No. A23-1354

State of Minnesota
In Supreme Court

Joan Growe, *et al.*,

Petitioners,

v.

Steve Simon, Minnesota Secretary of State,

Respondent.

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that constitutional provisions are understood in accordance with their text and history and accordingly has an interest in this case.

INTRODUCTION

Ratified in the wake of the Civil War, the third section of the Fourteenth Amendment disqualifies from holding any state or federal office those who, "having previously taken an oath . . . to support the Constitution of the United States," then "engaged in insurrection or rebellion against the same, or g[ave] aid or comfort to enemies thereof." U.S. Const. amend. XIV, § 3.

In the immediate aftermath of the Confederate rebellion, the Fourteenth Amendment's Framers saw this provision as essential to "securing key results of the Civil War in the Constitution" and ensuring that the formerly disloyal states would elect representatives who would "respect equality of rights." Eric Foner, *The Second*

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission.

Founding 84-89 (2019). As one proponent of Section 3 put it, the new constitutional provision would require "the citizens of the States lately in rebellion" to "raise up a different class of politicians." Cong. Globe, 39th Cong., 1st Sess. App. 228 (1866) (Rep. DeFrees).

Significantly, Section 3 disqualification is not limited to those individuals who supported the Confederacy. Its text applies broadly to any "insurrection or rebellion" against the United States, U.S. Const. amend. XIV, § 3, in recognition of the dangers posed by allowing individuals who attempted to overthrow their own government to later hold office in it. Indeed, the drafters of the Fourteenth Amendment rejected a version of the amendment that would have explicitly limited its application to the former Confederacy, *see* Cong. Globe, 39th Cong., 1st Sess. 2460 (1866) ("all persons who voluntarily adhered to *the late insurrection*, giving it aid and comfort, shall be excluded from the right to vote" (emphasis added)), and instead clarified that they sought a "measure of self-defense . . . designed to prevent a repetition of treason by these men, and . . . operate as a preventive of treason hereafter," Cong. Globe, 39th Cong., 1st Sess. 2918 (1866) (Sen. Willey).

By its terms, Section 3 states that covered individuals shall not "be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States," and that it applies to any individual who has "previously taken an oath, as a member of Congress, or as an

officer of the United States . . . to support the Constitution of the United States." U.S. Const. amend. XIV, § 3. This "sweeping" provision, Cong. Globe, 39th Cong., 1st Sess. 3146 (1866) (Rep. Finck), applies to former President Donald J. Trump because the presidency is an "office . . . under the United States" and former President Trump took an "oath . . . as an officer of the United States." A holding to the contrary would be at odds with the text and history of Section 3.

First, the plain text of Section 3 applies both to presidents and to the presidency. When the Fourteenth Amendment was framed and ratified, the phrase "office . . . under the United States" referred to a federal duty or "public charge," *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (Marshall, C.J.), and was often used to describe the presidency, *see*, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 3940 (1866) (report of Select Committee noting that the Appointments Clause "covers every possible office under or in the Government . . . *[a]side from* the President, Vice President, and members of Congress" (emphasis added)). Relatedly, the phrase "officer of the United States" referred to an individual who undertook a public duty and swore an oath under the Constitution. Lawmakers, jurists, and executive branch officials repeatedly referred to the president as an "officer of the Government." *See, e.g.*, Cong. Globe, 39th Cong., 2d Sess. 1505 (1867) (Sen. Dixon); *see also* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. ___, 110-11 (forthcoming 2024)

(noting that the Framers of Section 3 often referred to the president as holding an "office" and serving as an "officer" of the United States and that if, in these discussions, "a secret code was really at work, it was an extraordinarily well-kept secret").

Second, this broad text makes sense given the Framers' plan for the Amendment. The legislators who drafted and debated Section 3 envisioned a comprehensive provision that would prohibit individuals who "betrayed their country" while under oath from being "again intrusted with the political power of the State." Cong. Globe, 39th Cong., 1st Sess. 2918 (1866) (Sen. Willey) (spelling as in original). As various statements from the legislative debates make clear, the Framers concluded that this broad goal would best be served by enacting a provision that would prevent former officials who had betrayed the country from assuming the office of the presidency. As one scholar of constitutional law observed, it would be "rather strange" to understand Section 3 to apply to "former confederates serving as postmasters or corporals," but not "when a turncoat wished to serve as President." Saikrishna B. Prakash, *Why the Incompatibility Clause Applies to the Office of President*, 4 Duke J. Const. L. & Pub. Pol'y 35, 43 (2008).

