited.").

In *Bicking*, Minneapolis decided to exclude a proposed charter amendment from the ballot because it would be preempted by state law, and the Court found the resulting controversary justiciable under § 204B.44. *Bicking*, 891 N.W.2d at 308. Citing *Onvoy*, the Court held that there was "a dispute between adverse parties that claim a legal right to control the decision to place a proposed charter amendment before City voters" and the conflicting legal claims "present[ed] a concrete, genuine, justiciable controversy regarding the City's authority to refuse to place a citizen-initiated proposed charter amendment on the ballot." *Id*. at 308-09. The Court firmly rejected the argument that it was required to wait until after the election to determine whether the proposed amendment would be preempted, concluding, "we know of 'no good reason' to require an election on a proposed amendment that is in clear conflict with the constitution or the

laws of the state." *Id.* at 311. Here, the harm of delay is even more acute, because if Trump appears on the primary ballot and is later declared ineligible, Minnesota voters will have lost their ability to select a different (eligible) candidate for the Republican nomination.

The *Bicking* Court relied, in part, on its earlier decision in *Schowalter*, which involved a dispute between the Commissioner of the Minnesota Office of Management and Budget and the Minnesota Attorney General regarding the Commissioner's ability to issue appropriation refunding bonds. 822 N.W.2d at 294. Notably, the Court addressed the constitutionality of the bond issuance even though there was no certainty the Commissioner would issue the bonds even if the Court determined it would be constitutional for him to do so. *Id*. at 299, n. 5. *Schowalter* comports with the long line of opinions from this Court addressing the justiciability of cases brought under the Minnesota Uniform Declaratory Judgments Act which demonstrate that when the essential facts are known, a controversy is sufficiently ripe for adjudication. *See, e.g.*, *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 338-39 (Minn. 2011); *Minneapolis Fed'n of Men Teachers v. Bd. of Ed. of City of Minneapolis*, 56 N.W.2d 203, 205, 206 (Minn. 1952) (finding that a justiciable controversy only requires "a right on the part of the complainant to be relieved of an uncertainty or insecurity arising out of an actual controversy with respect to his rights, status, and other legal relations with an adversary, … although the Status quo … has not yet been destroyed.").

For almost a century, the Court has elevated substance over form in pursuit of the fundamental underlying goal of providing certainty to the election officials who must

administer the election, the political parties, and the voters who go to the polls expecting their votes to count. The Court should not depart from that principle now.

This controversy has ripened. Trump is a candidate for president.[3] Barring some extraordinary and unforeseen change of circumstances, or this Court's intervention, the RPM will submit Trump's name to appear on the presidential nomination primary ballot.[4] The Secretary himself has urged the Court to resolve the matter expeditiously so as not to delay printing of the ballots.[5] The error of placing an ineligible candidate on the ballot is about to occur and Petitioners are entitled to a determination of their claim that Trump is constitutionally disqualified from the presidency.

B. The Court's laches decisions support a finding of ripeness.

The Court's precedent dismissing petitions on the basis of laches reaffirms that this petition is ripe and must not be delayed. Laches is an equitable doctrine applied to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay. *Clark*, 755 N.W.2d at 299 (*citing Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002)). The Court has repeatedly stated that "[t]he very nature of matters implicating election laws and proceedings routinely requires expeditious consideration and disposition by courts facing considerable time constraints imposed by ballot preparation and distribution." *Clark v. Reddick*, 791 N.W.2d 292, 295 (Minn. 2010) (quoting *Clark*, 755 N.W.2d at 300 and *Peterson v.*

[3] Petition ¶ 1.

[4] Petition ¶ 315.

[5] Secretary's Response at 1-2, 7.

Stafford, 490 N.W.2d 418, 419 (Minn. 1992)). These time constraints have, in recent years, become even more important because of Minnesota's extended early voting period.

A known right to challenge a candidate may arise based on "facts [that] are a matter of public record." *See Clark v. Reddick*, 791 N.W.2d 292, 294 (Minn. 2010) (quoting *Briggs v. Buzzell*, 204 N.W. 548, 549 (1925)). The public record here forms an ample factual basis for the petition. Petitioners filed the petition on September 12 to give the Court and the parties adequate time to litigate and adjudicate this weighty matter of national significance. Consideration of the petition cannot wait until the January 2, 2024, deadline for submitting the names to appear on the presidential nomination primary ballot. As explained in Secretary Simon's response, the question of whether Trump may appear on the ballot must be resolved by January 5, 2024 for the Secretary to provide the final list of candidates to county auditors so ballots can be prepared in an orderly manner and voting can begin on January 19, 2024. This case cannot be resolved in the three-day period between the RPM's submission of the list and the provision of the lists to the county auditors.

Furthermore, prompt adjudication is in the best interests of all involved, not just election officials. First, unlike in almost any other election, there is no special election backstop to remedy a delay in resolution. In *Monaghen v. Simon*, the Court declined to dismiss a petition challenging a candidate's eligibility based on laches, in part because the Court did not *have* to change the general election ballot (which was already printed), and could simply declare the vote null and void, and set a special election for a few months later. 888 N.W.2d 324, 334-35 (Minn. 2016). No such option is available here.

As the Republican Party admits, its delegates are bound by the primary. There is no do-over and the die will have been cast.

In a case like this, justice delayed is justice denied. Not only for the Petitioners who seek to defend the integrity of our elections and our democracy by ensuring that only candidates eligible under a constitutional provision enacted to protect the republic from dangerous insurrectionists appearing on the presidential ballot, but for all involved who require certainty on this essential issue. All facts necessary for adjudication of whether Trump is eligible to be President of the United States have already occurred; no further external events are necessary for the Court to adjudicate the matter. *Cf. McCaughtry*, 808 N.W.2d at 338. This Court's century of case law demands expeditious resolution of this petition to provide clarity and certainty in the election process.

C. RPM's arguments that the Court may not address the petition fail.

RPM asserts that the Court may not address the petition because it lacks the authority to hear presidential eligibility challenges and, more generally, because states lack the authority to determine presidential candidates' eligibility. RPM Resp. to Petition at 12-15. Both arguments fail.

First, RPM argues the Court's jurisdiction to correct an error of placing a candidate "on the official ballot who is not eligible to hold the office" is, with respect to the President, limited to addressing the eligibility criteria in Article II, Section 1 of the Constitution. RPM Resp. to Petition at 12-13. RPM's assertion is mere say-so. It is axiomatic that one who is disqualified from holding the office of president is "not eligible to hold the office."

Second, RPM asserts that states lack the authority to address the eligibility of presidential candidates. This is incorrect. Multiple courts have held that a state may lawfully exclude a candidate from its presidential ballot when the candidate does not meet constitutional qualifications of age and citizenship. *See, e.g.*, *Lindsay v. Bowen*, 750 F.3d 1061, 1064 (9th Cir. 2014) (affirming exclusion of candidate); *Hassan v. Colorado*, 495 F. App'x 947, 949 (10th Cir. 2012) (affirming exclusion of candidate who was not natural born citizen); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (upholding exclusion of underage candidate). No basis exists for distinguishing age and citizenship requirements from insurrection disqualification. *See Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1312 (N.D. Ga. 2022) (*citing Hassan* and *Lindsay* and upholding state proceeding to adjudicate House candidate's eligibility under Section 3); Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559, 604 (2015) ("Unless the state's process independently breaches some other constitutional guarantee—such as an election law that severely restricts a voter's rights but is not narrowly drawn to advance a compelling state interest—then the state's examination of a presidential candidate's qualifications is permissible.").

This Court's decision in *De La Fuente v. Simon*, which involved a challenge to RPM's decision not to include a candidate on the list submitted pursuant to 207A.13, subd. 2, does not compel a different result. 940 N.W.2d 477 (Minn. 2020). While the Court noted that access to the presidential nomination primary ballot "runs only through the participating political parties who alone determine which candidates will appear on the ballot," the case did not present—and the Court did not answer—the question of

whether the Court may exclude a candidate from the presidential primary or general election ballots because he is ineligible to hold the office. *Id*. at 494-95. For all the reasons set forth above, the Court plainly has the authority to hear this petition.

III. SECTION 3 IS SELF-EXECUTING.

For at least four reasons, this Court may enforce Section 3 without special federal legislation.[6]

First, state courts do not need congressional permission to enforce the Constitution (including the Fourteenth Amendment) where constitutional obligations can be enforced through state law.

