No. A23-1354

STATE OF MINNESOTA
IN SUPREME COURT

JOAN GROWE, *et al.*,
PETITIONERS,

v.

STEVE SIMON, MINNESOTA SECRETARY OF STATE,
RESPONDENT.

BRIEF OF *AMICI CURIAE* REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, AND NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici Republican National Committee, National Republican Senatorial Committee, and National Republican Congressional Committee—collectively, National Republican Amici—are political organizations that help their members achieve electoral victories at the local, state, and national level, and who work to ensure a fair and equal electoral process. National Republican Amici have an interest in controlling their primaries and nominating the candidates of their choice. They also have an interest in ensuring that the rules governing elections are lawful and fairly applied. And they have an interest in promoting any of their potential nominees' ballot eligibility and electoral success.

INTRODUCTION

The Reconstruction Congress did not grant state officials sweeping authority to undermine the federal government.[1] But Petitioners have resurrected and reimagined Section Three of the Fourteenth Amendment to do just that. Their Petition makes a series of legal errors, and this Court should reject it. First and foremost, this is the wrong forum for this dispute. Petitioners seek to rewrite the text of Section Three to prohibit not just "hold[ing] office" but running for it, thereby authorizing pre-election adjudication that ultimately denies voters and Congress a say. Their theory of enforcement depends on the historically unreasonable proposition that the Reconstruction Congress gave States, including former Confederate States, the power to independently decide which national candidates and officeholders were illegitimate. Their proposed relief would interfere with political-party primaries, which violates Republicans' First Amendment rights. They misread the text and history to apply Section Three to former Presidents and future Presidents, even though the text references the Article VI oath of office that no President has ever taken. And last, they defy Congress's choice to end Section Three enforcement long ago.

"The people are the best judges [of] who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794-95 (1995) (internal quotation marks omitted). Petitioners set forth an unprecedently broad theory of Section Three's enforcement and scope that would displace that right and would have predictable escalation effects. They invite this

[1] No counsel for any party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the brief's preparation or submission.

Court to fire the first shot. Even former President Trump's most public critics, however, hope that cooler heads prevail. *E.g.*, Lessig, *A Terrible Plan to Neutralize Trump Has Entranced the Legal World*, Slate (Sept. 19, 2023), perma.cc/98J9-FFUU; Calabresi, *President Trump Can Not Be Disqualified*, Wall St. J. (Sept. 12, 2023), perma.cc/RX7S-RGF8; Feldman, *Alas, Trump Is Still Eligible to Run for Office*, Wash. Post (Aug. 20, 2023), perma.cc/T5DT-V7BV.

Amici Republican National Committee, National Republican Senatorial Committee, and National Republican Congressional Committee—collectively, National Republican Amici—do not take sides in presidential primary battles or endorse particular presidential primary candidates in open elections. Petitioner's arguments, however, threaten massive upheaval to the political process and future national candidates of all parties. Amici therefore respectfully oppose the Petition.

ARGUMENT

I. This is the inappropriate forum for this dispute.

A. Section Three does not apply until after an election.

Section Three cannot be enforced at the ballot stage. It governs only who can "hold" office. U.S. Const. amend. XIV, §3. It does not govern who can "run for" office or "be elected to" anything. To "hold" office means to presently possess it. *See Hold*, Black's Law Dictionary (2d ed. 1910) ("[T]o possess; to occupy; to be in possession and administration of; as to hold office."); *Hold*, Webster's American Dictionary of the English Language (1828) ("To have; as, to *hold* a place, office or title."). And regardless of whether Section Three is self-executing, any "'prophylactic'" extension must come from Congress. *Allen v. Cooper*, 140 S. Ct. 994, 1004

(2020). Former President Trump does not "hold" office by running for or being elected as President, so Section Three does not forbid him from either.

This interpretation is consistent with the rest of the Constitution. The Constitution always uses "hold" to refer to present occupation of the office, not the period of candidacy or election. *See, e.g.*, U.S. Const., art. II, §1 ("He shall hold his Office during the Term of four Years..."); *id.* art. I, §6 ("[N]o Person holding any Office under the United States, shall be a Member of either House...."). On Petitioners' account, Section Three deviates from this consistent usage despite no textual or historical evidence to support that reading.