Along the same lines, the debates about Section 3 make clear that the provision was understood to disqualify all officers who had taken an oath to support the Constitution and subsequently engaged in insurrection—including presidents.

Those debates repeatedly emphasized that Section 3 applied to anyone who "violated not only the letter but the spirit of the oath of office they took . . . to support the Constitution." *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2899 (1866) (Sen. Sherman). As the Fourteenth Amendment's Framers knew, the president—then as now—takes exactly such an oath.

Finally, courts' treatment of Section 3 in the years following its passage supports this understanding of the Clause. In state and federal cases, courts made clear that the definition of "officer" was to be broadly construed and included elected officers such as the president. Furthermore, these courts emphasized the importance of an oath in defining an officer, noting that the oath is "the test" to determine whether an individual was an officer under Section 3. *Worthy v. Barrett*, 63 N.C. 199, 202 (1869), *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869).

In sum, in ratifying the Fourteenth Amendment, the nation added to the Constitution a provision that would "strike[] at those who have heretofore held high official position" and later participated in an insurrection, hoping to stop "any rebellion hereafter to come," Cong. Globe, 39th Cong., 1st Sess. 3035-36 (1866) (Sen. Henderson), by preventing insurrectionists from "be[ing] declared eligible and worthy to fill any office up to the Presidency of the United States," 4 Cong. Rec. 325 (Jan. 10, 1876) (Rep. Blaine). An interpretation of Section 3 that exempts presidents

and the presidency would depart from the provision's clear text and be at odds with its history.

ARGUMENT

I. Section 3's Plain Text Makes Clear that the Section Applies to Both Presidents and the Presidency.

When interpreting constitutional text, courts are "guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012) ("Words must be given the meaning they had when the text was adopted."). When the Fourteenth Amendment was adopted, the presidency fell within the normal and ordinary meaning of an "office . . . under the United States," and the president would have been understood to have taken an oath as an "officer of the United States." U.S. Const. amend. XIV, § 3.

A. The Presidency Is an "office . . . under the United States."

When the Fourteenth Amendment was framed and ratified, the presidency was understood to be an "office . . . under the United States." In the mid-nineteenth century, an "office" was a "particular duty, charge or trust conferred by public authority, for a public purpose," and "undertaken by . . . authority from government

or those who administer it." *Office*, An American Dictionary of the English Language by Noah Webster 689 (Chauncey Goodrich ed., 1853); *Office*, Johnson's English Dictionary 646 (J.E. Worcester ed., 1859) ("a publick charge or employment; magistracy"); *see Maurice*, 26 F. Cas. at 1214 ("An office is defined to be 'a public charge or employment[.]'"); *Shelby v. Alcorn*, 36 Miss. 273, 275 (Miss. Err. & App. 1858) ("The whole body of laws on the subject, contemplates the performance of duties for the public, for a stated compensation, and the nature of which are prescribed by law. All these stamp the place with the unmistakable character of an office.").

Indeed, the Constitution itself explicitly referred to the presidency as an "office." *See, e.g.*, U.S. Const. art. I, § 3, cl. 5 ("Office of the President of the United States"); U.S. Const. art. II, § 1, cl. 1 ("[the President] shall hold his Office during the term of four Years"); U.S. Const. art. II, § 1, cl. 5 ("[n]o person except . . . a Citizen of the United States . . . shall be eligible to the Office of the President"); *see also* Baude & Paulsen, *supra*, at 108 ("At the risk of belaboring the obvious: Article II refers to the "office" of President innumerable times.").

An office "under the United States" referred to a public duty created by federal—rather than state—law. *See The Reconstruction Acts*, 12 U.S. Op. Att'y Gen. 141, 149 (1867) (considering statute replicating the text of Section 3, and noting that "federal officers and State officers are classified separately in the clauses

of the act under consideration"); *cf.* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 451 (2018) (noting, regarding the Appointments Clause, that "[t]he qualifier 'of the United States' clarifies that Article II refers to federal officers rather than state or local governmental actors" (internal footnote omitted)).