Second, Section 3 is stated as a self-executing prohibition, not a grant of power to legislate. Congress's only exclusive role under Section 3 is *removing* disqualifications. Section 5, which *does* confer congressional power to legislate, does not render Section 3 dependent on congressional legislation any more than it renders Section 1 dependent on congressional legislation.

Third, Reconstruction history demonstrates that Congress, state courts, and ex-Confederate insurrectionists overwhelmingly understood Section 3 applied *without* a federal enforcement statute.

Finally, other state courts relying on state law have applied Section 3 to the January 6, 2021 insurrection without special federal legislation.

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[6] The present question is not whether Section 3 can be enforced without *any* underlying cause of action. Section 204B.44 supplies the cause of action for eligibility challenges. Rather, the present question is whether, even where (as here) state law supplies a cause of action, some unwritten principle requires *congressional* action before the state may apply its laws to enforce Section 3.

A. State courts do not need congressional permission to enforce the Fourteenth Amendment.

1. *State courts are obligated to adjudicate federal constitutional questions.*

Nothing in the Constitution supports the idea that state judges may apply the Constitution only if Congress says they can. To the contrary, state courts are *obligated* to apply the Constitution. *See* U.S. Const., art. VI, § 2 (the U.S. Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby"). Fifty years before the Fourteenth Amendment, the U.S. Supreme Court established that state courts are competent to adjudicate questions arising under the U.S. Constitution. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 339-42 (1816) (Story, J.); *see also Robb v. Connolly*, 111 U.S. 624, 637 (1884) (Harlan, J.) (emphasizing that obligation to enforce U.S. Constitution lies "[u]pon the state courts, equally with the courts of the Union").

2. *State courts routinely adjudicate Fourteenth Amendment claims without federal statutory authorization.*

When plaintiffs in state court civil actions raise federal constitutional claims, courts do not first demand a federal statute authorizing consideration of the claims. *See Testa v. Katt*, 330 U.S. 386, 389 (1947) (holding that, when federal law applies to a cause of action, state courts must apply it). Instead, state courts review the constitutional claims on their merits. *See, e.g.*, *Beaulieu v. Mack*, 788 N.W.2d 892, 893, 897 (Minn. 2010) (considering plaintiff's Fourteenth Amendment equal protection claim raised under Minn. Stat. § 204B.44).

State courts began adjudicating Fourteenth Amendment claims—including claims using the amendment as a "sword," i.e., seeking affirmative relief—almost immediately after the amendment's passage without special authorization from Congress. *See, e.g.*, *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136 (Cal. 1872) (deciding affirmative claim for relief under Section 1's privileges and immunities clause).

Today, state courts—including this Court—routinely enforce provisions of the Fourteenth Amendment in civil actions without citing any federal statute "authorizing" such enforcement. *See, e.g.*, *Beaulieu*, 788 N.W.2d at 893, 897 (considering plaintiff's Fourteenth Amendment claim raised under Minn. Stat. § 204B.44 but rejecting petition on merits); *In re Candidacy of Independence Party Candidates Moore v. Kiffmeyer*, 688 N.W.2d 854 (Minn. 2004) (similar, but granting petition); *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108 (Minn. 1977) (reversing dismissal of plaintiff's Fourteenth Amendment claim).[7]

B. Nothing in the Fourteenth Amendment's text suggests Section 3 requires federal legislation.

1. *Section 3 states a direct prohibition, not an authorization.*

Section 3 states the disqualification as a direct prohibition: "*No person shall be* a Senator or Representative in Congress, or elector of President and Vice-President, *or hold* any office" if they previously took an oath as a covered official and then engaged in

[7] State courts also decide Fourteenth Amendment claims under 42 U.S.C. § 1983, *e.g.*, *Ringsred v. City of Duluth*, __ N.W.2d __, 2023 WL 5944262, *3 (Minn. Sept. 13, 2023), or Fourteenth Amendment defenses (i.e., as a "shield"), *e.g.*, *State v. Lufkins*, 963 N.W.2d 205 (Minn. 2021). But the examples above illustrate that state courts routinely decide *affirmative* Fourteenth Amendment civil claims without specific federal legislation.

insurrection or rebellion. The prohibition "lays down a rule by saying what shall be. It does not *grant a power* to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself." William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 (revised Sept. 19, 2023), at 17-18 (emphasis in original). It parallels other qualifications in the Constitution that, indisputably, require no special implementing legislation. *See* U.S. Const. art. I, § 2, cl. 2 ("*No Person shall be* a Representative" who does not meet age, citizenship, and residency requirements), § 3, cl. 3 ("*No Person shall be* a Senator" who does not meet age, citizenship, and residency requirements), art. II, § 2, cl. 5 ("*No Person . . . shall be* eligible to the Office of President" who does not meet age, citizenship, and residency requirements), amend. XII ("*no person* constitutionally ineligible to the office of President *shall be* eligible to that of Vice-President").

Likewise, Section 3's prohibitory language resembles the language of Section 1, which is indisputably self-executing. No federal legislation is needed to enforce the Due Process Clause or Equal Protection Clause in state court. *See* U.S. Const. amend. XIV, § 1 ("*No State shall make or enforce any law* which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive* any person of life, liberty, or property, without due process of law; *nor deny* to any person within its jurisdiction the equal protection of the laws.") (emphases added). *See supra* Part III.A.2.

In fact, a major purpose of the Fourteenth Amendment was to constitutionalize these protections precisely so that they did *not* depend on the whims of Congress. *See*,

e.g., Cong. Globe, 39th Cong., 1st Sess. at 1095 (Rep. Hotchkiss) (arguing for constitutional protection of civil rights because "We may pass laws here to-day, and the next Congress may wipe them out"). Likewise, Congress did not leave Section 3 to the whims of "the next Congress" which could pass or repeal legislation by bare majority; to the contrary, Section 3 applies until *two-thirds* of each chamber grants amnesty.

In contrast, constitutional provisions that require effectuating federal legislation explicitly state that Congress *may* enact legislation. For example, Article I authorizes Congress "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States." U.S. Const. art. I, § 8. This neither prohibits counterfeiting, nor establishes a punishment; it authorizes Congress to "provide for" such punishment. Such authorizing language typically uses formulations such as Congress "may" "by Law" do something, *e.g.*, U.S. Const. art. I, § 2, cl. 3; *id.* § 4, cl.1-2, or that Congress "shall have power" to do something, *e.g.*, *id.* art. I, § 8; art. III, § 3, cl. 2; art. IV, § 3, cl. 2. Similarly, the Treason Clause *defines* treason, and authorizes Congress "to declare the Punishment of Treason," but it does not itself impose any consequences for treason. *Id.* art. III, § 3. And the Impeachment Clause defines impeachable offenses, *id.* art. II, § 4 ("The President … shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors"), but the Constitution leaves to the House to decide whether to impeach, *id.* art. I, § 2, cl. 5 ("The House … shall have the sole Power of Impeachment"), and the Senate to decide whether to convict, *id.* art. II, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."). Unlike those provisions, Section 3 enacts its own disqualification—"No person shall be . . . or hold,"

the office—and, like other provisions of the Fourteenth Amendment, sets no prerequisites for congressional action before a state may independently implement it. To the contrary, the only exclusive role Section 3 confers upon Congress is the right to *waive* disqualification—which Congress has not done for Trump.

2. *Section 5's authorization of congressional legislation does not make Section 3 unenforceable without similar legislation.*

Under Section 5, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. This provision authorizes federal legislation but does not require it. Indeed, as the Supreme Court recognized soon after the enactment of the Fourteenth Amendment—and in the specific context of a dispute about the scope of Congress's enforcement power under Section 5—"the Fourteenth [Amendment], is undoubtedly self-executing without any ancillary legislation." *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

Section 5 applies to the entire Fourteenth Amendment, including Section 1's Due Process and Equal Protection Clauses. If Section 5 meant states could not adjudicate questions under Section 3 without congressional legislation, then it would *also* mean states could not adjudicate Due Process or Equal Protection Clause questions without congressional legislation. Yet courts in every state (including Minnesota) routinely adjudicate such questions without specific congressional authorization. *See supra* Part III.A.2. Just as Section 1 is enforceable outside of 42 U.S.C. § 1983, so too Section 3 is enforceable in state court even without federal legislation.

C. History confirms that states may enforce Section 3 without special federal legislation.

Nothing in Section 3's original public meaning—in congressional debates, state ratification debates, or public discussion surrounding ratification—supports the argument that congressional action is required for enforcement. To the contrary, the crucial period between 1868, when the amendment was ratified, and 1870, when the first federal enforcement legislation was passed, confirms that virtually everyone involved understood that Section 3 applied without special federal legislation.[8]

1. *Congress confirmed that Section 3 applies automatically.*

Both Congress and ex-Confederates understood Section 3 to apply between ratification of the Fourteenth Amendment in July 1868 and passage of the first federal statute enforcing Section 3 in May 1870.[9] If Section 3 were not self-executing, then during this 22-month period, Section 3 should have had no effect. But neither Congress nor ex-Confederates treated it that way.

[8] For more on why Section 3 is self-executing, *see* Baude & Paulsen, *supra*, at 17-49.

[9] *See* Act of May 31, 1870, ch. 114, § 14, 16 Stat. 140, 143 (repealed 1948).

Rather, during that 22-month period, Congress enacted multiple private bills granting Confederate insurrectionists amnesty from Section 3.[10] If Section 3 truly could not be enforced without federal enforcement legislation, it would have made no sense for Congress to pass amnesty bills long *before* enacting any enforcement legislation. Yet two-thirds of both houses of Congress repeatedly passed amnesties during that period.

These amnesty bills—passed by Congress months or years before any congressional statute authorizing federal Section 3 enforcement—show that Congress understood that Section 3's disqualification could be enforced directly by *states*. *See infra* Part III.C.3 (discussing history of state enforcement). Congress granted amnesty to specific individuals *precisely* because states could enforce Section 3 without federal legislation.

The ex-Confederate public also understood this. Private amnesty bills required an affirmative request by the disqualified individuals. *See* 2 James G. Blaine, *Twenty Years of Congress: From Lincoln to Garfield* 512 (1886). The many thousands who sought amnesty before May 1870 understood that they could be excluded from office by state

[10] *See, e.g.*, *An Act to relieve certain Persons therein named from legal and political Disabilities imposed by the fourteenth Amendment of the Constitution of the United States, and for other Purposes*, 16 Stat. 632 (Apr. 1, 1870); *An Act to relieve certain Persons therein from the legal and political disabilities imposed by the fourteenth amendment of the Constitution of the United States, and for other Purposes*, 16 Stat. 614-30 (Mar. 7, 1870); *An Act to remove political Disabilities of certain Persons therein named*, 16 Stat. 613 (Dec. 18, 1869); *An Act to relieve certain Persons therein named from the legal and political Disabilities imposed by the fourteenth Amendment of the Constitution of the United States, and for other Purposes*, 16 Stat. 607-13 (Dec. 14, 1869); *An Act to relieve Certain Persons of All Political Disabilities imposed by the Fourteenth Article of the Amendments to the Constitution of the United States*, 15 Stat. 436 (1868).

law and state courts; two-thirds of both houses of Congress agreed. If these individuals could only be excluded through legislation that did not exist, they would have had nothing to gain—and much to lose—by putting their fates in the hands of congressional votes requiring a two-thirds supermajority.

2. *Reconstruction-era state constitutions confirm that Section 3 requires no special federal legislation.*

Three contemporaneous state constitutions ratified by ex-Confederate states provide further evidence. These state constitutions confirm that disqualification is imposed by Section 3 itself and does not require further congressional action. For example, the Florida Constitution of 1868 provides:

> Any person debarred from holding office in the State of Florida by the third section of the proposed amendment to the Constitution of the United States, which is as follows: [quoting section 3] is hereby debarred from holding office in this state; *Provided*, That whenever such disability from holding office be removed from any person by the Congress of the United States, the removal of such disability shall also apply to this State.

Fla. Const. of 1868, art. XVI, § 1; *accord* S.C. Const. of 1868, art. VIII, § 2 (similar); Tex. Const. of 1869, art. VI, § 1.

Again, Congress did not pass enforcement legislation until May 1870. These pre-1870 state constitutions necessarily recognized that disqualification was imposed by the Constitution itself.

3. *Reconstruction-era state courts used state law in civil cases to enforce Section 3 without special federal legislation.*

The practice of multiple state courts during the Reconstruction era demonstrates that they enforced Section 3 without federal legislation, as well. *See Worthy v. Barrett*, 63 N.C. 199, 200 (1869) (holding that a sheriff-elect could not take office because he served under the Confederacy). The *Worthy* court said nothing about needing a federal statute to enforce Section 3. Instead, the court quoted from a *state* statute providing that "no person prohibited from holding office by Section 3 of the Amendment to the Constitution of the United States, known as Article XIV, shall qualify under this act or hold office in this State." *See id.* (citation omitted); *see also In re Tate*, 63 N.C. 308, 308-09 (1869) (citing *Worthy* as controlling authority).

That same year, the Louisiana Supreme Court adjudicated the Section 3 eligibility of a state official. *See State ex rel. Downes v. Towne*, 21 La. Ann. 490, 492 (1869). While the court concluded that "[t]he evidence in this case fails to establish conclusively that Downes is disqualified under the fourteenth amendment," the court never suggested it needed congressional legislation to decide disqualification.

D. <u>The only case demanding federal legislation to enforce Section 3 is erroneous or, at minimum, does not apply to functional state governments.</u>

The only ostensible basis for the view that state courts cannot enforce Section 3 without specific congressional action is an 1869 decision—since described by scholars as "indefensible" and "bonkers,"—Baude & Paulsen, *supra*, at 43—in the then-unreconstructed state of Virginia. *See Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869)

(No. 5,815). Caesar Griffin, a Black man, was convicted in Virginia court. *Id.* at 22. He brought a federal habeas petition challenging his conviction, arguing the Virginia judge presiding over his trial was disqualified under Section 3. *Id.* at 22-23. Chief Justice Salmon P. Chase, acting as a Circuit Justice, presided over a two-judge federal court hearing Griffin's challenge. *See id.* at 22. Chase rejected the petition on the purported basis that Section 3 was not self-executing and required federal legislation for enforcement. *Id.* at 26.

This decision—which is not binding outside federal courts in Virginia—is erroneous, contradictory, and unpersuasive. At minimum, it does not apply where, as in Minnesota, a functional state government exists.

1. *Griffin's Case provides no coherent principle to apply to other Section 3 cases.*

Griffin's Case is "confused and confusing," *Cawthorn v. Amalfi*, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring in the judgment); *see also* Baude & Paulsen, *supra*, at 43. During Reconstruction, it was apparently ignored by other states' courts, *e.g.*, *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 633 (La. 1869) (four months after *Griffin*, in response to disqualified individual claiming that Section 3 was not self-executing, responding that "we are far from assenting to" that proposition, and ruling him disqualified); *Downes*, 21 La. Ann. at 492 (decided after *Griffin*, and adjudicating a Section 3 claim on the merits), and Congress—presumably understanding

that Section 3 was not just enforceable but was actually being enforced—continued passing amnesty bills after the decision, *see supra* n. 10.[11]

Chief Justice Chase acknowledged that the "literal construction"—what today would be called plain meaning—of Section 3 would disqualify the Virginia judge. *Griffin*, 11 F. Cas. at 24. But noting that the judge's counsel "seemed to be embarrassed by the difficulties" supposedly presented by that plain meaning, Chase expounded upon the "great inconvenience" of applying it, sympathizing with the various "calamities which have already fallen upon the people of these [ex-Confederate] states." *Id.* at 24-25.[12] Construing the amendment narrowly based on these policy preferences, he opined that the principle against repeal by implication "*forbids* a construction of the amendment, not *clearly* required by its terms, which will *bring it into conflict or disaccord* with the other provisions of the constitution." *Id.* at 25 (emphases added). This upside-down analysis misconstrues and threatens to nullify the whole purpose of constitutional amendments. *See* Baude & Paulsen, *supra*, at 43 ("[T]he idea that constitutional amendments should presumptively be read so as not to change the Constitution (!)—that they should be construed to avoid *conflict* or even mere *disaccord* with prior

[11] In further repudiation, the Union-appointed provisional governor of Virginia pardoned Griffin three weeks after the decision. *See* Rockingham Reg., May 20, 1869, at 2 col. 3.