Nineteenth-century Americans understood the presidency to be an office under the United States. For example, many antebellum presidents specifically acknowledged that they were covered by the Constitution's Foreign Emoluments Clause, which applies to persons "holding any Office of Profit or Trust under" the United States. U.S. Const. art. I, § 9, cl. 8; *see, e.g.*, H. Rep. No. 23-302, at 2 (1834) (noting that the "precedent in Mr. Jefferson's Presidency . . . guide[d] . . . the Executive" to sell gifts that the president received and deposit the proceeds in the treasury); 14 *Abridgment of the Debates of Congress from 1789 to 1856*, at 141 (Thomas Hart Benton ed., 1860) (reprinting 1840 letter from Martin Van Buren to Syed Bin Sutan, Imaum of Muscat, rejecting gifts on account of the clause); An Act to authorize the sale of two Arabian horses, received as a present by the Consul of the United States at Zanzibar, from the Imaum of Muscat, Mar. 1, 1845, 5 Stat. 730 (disposing of gifts given to President Tyler); Joint Resolution No. 20, *A Resolution providing for the Custody of the Letter and Gifts from the King of Siam*, Mar. 15, 1862, 12 Stat. 616 (disposing of gifts given to President Lincoln).

Members of the 39th Congress, who drafted and approved Section 3's text, frequently referred to the presidency as an "office." Cong. Globe, 39th Cong., 1st Sess. 905 (1866) (Rep. Lawrence referring to the "very title under which the President now holds his office"); Cong. Globe, 39th Cong., 2d Sess. 1505 (1867) (Sen. Dixon asking colleagues to "take the case of the highest officer of the Government, the President of the United States . . . [who] holds that office . . . [and] has a right to the salary so long as he holds the office"); Cong. Globe, 39th Cong., 1st Sess. App. 233 (1866) (Sen. Davis describing the president's oath to "faithfully execute the office of President"); Cong. Globe, 39th Cong., 2d Sess. 384 (1867) (Sen. Howe describing the "exalted office of the President of the United States, the Chief Magistrate of the nation"); *id.* at 518 (Sen. Willey describing the "office of the President" and referring to the presidency as an "executive office").

Lawmakers also referred to the presidency as an office "under the United States." This is why they deemed it necessary to explicitly exempt the president from a provision that applied broadly to those holding "any office of honor or profit under the government of the United States." *See* Act of July 2, 1862, ch. 128, 12 Stat. 502 (repealed 1868) (requiring a loyalty oath from anyone holding "any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, *excepting the President of the United States*" (emphasis added)); *see also* Cong. Globe, 39th Cong., 1st Sess. 3940

(1866) (report of Select Committee noting that the Appointments Clause "covers every possible office under or in the Government . . . [a]side from the President, Vice President, and members of Congress"). The statute, which was repealed in 1868 and reenacted with similar prefatory language in 1884, *see* Act of May 13, 1884, ch. 46, § 2, 23 Stat. 21, 22, suggests that lawmakers—indeed, many of the same lawmakers who drafted and debated the Fourteenth Amendment—understood the presidency to be an "office . . . under the United States." U.S. Const. amend. XIV, § 3.

B. The President Is an "Officer of the United States."

In the mid-nineteenth century, as today, the president fell within the ordinary meaning of the phrase "officer of the United States." In that era, the word "officer" referred to a "man employed by the publick," *see Officer*, Johnson's English Dictionary 646 (J.E. Worcester ed., 1859), or "[a] person commissioned or authorized to perform any public duty," *see Officer*, An American Dictionary of the English Language by Noah Webster 689 (Chauncey Goodrich ed., 1853). And once again, an officer "of the United States" is someone who performed a public duty for the federal—rather than a state—government. *See supra* at 7-8.

In that era, the president was understood to be "required and expected to perform" certain federal "services," *Williams v. United States*, 42 U.S. 290, 297 (1843), and to be "employed in the executive functions of the union," 3 Joseph Story,

Commentaries on the Constitution of the United States, 301 (1833). Courts and commentators often referred to the president's official or public duties. *See State of Mississippi v. Johnson*, 71 U.S. 475, 499 (1866) (describing the "duty of the President in the exercise of the power to see that the laws are faithfully executed"); *id.* at 501 (the president's "official duties"); *Washington News & Gossip*, Evening Star 2, Aug. 22, 1856 (noting that the president had a "great public duty to perform"); *Summary of Events*, 2 Am. L. Rev. 747, 755 (1868) (referring to "the great and difficult public duties enjoined on the President by the Constitution and laws of the United States"); *see generally* Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153, 162 (2021) (applying a "functionalist test" and noting that "the President quite clearly is legally delegated a portion of the sovereign powers of the United States for continuous exercise").