[12] Judge Underwood, in the unpublished district court opinion in *Griffin's Case* that Chief Justice Chase reversed on appeal as circuit justice, wrote, "Whatever inconvenience may result from the maintenance of the Constitution and the laws, I think the experience of the last few years shows that much greater inconvenience comes from attempting their overthrow." Baude & Paulsen, at 40 n.144 (citation omitted).

constitutional law—is indefensible. *Of course,* constitutional amendments change prior constitutional law. That is their purpose and function.") (emphasis in original).

Further, *Griffin's Case* contradicts a different Virginia circuit case that Chief Justice Chase himself had just decided. In the treason prosecution of Jefferson Davis, Chase concluded that Section 3 *was* self-enforcing and that *no* Act of Congress was required for its implementation.[13] *See Case of Davis*, 7 F. Cas. 63, 90, 102 (C.C.D. Va. 1867) (No. 3,621a); *Cawthorn*, 35 F.4th at 278 n.16 ("These contradictory holdings . . . draw both cases into question and make it hard to trust Chase's interpretation."); *see also* Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 Const.

[13] Chief Justice Chase suggested Davis's lawyers should argue that Section 3 disqualification was the *exclusive* sanction for ex-Confederates. *See Cawthorn*, 35 F.4th at 278 n.16; C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 Akron. L. Rev. 1165, 1196 (2009); *see also* Cynthia Nicoletti, *Secession On Trial: The Treason Prosecution of Jefferson Davis* 294-296 (2017) (suggesting that this questionable intervention stemmed from Chase's personal and political qualms about the Davis case).

Davis moved to quash his indictment. However, since no federal legislation had yet been passed to implement Section 3, Davis necessarily also argued that Section 3 was self-enforcing. *See* 7 F. Cas. at 90-91. After a presidential pardon relieved Davis of criminal liability, Chief Justice Chase "instructed the reporter to record him as having been of opinion . . . that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States." *Id*. Thus, Chase necessarily adopted Davis's argument that Section 3 is self-enforcing.

Just as Chase's interpretation in *Case of Davis* may have reflected his personal qualms about the Davis prosecution, his interpretation in *Griffin* may have reflected his personal opposition to Section 3 as "too harsh on former Confederate officials." *See Cawthorn*, 35 F.4th at 278 n.16 (*quoting Connally, supra*, at 1196). The racial dynamic of rulings favoring two ex-Confederates, but not the Black petitioner Griffin, may also be relevant.

Comment. 87, 100-108 (2021) (providing a detailed analysis of *Davis* and *Griffin's Case*). *Griffin's Case* did not attempt to reconcile these conflicting points of view.[14]

Griffin's Case never explained why *state* law could not be the basis for Section 3 enforcement. It noted that "[t]o accomplish this ascertainment [of who is disqualified] and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." 11 F. Cas. at 26. But *Griffin's Case* did not consider *state* court proceedings, and never explained why *state* courts could not provide such "proceedings, evidence, decisions, and enforcements of decisions, more or less formal"—like this action under Minnesota law. Instead, Chase proceeded, without explanation, to conclude that "these can only be provided for by congress." *Id.* Even if that is true in federal court, it does not explain why a state court would need federal legislation to enforce the Fourteenth Amendment.

Chief Justice Chase relied on Section 5, which authorizes congressional legislation. *See* 11 F. Cas. at 26. But authorizing Congress to enact legislation does not deprive states of their inherent authority and obligation to enforce the U.S. Constitution. *See supra* Part III.B.2. Chase stated that the exclusive role for Congress in removing disqualifications "gives to [C]ongress absolute control over the whole operation of the

[14] Chief Justice Chase's divergent rulings in these two cases cannot be reconciled by a post hoc distinction (never offered by Chase himself) that Davis raised Section 3 as a *defense* to a criminal prosecution, whereas Griffin raised Section 3 as an *affirmative* argument in a habeas petition. The fact that this clever explanation did not occur to any of the hundreds of ex-Confederates who petitioned Congress for amnesty before 1870 despite the lack of congressional enforcement legislation, nor the two-thirds of both chambers of Congress that repeatedly granted such amnesty, indicates that the rest of the country did not recognize such a distinction.

amendment." *Griffin's Case*, 11 F. Cas. at 26. But that does not follow. Rather, Section 3's grant of exclusive authority to Congress to *remove* the disqualification, coupled with the absence of such language regarding the *disqualification itself*, reinforces the conclusion that Section 3's disqualification requirement, like other requirements of the Fourteenth Amendment and the Constitution generally, may (and must) be enforced by state courts with or without congressional action.

2. *Griffin's Case should be limited to its unusual context: a state without a fully functional government.*

In 1869, Virginia was an unreconstructed state under military occupation. *Cf.* Act of Jan. 26, 1870, ch. 10, 16 Stat. 62-63 (readmitting Virginia to the Union). Its provisional government operated under the control of a Union Army General as part of military reconstruction. *See, e.g.*, First Military Reconstruction Act, ch. 153, 14 Stat. 428-430 (1867). Indeed, *Griffin's Case* quoted from a Joint Resolution of Congress that referred to "the provisional government[] of Virginia." 11 F. Cas. at 26-27 (citation omitted).

Since Virginia was under federal control when *Griffin's Case* was decided, the Court's conclusion that "proceedings, evidence, decisions, and enforcements of decisions, more or less formal . . . can only be provided for by [C]ongress," 11 F. Cas. at 26, is arguably defensible if limited to that context. Provisional state governments operating under federal military occupation lacked the powers of ordinary state governments. Put differently, Virginia was treated more like a federal territory, with limited autonomy accorded by Congress.

Moreover, Virginia ratified the Fourteenth Amendment in October 1869, *after* Chief Justice Chase decided *Griffin's Case*. It is unsurprising that Virginia courts did not enforce a constitutional amendment *that Virginia itself* was at the time refusing to recognize.

3. *The only precedential effect of Griffin's Case is limited to the "de facto officer" doctrine.*

As Chase explained in an unusual coda, while the case was pending he consulted with the U.S. Supreme Court justices, who "unanimously concur[red] in the opinion that a person convicted by a judge de facto acting under color of office, though not de jure . . . can not be properly discharged upon habeas corpus." *Griffin's Case*, 11 F. Cas. at 27; *see also* Baude & Paulsen, *supra*, at 45-49. In other words, according to Chief Justice Chase, the full U.S. Supreme Court agreed with him in an *ex parte* conversation that habeas does not lie when the sentencing judge, though disqualified by Section 3, acts under color of office.

If true, that apparently unanimous ruling of the U.S. Supreme Court not only controls but obviates the remainder of *Griffin's Case*, and is (if anything) the relevant precedent. In modern terms, *Griffin's Case* was affirmed on other grounds.

E. <u>Recent decisions regarding the January 2021 insurrection recognize Section 3 enforcement without special federal legislation.</u>

Since January 6, 2021, two different state courts have applied Section 3 to the January 2021 insurrection. In 2022, a New Mexico state court applied Section 3 under the state *quo warranto* statute, and removed a county commissioner from office for engaging in insurrection. *See New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-

00473, 2022 WL 4295619 (N.M. 1st Jud. Dist., Sept. 6, 2022), *appeal dismissed*, No. S-1-SC-39571 (N.M. Nov. 15, 2022), *cert. filed* May 18, 2023. No special federal legislation was needed. Similarly, Georgia adjudicated a Section 3 ballot challenge against Representative Marjorie Taylor Greene. *See Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Ofc. of State Admin. Hrgs. May 6, 2022), *available at* https://freespeechforpeople.org/wpcontent/uploads/2022/05/2222582.pdf. While the administrative law judge overseeing the state proceeding (like the Louisiana Supreme Court in *Downes*) found there was insufficient evidence to establish that Greene personally engaged in insurrection, he followed *Worthy* and adjudicated the Section 3 question on the merits. Neither the administrative law judge, nor the state courts on appellate review, *see Rowan v. Raffensperger*, No. 2022-CV-364778 (Ga. Fulton Cty. Sup. Ct. July 25, 2022), nor the federal court that rejected Greene's efforts to enjoin the state proceeding, *see Greene*, 599 F. Supp. 3d 1283, *remanded as moot*, 52 F.4th 907 (11th Cir. 2022), questioned the state's authority to adjudicate and enforce Section 3. *See, e.g.*, *Greene*, 599 F. Supp. 3d at 1319 ("Plaintiff has pointed to no authority holding that a state is barred from evaluating whether a candidate meets the constitutional requirements for office or enforcing such requirements").[15]

[15] In one Arizona decision, the state supreme court noted that the county trial judge had dismissed a Section 3 challenge on multiple grounds, including an ostensible requirement for congressional legislation, but the state supreme court affirmed on a technical question of Arizona election law and expressly declined to decide or endorse the county judge's constitutional theory. *See Hansen v. Finchem*, No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz. May 9, 2022).