Indeed, mid-nineteenth-century Americans, including officials in every branch of government, frequently referred to the president as an officer of the government or of the United States. In the Civil War era, presidents James Buchanan and Andrew Johnson both referred to themselves as the "chief executive officer of the United States," echoing a term that had been used to describe the president since "as early as 1794." *See* John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. 1, 17-18 (2023) (citing references to

presidents Washington, Jefferson, Jackson, Van Buren, Harrison, Polk, Taylor, Fillmore, Buchanan, Lincoln, Johnson, Grant, and Garfield). Executive agencies referred to the president as an "officer," as well. *See The Reconstruction Acts*, 12 U.S. Op. Atty. Gen. 182, 196 (1867) (disapproving of a law in which a military governor was placed "on higher ground than the President, who is simply an executive officer"); *Claims for the Use of Turnpikes in Time of War*, 13 U.S. Op. Att'y Gen. 106, 109 (1869) (describing the president as the "ultimate superior officer"); *Compromise of Internal-Revenue Cases*, 13 U.S. Op. Att'y Gen. 479, 480 (1871) (referring to "any officer but the President").

Members of the 39th Congress repeatedly referred to the president as an officer as well. The president was a "high officer of the Government," Cong. Globe, 39th Cong., 1st Sess. 132 (1866) (Rep. Spalding), and the "chief executive officer of the United States," *id.* at 1318 (Rep. Holmes) (quoting a proclamation from the President); *id*. at 915 (Sen. Saulsbury referring to the president as "the chief executive officer of the country"); *id.* at 2914 (1866) (Sen. Doolittle referring to "the President as the chief executive officer of the Government"); Cong. Globe, 39th Cong., 2d Sess. 1505 (1867) (Sen. Dixon remarking that "I know that not a single officer of the General Government from the President down can receive his salary without an appropriation from Congress"); *id*. at 1158 (Rep. Eldridge describing acts

"of any President or other officer of the Government"); *id*. at 1800 (Sen. Wade noting that "[t]he President is a mere executive officer").

And, significantly, lawmakers understood that Section 3 would apply to vice presidents even though they, like presidents, are not explicitly mentioned in the text of the provision. In the debate over the Fourteenth Amendment's ratification, lawmakers raised the Burr conspiracy—Vice President Aaron Burr's armed expedition to gain personal political power in the Union's newly acquired western territories—as an example of the type of treason that should lead to future disqualification from office. *See* Cong. Globe, 39th Cong., 1st Sess. 2535 (1866) (Rep. Eckley arguing that "[t]hose who engaged in the rebellion and strove to overthrow the Government . . . are not fit . . . to administer its affairs. . . . Even Burr . . . lived and died in obscurity . . . ."). So far as *amicus* is aware, no one objected to the relevance of this example.

Lawmakers similarly referred to the president as an officer of the government or an officer of the United States in the decades before the Fourteenth Amendment's ratification. *See, e.g.*, Cong. Globe, 36th Cong., 1st Sess. 997 (1860) (resolution of Rep. Covode referring to an investigation of "whether the President of the United States, or any other officer of the Government, has . . . sought to influence the action of Congress"); Cong. Globe, 33rd Cong., 2d Sess. 566 (1855) (Sen. Cass referring to "any officer of the United States, excepting the President"); Cong. Globe, 35th

Cong., 1st Sess. 1713 (1858) (Sen. Trumbull noting that "[t]he President of the United States is the officer that exercises this authority"); Cong. Globe, 38th Cong., 2d. Sess. 648 (1865) (Rep. Wilson explaining that "neither the Secretary of War, nor the President, nor any *other officer of the Government*, shall appropriate money to uses which are prohibited by law" (emphasis added)).

Courts, too, referred to the President as an officer. In an 1868 case, the Supreme Court observed that "[w]e have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." *The Floyd Acceptances*, 74 U.S. 666, 676-77 (1868); *see also Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (ordering clerk to send a copy of court proceedings "under seal, to the president of the United States," and observing that "[i]t will then remain for that high officer . . . to determine what measures he will take"). On several occasions, courts specifically referred to the president as an "officer of the United States." *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 752 (C.C.D.C. 1837) ("The president himself . . . is but an officer of the United States . . . ."), *aff'd* 37 U.S. 524 (1838); *Hawkins v. Governor*, 1 Ark. 570, 587 (1839) ("[a]ll the officers of the government, except the President of the United States, and the Executives of the States, are liable to have their acts examined in a court of justice").