These decisions comport with the holding of Judge (now Justice) Gorsuch that "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F. App'x at 948 (rejecting challenge to state's exclusion of a naturalized presidential candidate from ballot); *Greene*, 599 F. Supp. 3d at 1319 (denying motion to enjoin Section 3 proceeding, and finding that state's "legitimate interest includes enforcing existing constitutional requirements [including Section 3] to ensure that candidates meet the threshold requirements for office"), *remanded as moot*, 52 F.4th 907 (11th Cir. 2022).

Nothing materially differentiates Section 3 from other constitutional qualifications for office, nor other questions under the U.S. Constitution that state courts routinely adjudicate.

IV. THE PRESIDENCY OF THE UNITED STATES IS A BARRED "OFFICE . . . UNDER THE UNITED STATES" UNDER SECTION 3.

A. The presidency is an "office" under the Constitution.

1. *The Constitution repeatedly describes the presidency as an "office."*

The 1787 Constitution and antebellum (1803) Twelfth Amendment repeatedly label the presidency an "office." *See, e.g.*, U.S. Const. art. II, § 1, cl. 1 ("[The President] shall hold his *Office* during the Term of four years."), art. II, § 1, cl. 8 ("Before he enter on the Execution of his *Office*, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the *Office* of President of the United States . . . ."'). The antebellum Constitution repeatedly uses that term in *eligibility*

provisions. *Id.* art. II, § 1, cl. 5 ("No person . . . shall be eligible to the *Office* of the President; neither shall any Person be eligible to that *Office*"), art. II, § 1, cl. 6 ("In Case of the Removal of the President from *Office*, or of his . . . Inability to discharge the Powers and Duties of the said *Office*."); *see also id.* amend. XII ("no person constitutionally ineligible to the *office* of President").[16]

Likewise, the ratifying public understood the presidency as an "office." *See, e.g.*, Federalist No. 39 (Madison) (referring to presidency as an "office" three times); Federalist No. 66 (Hamilton) (referring to presidency as the "first office"); Federalist No. 68 (Hamilton) (referring to presidency as an "office" five times); Federalist No. 69 (Hamilton) (twice); Federalist No. 72 (Hamilton) (five times); Saikrishna Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 Duke J. Const. L. & Pub. Pol'y 143, 147-48 (2009) (collecting other citations).

B. <u>A contrary reading is absurd.</u>

Several provisions of the 1787 Constitution would be absurd if the presidency were not an office "under the United States." If it were not, then "the President could simultaneously hold a seat in Congress, sit in the Electoral College, and be subject to a religious test." *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 884 (D. Md. 2018), *rev'd on other grounds*, 928 F.3d 360 (4th Cir. 2019);[17] Prakash, *supra*, at 148-51 (2009).

[16] This brief adds emphases to constitutional text *passim*, highlighting terms such as "office" and "officer."

[17] *Rev'd en banc*, 958 F.3d 274 (4th Cir. 2020), *vacated as moot*, 141 S. Ct. 1262 (2021).

Specifically:

- Presidents could be impeached and convicted, but not removed. *See* U.S. Const. art. I, § 3, cl. 7 ("Judgment in cases of impeachment shall not extend further than to removal from *office* . . . .").

- Even if removed, they could not be disqualified from returning to power. *See id.* ("and disqualification to hold and enjoy any *office* of honor, trust or profit *under the United States*").

- The president could simultaneously serve in Congress. *See* U.S. Const. art. I, § 6, cl. 2 ("[N]o Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office."); John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L. Rev. 141, 146 (1995) ("The Presidency is surely an 'Office under the United States'; one could hardly interpret the Incompatibility Clause to allow a Representative or Senator to retain a seat in the Congress after being elected and inaugurated as President.").

- The president could serve as a presidential elector—for himself—even though every other major federal officeholder is barred. *See* U.S. Const. art. II, § 1, cl. 2 ("no Senator or Representative, or Person holding an *Office* of Trust or Profit *under the United States*, shall be appointed an Elector.").

- The presidency could be subject to a religious test. *See* U.S. Const. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any *Office* or public Trust *under the United States*.").

Thus, the presidency is an "office . . . under the United States." *Trump*, 315 F. Supp. 3d at 881-86 (analyzing and rejecting view, advanced by Professor Seth Barrett Tillman as amicus curiae, to the contrary); *see also Trump v. Mazars USA, LLP*, 39 F.4th 774, 792 (D.C. Cir. 2022) (noting that the Foreign Emoluments Clause, which applies to anyone "holding any Office of Profit or Trust under" the United States, "bars federal officials (including the President) from accepting gifts or other payments from foreign

governments"); *see also* H. Rep. No. 302, 23d Cong., 1st Sess. at 2 (1834) (noting that President Jefferson had reached same conclusion).

C. Congressional debate specifically clarified that the presidency is a barred "office . . . under the United States" under Section 3.

The history and purpose of Section 3 confirm that insurrectionists are barred from the presidency. In fact, this question was explicitly asked and answered during congressional debate, in which Senator Johnson expressed concern that "this amendment does not go far enough." He expressed concern that the specific enumeration of certain offices and not others "meant that section 3 would *not* apply to the presidency:

> I do not see but that any one of those gentlemen [ex-Confederates] may be elected President or Vice President of the United States, and why did you omit to exclude them? I do not understand them to be excluded from the privilege of holding the two highest offices in the gift of the nation.

Cong. Globe, 39th Cong., 1st Sess. 2899 (1866).[18]

But Senator Morrill interrupted him:

> Let me call the Senator's attention to the words "or hold any office, civil or military, under the United States."

Id. In other words, the phrase "office . . . under the United States" already addressed Senator Johnson's concern, because it prevented insurrectionists from holding the "two highest offices" in the land. Senator Johnson then acknowledged there was "no doubt" he had been wrong, and that he had been "misled by noticing the specific exclusion in the case of Senators and Representatives." *Id.*

[18] Available at https://memory.loc.gov/ll/llcg/073/0000/00212899.tif.

This legislative history conclusively establishes Congress's understanding and intent, and the presumptive understanding of the ratifying public, that insurrectionists are barred from the presidency.

D. The generation that ratified and implemented the Fourteenth Amendment understood the presidency as an "office . . . under the United States" for purposes of Section 3.

During the ratification period, the public specifically discussed the scenario of Jefferson Davis or Robert E. Lee rising to the presidency. *See, e.g.*, *Democratic Duplicity*, Indianapolis Daily J., July 12, 1866, at 2 col. 1 (three days after congressional enactment, explaining that opponents of Section 3 believed "that a rebel is as worthy of honor as a Union soldier; that ROBERT E. LEE is as eligible to the Presidency as Lieut. General GRANT"); *Rebels and Federal Officers*, Gallipolis J. (Gallipolis, Ohio), Feb. 21, 1867, at 2 col. 1 (criticizing President Johnson's alternate Fourteenth Amendment proposal, which lacked an equivalent to Section 3, and noting that "Reconstruction upon this basis would render Jefferson Davis eligible to the Presidency of the United States").

After ratification, newspapers around the country raised the concern that amnesty proposals debated at the time might render Jefferson Davis eligible for the presidency. *See* John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. __ (forthcoming 2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157, at 7-10 (collecting sources). The idea that amnesty could make Davis eligible for the presidency was expressed by both amnesty *opponents*, who viewed this specter with horror, *see* Terre Haute Wkly. Express, Apr. 19, 1871, at 4, col.1 (warning that if amnesty were granted, "JEFF DAVIS would be elligible [sic] to the

Presidency"); *Columbus Letter: An Unexpected Opposition*, Cincinnati Comm'l, Jan. 9, 1871, at 3 col. 3 (questioning whether nation should "make Jeff. Davis and John C. Breckinridge eligible to the Presidency of the United States"), and amnesty *supporters*, who welcomed Davis's return to presidential eligibility, *see The Administration, Congress and the Southern States—The New Reconstruction Bill*, N.Y. HERALD (N.Y., N.Y.), Mar. 29, 1871, at 6[19] (proposing "such an amnesty as will make even Jeff Davis eligible again to the Presidency").