Lawyers and jurists also referred to the president as an "officer." *See Ex parte Vallandigham*, 28 F. Cas. 874, 901 (C.C.S.D. Ohio 1863) (statement of counsel) (referring to the president as "a chief executive officer"); *id.* at 915 (statement of another counsel) (calling the president an "officer under the constitution"); *Johnson*, 71 U.S. at 479 (statement of counsel) (describing the liability of "the President as well as other officers"); *Coppell v. Hall*, 74 U.S. 542, 547 (1868) (statement of counsel) (noting that "no officer of the government, save the President, had any authority"); *Untitled Notes*, 15 Western Jurist 122 (1881) (observing that "[th]e writ of *mandamus* has at various times been prayed for, against every officer of government, both State and national, except the President of the United States").

Similarly, many prominent treatise-writers referred to the president as an "officer." 2 Joseph Story, *Commentaries on the Constitution of the United States* 102 (1833) (referring to the president and vice president as "officers [who] owe their existence and functions to the united voice of the whole, not of a portion, of the people"); 1 James Kent *Commentaries on American Law* *281 (4th ed. 1840) (noting, when describing the president's salary, that the "legislature [does not] possess[] a discretionary control over the salaries of the executive and judicial officers"); Henry Flanders, *Exposition of the Constitution of the United States* 180 (1860) (observing that "[t]he President . . . may delegate his right to *another* officer" (emphasis added)); Anson Willis, *Our Rulers and Our Rights: or, Outlines of the*

United States Government 23 (1868) (referring to the president as the "highest officer in the government"). And political groups also referred to the president as an "executive officer." *Resolution*, Evening Star, Sept. 28, 1866 (reprinting Resolution of the Soldiers and Sailors of the Army and Navy of the United States).

II. Excluding Presidents and the Presidency from the Operation of Section 3 Would Defeat the Section's Purpose.

As the history of Section 3 demonstrates, exempting presidents and the presidency from the strictures of Section 3 would seriously undermine the Fourteenth Amendment's ability to serve its purpose: to prevent another rebellion by excluding from "positions of public trust . . . those whose crimes have proved them to be enemies to the Union, and unworthy of public confidence." *Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess. (1866), at xviii; *see id.* at xvi (describing a desire to prevent "leading rebels" from resuming "power under that Constitution which they still claim the right to repudiate"); *cf., e.g., Abramski v. United States*, 573 U.S. 169, 179 (2014) ("[W]e must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" (quoting *Maracich v. Spears*, 570 U.S. 48, 52 (2013)); *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008) (looking to the Second Amendment ratification debates to determine the meaning of the Amendment's prefatory clause).

A. Section 3 Applies to the Presidency.

The Framers of the Fourteenth Amendment sought to withhold the office of the presidency, as well as many other offices of government, from "leading rebels," *Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess. (1866), at xvi, ensuring that when the former Confederate states "were restored to full participation in the Union," they could not undo the hard-fought gains of the Civil War, Foner, *supra*, at 89. The first draft of what became Section 3 was introduced in the House by Rep. Thaddeus Stevens, on behalf of the Joint Committee on Reconstruction, as part of a five-section proto-Fourteenth Amendment. *See* Cong. Globe, 39th Cong., 1st Sess., 2286-87 (1866). The original version of Section 3 disenfranchised all persons who "voluntarily adhered to the late insurrection [or] g[ave] it aid and comfort." *Id.* Rep. Stevens and the other members of the Joint Committee sensed that "[l]eading traitors" held "nearly all the places of power and profit in the South" and could easily become federal representatives, senators, and even president. *Id*. at 2285; *see generally* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 91 (2021).

There is no doubt that lawmakers' interest in protecting federal offices from the dominant "political class" of the Confederacy extended to the office of the presidency. *See id.* at 93-94 ("Practically speaking, Congress did not intend (nor would the public have understood) that Jefferson Davis could not be a

Representative or a Senator but could be President."); Prakash, *supra*, at 43 ("Reading [Section 3] to require a congressional waiver for former confederates serving as postmasters or corporals but to not require such a waiver when a turncoat wished to serve as President would be rather strange."). In the House, Rep. Stevens argued that the Fourteenth Amendment would protect the presidency from former secessionists because it would be enforced "in reference to the presidential and all other elections." Cong. Globe, 39th Cong., 1st Sess. 2544 (1866). Other lawmakers described the proposal's application to "the election of the next or any future President of the United States." *See id.* at 2768 (1866) (Sen. Howard).

Legislators' concerns with protecting presidential elections from former Confederates persisted as they revised the text of Section 3. After concerns that the original draft would be difficult to enforce, lawmakers changed course, proposing a new version of the provision that would prevent any person from becoming "a Senator or Representative in Congress, or an elector of President and Vice President, or hold[ing] any office, civil or military, under the United States, or under any State, who having previously taken an oath . . . or as an officer of the United States . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same." *Id.* at 2869 (Sen. Howard). When the new version was introduced in the Senate, Sen. Reverdy Johnson suggested that the text did not go far enough because it did not bar ex-Confederates from the presidency and vice

presidency. *Id.* at 2899. Another Senator corrected him, calling attention to the words "or hold any office, civil or military, under the United States." *Id.* (Sen. Morrill). Sen. Johnson acknowledged his mistake, explaining that he was "misled" by the specific reference to Senators and Representatives. *Id.* ("Perhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives."). The Senate voted to adopt Section 3 of the draft Fourteenth Amendment the day after this exchange. *Id*. at 2921.

Public commentary on the proposed amendment buttresses this view of its meaning. When the Fourteenth Amendment was proposed, one newspaper observed that it would disqualify "all noted rebels from holding positions of trust and profit under the Government," observing that to do otherwise would leave "Robert E. Lee . . . as eligible to the Presidency as Lieut. General Grant." *See Democratic Duplicity*, Indianapolis Daily J., July 12, 1866, at 2 (quoted in Vlahoplus, *supra*, at 7 n.37); *see also* Gallipolis J. (Gallipolis, Ohio), Feb. 21, 1867, at 2 (noting that a counterproposal to the amendment would "render Jefferson Davis eligible to the Presidency of the United States"). In the 1870s, when Congress considered proposals that would grant "amnesty" to former Confederates barred by Section 3 and allow them to return to office, critics noted that the proposals would make former officials "eligible to the Presidency of the United States." *Address of Senator*

Morton, Phila. Inquirer, June 5, 1872, at 8; *see also* Vlahoplus, *supra*, at 7-8 (collecting other sources). Rep. James Blaine, who had served in the House that passed the Fourteenth Amendment, noted in critique that the amnesty proposal would have allowed "Mr. [Jefferson] Davis, by a two-thirds vote of the Senate and a two-thirds vote of the House, be declared eligible and worthy to fill any office up to the Presidency of the United States." 4 Cong. Rec. 325 (Jan. 10, 1876).

B. Section 3 Applies to Presidents.

In addition to prohibiting insurrectionists from serving as president, the Fourteenth Amendment's Framers also sought to disqualify a variety of individuals, including presidents, from holding office if they had violated an "oath of office to support the Constitution" by engaging in insurrection. *See* Cong. Globe, 39th Cong., 1st Sess. 2899 (1866) (Sen. Sherman) (noting that covered individuals who "violated that oath in spirit by taking up arms against the Government of the United States are to be deprived for a time at least of holding office"); *see id.* at 2898 (Sen. Hendricks) (describing as the "theory" of the Section "that persons who have violated the oath to support the Constitution of the United States ought not to be allowed to hold any office"); *see also* Magliocca, *supra*, at 93 n.31 (citing 1866 speech of Hon. John A. Bingham stating that Section 3 meant broadly that "no man who broke his official oath with the nation or State . . . be again permitted to hold a position, either in the National or State Government"); Lynch, *supra*, at 179 (explaining that the "general

idea behind Section 3" was to prevent those who had violated an oath to support the Constitution from taking that oath again); Baude & Paulsen, *supra*, at 105 ("[I]n general: If the original Constitution required an oath for a position, Section Three treats having held such a position as the trigger for Section Three's application."). As one lawmaker put it, the Fourteenth Amendment targeted "those men who committed the unpardonable political sin of having sworn to support the Constitution of the United States and then conspired against it," ensuring that these men "may not again be intrusted with power." Cong. Globe, 40th Cong., 2d Sess. App. 117 (1868) (Sen. Morrill) (spelling as in original); Cong. Globe, 39th Cong., 1st Sess. 2899 (1866) (Sen. Hendricks) (describing the "purpose" of Section 3 "to be to exclude the men who violated their oath of office"). For the Framers, the oath—not the office—was important.