In 1872, after a broad amnesty bill finally passed, the Chicago Tribune noted that the act made many ex-Confederates "as eligible to the Presidency . . . as General Logan or General Butler." *The Philadelphia Platform*, Chicago Trib., June 8, 1872, at 4. Similarly, in 1876, the central debate over a (failed) universal amnesty bill concerned whether it would, or would not, render Davis eligible for the presidency. *See* Vlahoplus, *supra*, at 9 (citing multiple newspaper reports and editorials describing the debate as whether amnesty bill should extend so far as to make Davis eligible for the presidency).

If Davis were already eligible for the presidency because the presidency was *not* an "office … under the United States" under Section 3, then these debates would have been pointless.

E. The spirit and purpose of Section 3 reveals an intent to include the presidency as "an office . . . under the United States."

Section 3's purpose is to protect the republic from those who, having sworn to support its Constitution, turned against it. *See* Cong. Globe, 39th Cong., 1st Sess. 2918

[19] Reproduced in *Northern View*, Fairfield Herald (Winnsboro, S.C.), Apr. 12, 1871, at 1.

(Sen. Willey) (Section 3 is "not . . . penal in its character, it is precautionary. It looks not to the past, but it has reference, as I understand it, wholly to the future. It is a measure of self-defense."); *United States v. Powell,* 27 F. Cas. 605 (C.C.D.N.C. 1871) ("those who had been once trusted to support the power of the United States, and proved false to the trust reposed, ought not, as a class, to be entrusted with power again until congress saw fit to relieve them from disability").

Given this broad purpose, it is absurd to suggest that insurrectionists are considered so dangerous to the republic that they must be excluded from minor offices, such as county commissioner, *White*, 2022 WL 4295619, at **16-17; county sheriff, *Powell*, 27 F. Cas. at 605; *Worthy*, 63 N.C. at 201-03; district solicitor, *In re Tate*, 63 N.C. at 308; or even as an *elector* for the president, *see* amend. XIV, § 3—yet are for some reason still eligible for the nation's most powerful office. Nothing in the amendment's text or history suggests that the Framers and the ratifying public acted with such bizarre effect. *See* Myles Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill of Rts. J. 153, 163 (2021) ("[I]nstead of questioning whether the drafters intended to include the President, it is proper to question whether the public would have thought the President was immune from this provision.").

Indeed, such a bizarre interpretation would contradict a broader constitutional design. Elsewhere, throughout the Constitution, presidential qualifications are the *most* stringent, whether for age (25 for House; 30 for Senate; 35 for president), United States residency ("when elected" for House and Senate; fourteen years for president), or

citizenship (seven years for House; nine years for Senate; from birth for president). *Compare* U.S. Const. art. I, § 2, cl. 1 *with id.* art. I, § 2, cl. 3 *and id.* art. II, § 1, cl. 5. Reading the presidency out of section 3 would lead to the incongruous result of rendering the qualifications for president far *less* stringent than those of minor local, state, or federal officials.[20]

V. THE PRESIDENT OF THE UNITED STATES IS A COVERED "OFFICER OF THE UNITED STATES" UNDER SECTION 3.

A. The plain meaning of "officer of the United States" includes the president for at least some purposes.

1. *An "officer" is one who holds an office.*

The simplest meaning of "officer" is one who holds an office. *See* N. Bailey, *An Universal Etymological English Dictionary* (20th ed. 1763) ("one who is in an Office"); *see also United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, C.J., riding circuit) ("An office is defined to be a public charge or employment, and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States.") (quotation marks omitted). This plain meaning must be the starting point:

> The Constitution repeatedly designates the Presidency as an "Office," which surely suggests that its occupant is, by definition, an "officer." An interpretation of the Constitution in which the holder of an "office" is not an "officer" seems, at best, strained.

[20] For more on why the presidency is a barred office under Section 3, *see* Vlahoplus, *supra*, at 6-13, 22-27; Baude & Paulsen, *supra*, at 104-112.

Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1371–72 (Fed. Cir. 2006) (en banc) (Gajarsa, J., concurring in part and concurring in the judgment) (citations omitted). Even today, this plain meaning is widely used by the Supreme Court and the executive branch alike. *See, e.g.*, *Nixon v. Fitzgerald,* 457 U.S. 731, 750 (1982) (referring to president as "the chief constitutional officer of the United States"); *Cheney v. U.S. District Court for the District of Columbia*, 541 U.S. 913, 916 (2004) (Scalia, J.) (referring to "the President and other officers of the Executive"); *Motions Sys. Corp.*, 437 F.3d at 1368 (cataloguing multiple presidential executive orders in which the president refers to himself as an "officer"); Office of Legal Counsel, U.S. Dep't of Justice, *A Sitting President's Amenability to Indictment and Criminal Prosecution* (Oct. 16, 2000), at 222, 226, 230 (distinguishing "*other* civil officers" from the president) (emphasis added), *available at* https://www.justice.gov/d9/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf; Exec. Order No. 11435 (January 21, 1968) (referring to actions "of the President or of any other officer of the United States").

The 1787 Constitution used the term "officer . . . of the United States" in multiple ways. Some unquestionably include the president, *e.g.*, U.S. Const. art. I, § 8 (empowering Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government *of the United States*, or in any Department or *Officer* thereof") (emphases added), while others may not. The phrase is not an "indivisible term of art," with the exact same meaning in every appearance. *See* Jennifer L. Mascott, *Who are "Officers of the United States*"?, 70 Stan. L. Rev. 443, 471 (2018). Rather, the

constitutional text, drafting history, and Founding-era debates demonstrate that "Officers of the United States' is a descriptive phrase indicating that the officers are federal, and not state or private, actors." *Id*. at 471-83;[21] *cf*. Cong. Globe, 39th Cong., 1st Sess. 3939 (1866) (noting that "'officers of' and 'officers under' the United States are . . . 'indiscriminately used in the Constitution.'") (citation omitted). Here, the point is simply that an "officer . . . of the United States" *can* include the president.

B. Trump has argued in court that he was an "officer of the United States" during his term in office.

In multiple lawsuits, Trump has argued that he was an "officer of the United States" under the federal officer removal statute. Under 28 U.S.C. § 1442(a)(1), "any officer . . . of the United States" may remove a state court case to federal court if the action concerns "any act under color of such office." *Id.* While Trump's removal efforts have met with mixed success, the courts have agreed with him that the president is an officer of the United States. *See K&D LLC v. Trump Old Post Office LLC*, 951 F.3d 503, 505 (D.C. Cir. 2020) (affirming district court's denial of motion to remand); *New York v. Trump*, No. 23-cv-03773-AKH, 2023 WL 4614689, *5 (S.D.N.Y. July 19, 2023) (agreeing with Trump that president is an "officer of the United States" but remanding because acts at issue were not under color of office).

[21] Similarly, the distinction between "elected" and "appointed" officials in cases that solely concern the latter is not relevant to this question. *Cf. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010) (holding that limits on removal of board members violated separation of powers); *United States v. Mouat*, 124 U.S. 303, 307 (1888) (holding that naval paymaster's clerk was not an officer).

To be sure, the statutory definition of "officer of the United States" may in theory differ from the *constitutional* definition of "officer of the United States" in other contexts. But if "officer of the United States" can include the president in a *statute*, then surely the same phrase can include the president in Section 3.

VI. THE PRESIDENT IS AN "OFFICER OF THE UNITED STATES" UNDER SECTION 3.

A. The original public meaning of "officer of the United States" included the president.

By the 1860s—the relevant period for ascertaining the original public meaning of the Fourteenth Amendment—"officer of the United States" was widely understood to include the president. Intuitively, someone who takes a constitutionally required oath to "preserve, protect and defend" the Constitution before he can "enter on the Execution of his Office," U.S. Const., art. II, § 1, is, in plain language, an "officer of the United States." Presidents, members of Congress, Supreme Court justices, and the general public referred to the president this way. Whether this was consistent with the 1787 Constitution or the result of "linguistic drift," the original public understanding of Section 3 in the 1860s applied to an insurrectionist ex-president.

Well before the Civil War, both common usage and judicial opinions described the president as an "officer of the United States." As early as 1789, congressional debate referred to the president as "the *supreme Executive officer* of the United States." 1 Annals of Congress 487–88 (Joseph Gales ed., 1789) (Rep. Boudinot); *cf.* Federalist No. 69 (Hamilton) ("The President of the United States would be an officer elected by the people"). Chief Justice Branch wrote in 1837 while riding circuit that "[t]he president

himself . . . is but an officer of the United States." *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 752 (C.C.D.D.C. 1837), *affirmed*, 37 U.S. 524 (1838).