And the Framers of Section 3 repeatedly noted that the president swore an oath to support the Constitution. Cong. Globe, 39th Cong., 1st Sess. App. 234 (1866) (Sen. Davis) (noting that "the President, before entering upon the execution of his office, should take an oath"). Moreover, lawmakers made no distinction between the presidential oath mandated by Article II and the oath of office for other federal and state officers. *See* Cong. Globe, 39th Cong., 1st Sess. 2901 (1866) (Sen. Trumbull) (stating that the president "is responsible to the Constitution and the law, and so is the most inferior postmaster in the land"); Cong. Globe, 40th Cong., 2d

Sess. 1811 (1868) (Sen. Corbett) (attaching an excerpt objecting that the "Rump Congress, illegally in session," was "acting outside of the Constitution they in common with the President took [an] oath to protect"); *see also* Cong. Globe, 37th Cong., 3d Sess. 89 (1862) (Sen. Davis noting that "the language in [the President's] oath of office . . . makes his obligation more emphatic and more obligatory, if possible, than ours"). Indeed, during debate on Section 3, Sen. Doolittle argued that Congress should not pass the provision because federal officers were already required by statute to take an oath supporting the Constitution, which was enough to protect against future rebellion. Cong. Globe, 39th Cong., 1st Sess. 2900 (1866). When defending his position, he specifically noted that the president was already required to take the "oath . . . specified in the Constitution." *Id*. at 2915.

The fact that presidents are elected—and not appointed—does not affect the Section's application. When debating Section 3, the provision's Framers explicitly remarked that it would apply to former governors, who owed their office to election, rather than appointment. For example, Rep. Jehu Baker of Illinois noted specifically that it would apply to state-level elected officials, including "Governors . . . who having sworn to support the Constitution, then did break their plighted faith." Cong. Globe, 39th Cong., 1st Sess. App. 257 (1866); Cong. Globe, 39th Cong., 1st Sess. 782 (1866) (Rep. Ward) (noting that "a former member of the rebel congress, once a Speaker of this House, whose lips are steeped in violated constitutional oaths, [had

been] elected Governor of South Carolina," and that "Loyal Alabama has a rebel general for Governor").

This approach is consistent with two opinions of then-Attorney General Henry Stanbery interpreting the meaning of "officer" in federal statutes that implemented Section 3 pending its ratification. Attorney General Stanbery—despite being "dedicated" to doing "everything in his power to resist congressional Reconstruction," Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 Wm. & Mary L. Rev. 2001, 2077 (2005)—determined that "executive or judicial officers of a state" clearly included governors, even though they were elected. *The Reconstruction Acts*, 12 U.S. Op. Att'y Gen. 141, 152 (1867) ("In one sense, and in a popular sense, the description, executive officers of a State, is applicable to a well-known class: the governor, lieutenant governor, State auditor treasurer, secretary, and State officials proper, who exercise executive functions at the seat of government"); *see also id.* at 190 (referring to the governor as one of the "legislative, executive, and judicial officers of the State"). Stanbery observed that "the term officer is used in its most general sense, and without any qualification," and was "intended to comprehend" any violator of the "official trust" of the United States. *Id.* at 158. Indeed, he explained, the provision was even more appropriately

applicable to federal officials, who stood "in more direct relation and trust to the United States than the officers of a State." *Id.*

These references to former governors invoked an obvious parallel between the chief executive officers of the state and federal governments. If contemporary observers understood that the highest elected official of each state was included under Section 3's reference to "officers," they would have understood the federal government's highest elected official to be included as well. Indeed, courts and contemporary observers often drew parallels between the "chief executive officer of a State" and the federal government's chief executive before Section 3 was passed. *See* Vlahoplus, *supra*, at 16 (citing *The Military Reconstruction Bill*, Charleston Mercury, Apr. 10, 1867, at 1, and several state cases); *see also Ex parte Wells*, 59 U.S. 307, 318 (1855) (using the power of state governors to interpret the president's constitutional pardon power); *Hawkins*, 1 Ark. at 587 (describing principles applicable to "[a]ll the officers of the government, except the President of the United States, and the Executives of the States"). Moreover, as one senator summarized, Section 3's Framers aimed to "strike[] at those who have heretofore held high official position," no matter their elected status, to target "the leaders of the past rebellion as well as the leaders of any rebellion hereafter to come." Cong. Globe, 39th Cong., 1st Sess. 3035-36 (1866) (Sen. Henderson). Governors and presidents were just as likely as appointed officials to become "leaders" of future rebellions.