By the 1860s, this usage was firmly entrenched. *See* Vlahoplus, *supra*, at 18-20. On the eve of the Civil War, President Buchanan called himself "the chief executive officer under the Constitution of the United States." *Id.* at 18 (citation omitted). That usage was repeated with respect to President Lincoln. *See* Cong. Globe, 37th Cong., 2d Sess. 431 (1862) (Sen. Davis) (referring to President Lincoln as "the chief executive officer of the United States"). In a series of widely reprinted official proclamations that reorganized the governments of former confederate states in 1865, President Andrew Johnson referred to himself as the "chief civil executive officer of the United States."[22]

This usage continued throughout the Thirty-Ninth Congress, which enacted the Fourteenth Amendment, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 335 (Sen. Guthrie) (1866), 775 (Rep. Conkling) (quoting Att'y Gen. Speed), 915 (Sen. Wilson), 2551 (Sen. Howard) (quoting President Johnson), and during its two-year ratification period, *see, e.g.*, *Mississippi v. Johnson*, 71 U.S. 475, 480 (1866) (counsel labeling the president the "chief executive officer of the United States"); Cong. Globe, 39th Cong. 2d Sess. 335 (1867) (Sen. Wade) (calling president "the executive officer of the United States"); Cong. Globe, 40th Cong. 2d Sess. 513 (1868) (Rep. Bingham) ("executive officer of the United

[22]Andrew Johnson, Proclamation No. 135 (May 29, 1865); Proclamation No. 136 (June 13, 1865); Proclamation No. 138 (June 17, 1865); Proclamation No. 139 (June 17, 1865); Proclamation No. 140 (June 21, 1865); Proclamation No. 143 (June 30, 1865); Proclamation No. 144 (July 13, 1865), *all reprinted in* 8 *A Compilation of the Messages and Papers of the President*, 3510–14, 3516–23, 3524–29 (James D. Richardson ed., 1897).

States"). Given the repeated and consistent description of the president as the (chief) (executive) "officer of the United States," the original public meaning of the phrase in Section 3 necessarily included the president.

Indeed, an insurrectionist ex-president was hardly inconceivable in 1866. Former President John Tyler (1841-45) joined the Confederacy, although he died in 1862. If he had survived the war and sought public office, the idea that his disqualification would turn on whether he had happened to also serve as a *less powerful* covered official—as it happens, Tyler had also served in the House—bears no relation to any defensible understanding of Section 3.

B. The generation that ratified the Fourteenth Amendment understood the president to be an "officer of the United States."

Those charged with interpreting and applying the term "officer" in Section 3—often in the context of the phrase "officer of any State"—repeatedly interpreted it in a commonsense manner that does not distinguish elected from appointed office. Rather, they understood an "officer" (state or federal) to mean one who, by dint of office, must take an oath to support the Constitution. *See Worthy*, 63 N.C. at 204 ("The oath to support the Constitution is the test. The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress.").

Under this analysis, an "officer" under Section 3 is one who is "required to take an oath to support the Constitution," in contrast to a "placeman" who is "simply required to take an oath to perform the particular duty required of him." *Id.* at 202-03 (enumerating

state officers who satisfy this test, including apex elected officials such as governor, as well as minor officials such as "Inspectors of flour, Tobacco, &c." and "Stray Valuers"). *See also Powell*, 27 F. Cas. at 605-06 (holding elected constable was an "officer in the state" because he held "executive office"); *see also The Reconstruction Acts* (May 24, 1867), 12 U.S. Op. Att'y Gen. 141, 158 (1867) (defining covered officials as those "[h]olding the designated office, State or federal, accompanied by an official oath to support the Constitution of the United States"); *In re Exec. Comm. of 14th October, 1868*, 12 Fla. 651, 651–52 (1868) (interpreting Section 3 as incorporated into Florida Constitution, and defining an "officer" simply as "a person commissioned or authorized to perform any public duty").[23]

Just one month after sending the Fourteenth Amendment to the states for ratification, Congress explained its own interpretive methodology, rejecting distinctions between "officer of" and "office under" the United States. A select committee report rejected any constitutional distinction between officers "of" the United States and officers "under" the United States. *See* Vlahoplus, *supra*, at 24-26. As the report explained, "[i]t is irresistibly evident that no argument can be based on the different sense of the words

[23] An oath to "support" the Constitution (as used in Section 3 and in art. VI, cl. 3) is not materially distinct from an oath to "preserve, protect, and defend" the Constitution (as used in art. II, § 1, cl. 8). In the 1860s, Congress twice revised art. VI oaths, using these verbs interchangeably. *See* Act of July 2, 1862, ch. 128, 12 Stat. 502 ("support and defend"); Act of Aug. 6, 1861, ch. 64, 12 Stat. 326-27 ("support, protect, and defend"). Likewise, many states—mandated by art. VI to require officials to *support* the Constitution—then or now have specified an oath to "preserve, protect, and defend" the Constitution. *See, e.g.*, Ga. Const. of 1868, art. IV, § 1, cl. 5 ("preserve, protect, and defend"); S.C. Const. of 1895, art. III, § 26 ("preserve, protect, and defend"). This long history of interchangeable usage demonstrates the verb phrases' equivalence.

'of' and 'under.'" Cong. Globe, 39th Cong., 1st Sess. 3939 (1868) (concluding that terms "of" and "under" the United States "are made by the Constitution equivalent and interchangeable."). *Id.* The committee dismissed efforts to distinguish these terms as "mere verbal criticism" and emphasized that "[n]o method of attaining the Constitution is more unsafe than this one of 'sticking' in sharp verbal criticism." *Id.*

C. The framers and general public did not understand Section 3 to be constrained by technical taxonomies.

Any reading of Section 3 that allows an insurrectionist president to return to power simply because he happened not to have any prior public service would make a mockery of the protective purpose and parallel structure of Section 3.

Structurally, Section 3 pairs covered officials with barred offices:

Covered officials	**Barred offices**
"members of Congress"	"Senator or Representative in Congress"
"officer of the United States"	"any office, civil or military, under the United States"
"executive or judicial officer of any state"	"any office, civil or military, under . . . any state"
"member of any state legislature"	"any office, civil or military, under . . . any state"
	"elector of President and Vice President"

See Baude & Paulsen, *supra*, at 106-07. The simplest understanding is that—with the exception of presidential electors, who only appear in the "barred offices" list—these lists

match. *See* Vlahoplus, *supra*, at 22-27 (describing the "essential harmony" of the "office" and "officer" terms).

It strains credulity to suggest that the Framers of the Fourteenth Amendment relied on nonsensical textualism that would somehow seek to distinguish "member[] of Congress" from "Senator or Representative in Congress" because they used different words. The same logic applies to the table's second row.

Some commentators have developed elaborate schema to distinguish officers of "the Government of the United States," U.S. Const. art. I, § 8, which indisputably includes the president, from officers of "the United States," which they claim does not. *See* Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S. Tex. L. Rev. 309 (2021) (introducing a planned ten-part series of law review articles that is apparently necessary to understand and explain their taxonomy). Absolutely no evidence suggests that the Framers of the Fourteenth Amendment, or the ratifying public, understood the meaning of terms in the amendment to be constrained by byzantine technical taxonomies. *See* Baude & Paulsen, supra, at 105 ("a reading that renders the document a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one"); *cf.* Cong. Globe, 39th Cong., 1st Sess. 1089 (1866) (Rep. Bingham) (asked to define "due process of law," replying "the courts have settled that long ago, and the gentleman can go and read their decisions").

Rather, the Framers understood the terms with their common meanings and for the intended purpose of protecting the republic. If "[t]he oath to support the Constitution is

the test," *Worthy*, 63 N.C. at 204, then the president's oath—the only one explicitly specified in the Constitution itself—must qualify at least as much as those of "Inspectors of flour, Tobacco, &c." or "Stray Valuers." *See Worthy*, 63 N.C. at 203.

The theory that a deputy assistant undersecretary, newly commissioned second lieutenant, or Inspector of Flour who engages in insurrection is forever excluded from public office unless and until Congress grants him amnesty, but a *president* is not, [24] is completely untethered from the amendment's purpose to protect the republic from oath-breaking insurrectionists.[25]

VII. OTHER TERMS IN SECTION 3 FURTHER SUPPORT DISQUALIFICATION HERE.

A. "Insurrection"

Nineteenth-century definitions of "insurrection" varied in exact wording but converge on key elements. *See* Baude & Paulsen, *supra*, at 63-93 (canvassing dictionary definitions, public and political usage, judicial decisions, and other sources); *id*. at 64 (summarizing all these definitions as "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect"); Webster's Dictionary (1830) ("combined resistance to . . . lawful authority . . ., with intent to the denial thereof"); 1 John Bouvier, *Bouvier's Law Dictionary*, 817 (15th ed., 1883) (defining "insurrection" as "rebellion"), 2 Bouvier, *A Law Dictionary*, 510 (defining "rebellion" as "The taking up arms traitorously against the government. *The forcible*

[24] Unless, of course, he previously served as Inspector of Flour.

[25] For more on why the president is a covered official under Section 3, *see* Vlahoplus, *supra*, at 13-27; Baude & Paulsen, *supra*, at 104-112.

opposition and resistance to the laws and process lawfully issued.") (emphasis added); *see also The Prize Cases (The Amy Warwick*), 2 Black (67 U.S.) 635, 666 (1862) ("Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government."); *Allegheny Cty. v. Gibson*, 90 Pa. 397, 417 (1879) ("A rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state; a rebellion; a revolt").[26]

The term as used in Section 3 is informed by previous insurrections against the United States, such as the Whiskey, Shays', and Fries Insurrections. Cong. Globe, 39th Cong. 1st Sess. 2534 (1866) (Rep. Eckley) (during debates over clause, arguing that "[b]y following the precedents of our past history will we find the path of safety," then discussing approvingly the expulsions and investigations of representatives who supported the "small in comparison" Whiskey Rebellion); *see also The Reconstruction Acts,* 12 U.S. Op. Atty. Gen. at 160 (opining that, in similarly-worded statute, "[t]he

[26] *United States v. Greathouse* does not purport to define "insurrection." There, Circuit Justice Field noted that the indictment before the jury "charge[d] the commission of acts, which, in the judgment of the court, amount to treason within the meaning of the constitution." 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863). Justice Field then proceeded to charge the jury with the elements of treason.

language here comprehends not only the late rebellion, but every past rebellion or insurrection which has happened in the United States").[27]

To qualify as an insurrection, the uprising must be "so formidable as for the time being to defy the authority of the United States." *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894) (an uprising (emphasis added). However, no minimum threshold of violence or level of armament is required. *See id.* at 830 ("It is not necessary that there should be bloodshed"); *Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) ("military weapons (as guns and swords . . .) are not necessary to make such insurrection . . . because numbers may supply the want of military weapons, and other instruments may effect the intended mischief."). Even a failed attack with no chance of success can qualify as an insurrection. *See In re Charge to Grand Jury*, 62 F. at 830 ("It is not necessary that its dimensions should be so portentous as to insure probable success.").[28]

B. "Engage"

Under the *Worthy-Powell* standard, to "engage" in insurrection or rebellion means to provide voluntary assistance, either by service or contribution (except charitable

[27] Section 3's phrase "insurrection or rebellion against *the same*" can be read either more broadly as an "insurrection or rebellion against [the United States]" (i.e., any insurrection against federal authority) or more narrowly as applying to an "insurrection or rebellion against [the Constitution of the United States]" (i.e., only insurrections seeking to block exercise of core constitutional functions of the federal government). Since the January 6 insurrection sought to block Congress from exercising its essential constitutional function of certifying the electoral votes, as provided by Art. II and the Twelfth Amendment, the distinction does not matter here.

[28] Modern jurisprudence agrees. *See Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954) (an insurrection "is no less an insurrection because the chances of success are forlorn.").

contributions). *See Powell*, 27 F. Cas. at 607 (defining "engage" as "a voluntary effort to assist the Insurrection . . . and to bring it to a successful [from insurrectionists' perspective] termination"); *Worthy*, 63 N.C. at 203 (defining "engage" as "[v]oluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary"); *see also In re Tate*, 63 N.C. 308 (applying *Worthy*). Both modern judicial decisions that construe "engage" under section 3 have adopted the *Worthy-Powell* standard. *See White*, 2022 WL 4295619 at *19; *Rowan*, *supra*, at 13-14. No court has ever used a different standard under Section 3.

Engagement does not require that an individual personally commit an act of violence. *See Powell*, 27 F. Cas. at 607 (defendant paid to avoid serving in Confederate Army); *Worthy*, 63 N.C. at 203 (defendant simply served as county sheriff); *Rowan*, *supra*, at 13; *White*, 2022 WL 4295619, at *20. Indeed, Jefferson Davis—the president of the Confederacy—never fired a shot.

Engagement can include incitement. "Disloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come under the disqualification." *The Reconstruction Acts*, 12 U.S. Op. Att'y Gen. at 205 (opinion of Attorney General Stanbery regarding a similarly-worded statute); *see also Charge to Grand Jury*, 62 F. at 830 ("When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force that the civil authorities are inadequate to put them down, and a considerable military force is needed to accomplish that result, they become insurgents; and *every person who knowingly incites, aids, or*

abets them, no matter what his motives may be, is likewise an insurgent.") (emphasis added).[29]

Incitement is not the only category of speech that can satisfy the *Worthy-Powell* standard. Engagement includes both words and actions. Confederate leaders used words to tell subordinates what to do. Although "merely disloyal sentiments or expressions" may not suffice, 12 U.S. Op. Atty. Gen. at 164, "marching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding, would appear to constitute 'engagement' under the *Worthy-Powell* standard." *Rowan*, *supra*, at 14.

The First Amendment does not preclude disqualifying someone based on speech. Section 3 is not a mere statute, subject to First Amendment review; it is a coequal provision of the Constitution, and is in fact the later-enacted and more specific provision. *See* Baude & Paulsen, *supra*, at 57-61. By analogy, all Americans have a First Amendment right to refuse to swear an oath to protect the Constitution, but the Constitution itself requires federal and state legislators and officers to take an oath to protect the Constitution before they can serve. *See* U.S. Const. art. VI. First Amendment "compelled speech" analysis, which protects private citizens from compelled oaths, does

[29] The fact that the 1862 Second Confiscation Act criminalized a longer list of verbs is irrelevant. *See* 12 Stat. 589, 590 (1862) (making it a crime to "incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or . . . give aid or comfort thereto"). No historical evidence suggests that Congress's decision to streamline this lengthy statutory verbiage in the later constitutional amendment meant to *exclude* incitement or other forms of engagement. *See M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819) (denying that Constitution must "partake of the prolixity of a legal code").

not apply to legislators who refuse to take an oath, because the more specific provision controls. *See Bond v. Floyd*, 385 U.S. 116, 132 (1966). Likewise, the First Amendment does not protect words that meet Section 3's definition of "engag[ing]" in insurrection.

Finally, engagement does not require previous conviction, or even charging, of any criminal offense. *See, e.g.*, *Rowan*, *supra*, at 13-14; *White*, 2022 WL 4295619, at *24; *Powell*, 27 F. Cas. at 607 (defendant not charged with any prior crime); *Worthy*, 63 N.C. at 203 (defendant not charged with any crime); *In re Tate*, 63 N.C. 308 (defendant not charged with any crime); Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 Const. Comment. 87, 98-99 (2021) (in special congressional action in 1868 to enforce Section 3 and remove Georgia legislators, none of whom had been charged criminally); Baude & Paulsen, *supra*, at 68, 83-84.[30] Indeed, it appears that the vast majority of ex-Confederates—including Sheriff Worthy, most of the House and Senate candidates-elect that Congress excluded from their seats, and the many tens of thousands who petitioned Congress for amnesty—were never charged with, let alone convicted of, any crimes.

CONCLUSION

These threshold matters satisfied, the Court should set a prompt schedule for an evidentiary hearing.

[30] Rather than require a criminal conviction as a prerequisite to a civil action to disqualify an officeholder, Congress did the reverse and imposed criminal penalties for those who held office in defiance of the Disqualification Clause. *See* Act of May 31, 1870, ch. 114, § 15, 16 Stat. 140, 143.

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Respectfully submitted,

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this petition conforms to the requirements of Minn. R. Civ. App. P. 117, subd. 3, for a petition produced with a proportional 13-point font. The length of this brief is **13,970** words. This brief was prepared using Microsoft Word 2016.

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