III. Judicial Interpretations of Section 3 Support Its Application to Both Presidents and the Presidency.

In addition to the text and history of Section 3, the judicial treatment of this provision in the years following its passage supports its application both to presidents and the presidency.

In the decades following the Civil War, "political pressure for sectional reconciliation" led Congress to remove Section 3 disabilities for most former officers. Magliocca, *supra*, at 89. Many courts, however, considered the definitions of both "office" and "officer" during the brief period when the Section was being enforced. *Id.* at 93. In these instances, courts echoed the common-sense, public understanding of the terms. *See supra* Part I. An officer was "commissioned or authorized to perform any public duty." *In the Matter of Exec. Commc'n of the 14th Oct. 1868*, 12 Fla. 651, 652 (Fla. 1868); *Worthy*, 63 N.C. at 199. In *Worthy*, the Supreme Court of North Carolina considered whether a former sheriff was an "officer" for the purposes of Section 3. *Id.* at 202. The court reasoned that "[a]n office is a right to exercise a public or private employment, . . . and to which there are annexed duties." *Id.*; *see also In re Tate*, 63 N.C. 308, 309 (1869) (extending *Worthy*'s reasoning to "the office of Solicitor for the State"). Furthermore, courts made clear that the definition of "officer" was to be broadly construed. *United States*

v. Powell, 27 F. Cas. 605, 606 (C.C.D.N.C. 1871) (noting in jury charge that "[t]he words of the statute . . . are broad enough to embrace every officer in the state").[2]

Echoing the Fourteenth Amendment's Framers, these courts emphasized that the requirement of an oath was an important factor in identifying whether a certain person or position was an "office" or "officer." For the *Worthy* court, an officer was someone "required to take . . . an oath to support the Constitution of the State and of the United States." *Worthy*, 63 N.C. at 202; *see id.* ("I do not know how better to draw the distinction between an *officer* and a mere *placeman*, than by making his oath the test."). Because state law required sheriffs to take an oath to support the Constitution of the United States, *id.* at 202-03, the court reasoned that they were "officers" for the purposes of Section 3, *id.* at 205; *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 633 (1869) (Section 3 disqualified the defendant from being a state judge because "before the late rebellion, [he] held an office for the discharge of the duties of which he took an oath to support the Constitution of the United States"); *see generally Bunn v. People ex rel. Laflin*, 45 Ill. 397, 411 (1867) (state agents were not officers because "[n]o franchise is conferred upon them, nor are they required,

[2] These cases also clarify that contemporary jurists saw Section 3 as applying to elected as well as appointed officers. *See generally Powell*, 27 F. Cas. at 606 (applying statute implementing Section 3 to an elected sheriff); *Worthy*, 63 N.C. at 199 (same); *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (describing Section 3's application to "persons in office by lawful appointment or *election* before the promulgation of the fourteenth amendment" (emphasis added)).

as they would have been if the law makers supposed they were officers, to take an oath to support the Constitution of the United States or of this State"); *Shelby*, 36 Miss. at 277 (an individual is an "officer . . . [i]f the duties had been prescribed by law, and the party required to take an oath to perform them").

In other words, an officer was a person "commissioned or authorized to perform any public duty," *Exec. Commc'n*, 12 Fla. at 652, and such commission or authority was signified by the taking of an oath, *Worthy*, 63 N.C. at 202. As the Framers of the Fourteenth Amendment were well-aware, the president takes an oath to support the Constitution of the United States, *see* U.S. Const. art. II, § 1, cl. 8, reciting words that are even more "emphatic and obligatory," than those prescribed for other federal officers, *see supra* at 21. Thus, these cases further confirm what the text and history of Section 3 make clear: the provision applies to presidents no less than it does to other officers of the United States, and it prohibits individuals who violated their oath from holding the office of president no less than it prohibits them from holding other offices.

* * *

The Framers of Section 3 sought to ensure that federal officials who swore to support the Constitution and "violated that oath in spirit by taking up arms against the Government of the United States [would] be deprived for a time . . . of holding office." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866) (Sen. Sherman). This

modest goal—so central to America's Second Founding—would be undermined if Section 3 of the Fourteenth Amendment did not apply to the president and the presidency, as its plain text demands.

CONCLUSION

For the foregoing reasons, the Court should conclude that Section 3 of the Fourteenth Amendment applies to the president and the presidency.

Respectfully submitted,

Dated: October 6, 2023

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