Historical practice shows that Section Three did not apply before elections. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) ("'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'"); *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) ("the longstanding practice of the government can inform our determination of what the law is" (cleaned up)). After the ratification of Section Three, several candidates' qualifications were challenged under Section Three. *Hinds' Precedents of the House of Representatives of the United States* 474-86 (1907) [hereinafter *Hinds'*]. In each case, the challenges were *not decided* by election officials or judges, and not before the election. Instead, Congress resolved the challenges *after* the candidate won his election through an evidentiary and deliberative process. *See, e.g.*, 41 Cong. Globe 948-49, 2135, 5443-46, 5195-96 (1869-70).

Even when the challenged candidate was obviously disqualified—such as when he led Confederate troops in violent battles against the United States—the candidate did not implicate Section Three until he sought to "hold" office *after* the election. *See Hinds'* 478-86. At that time, a formal complaint would be lodged, Congress would hear evidence, and

Congress would decide before the person was sworn in. *See, e.g.*, *Hinds'* 474-86; 41 Cong. Globe 948-49, 2135, 5443-46, 5195-96 (1869-70). Courts did not decide qualification pre-election; it was a "political question beyond the competence of courts to decide." *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948).

Pre-election enforcement would also thwart Section Three's design. The last clause of Section Three gives Congress the power to "remove" the disability. U.S. Const. amend. XIV, §3. So Congress can ultimately seat anyone, regardless of whether they are qualified. But if state officials can impose the disability preemptively at the ballot stage, it would deprive Congress of this power and render the last clause meaningless in many cases. Of course, "[t]here is a presumption against a construction which would render a [provision] ineffective or inefficient." *Bird v. United States*, 187 U.S. 118, 124 (1902).

Finally, pre-election enforcement of Section Three silences voters. "The people are the best judges [of] who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." *Thornton*, 514 U.S. at 794-95 (quoting 2 *Debates on the Federal Constitution* 292-93 (Elliot ed. 1876) (Livingston)). But for a court to decide this question before the people can vote is to do exactly that. ""The true principle of a republic," in Alexander Hamilton's famous words, "is[] that the people should choose whom they please to govern them."" *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) (brackets omitted) (quoting 2 *Debates on the Federal Constitution* 257 (Elliot ed. 1876) (A. Hamilton)). Nothing more subverts that principle than pre-emptive ballot cleansing by government officials. Ballot cleansing makes our government no longer one ""by the people."" *Thornton*,

514 U.S. at 821 (quoting Lincoln, Gettysburg Address (1863)). Section Three's text and history do not allow it.

B. Section Three, a Reconstruction measure, did not give state officials power to frustrate the federal government or national will.

Petitioners' interpretation of Section Three is especially unlikely given the historical context. The overwhelming import of the Reconstruction Amendments, including the Fourteenth Amendment, was to weaken the ability of state governments to disrupt the mechanisms of the national government. "Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179 (1980).

Yet Petitioners would transform Section Three into a states'-rights superpower. On their account, the Reconstruction Congress gave *state* officials—here, state courts and state election officials—the power to decide the most sensitive political questions about loyalty and legitimacy, and to then decide on that basis who may stand for election to the most important position in the *national* government. Petitioners' claim that the Reconstruction Congress gave States, including former Confederate States, the power to independently decide national candidates' qualifications with no "congressional permission" is implausible. Petitioners' Br. 13.

Their theory that Section Three is "self-executing" goes even further. It requires state officials to nullify any actions taken by already-seated officers whom they conclude satisfy Section Three. As Petitioners' most-cited supporters explain, "anybody who possesses legal authority" at the state level can decide Section Three qualification not only in a pre-election ballot lawsuit, but also in lawsuits seeking to treat any later official actions as void. Baude &

Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev., at 22-29 (forthcoming 2024); *see also* Petitioners' Br. 12-29 (advancing broad theory of state power to enforce Section Three without congressional permission). After all, "[t]hose who cannot constitutionally hold office cannot constitutionally exercise government power, so the subjects of that power can challenge their acts as *ultra vires*." Baude & Paulsen, *supra*, at 29.

That is the last thing the Reconstruction Congress would have done. Section Three was enacted by the Reconstruction Congress as it fought to reassert its authority over States that warred against it and viewed the federal government and its officials as illegitimate. At the state level, many officials still believed that the Confederate States were legitimate and the Union was illegitimate. *See generally* Nicoletti, *Secession on Trial: The Treason Prosecution of Jefferson Davis* (2017). If Section Three gave a wide range of *state* officials the power to disqualify any candidates whom—in the state officials' views—engaged in insurrection or rebellion, then it would have been a self-sabotaging laughingstock. On Petitioners' theory, the Reconstruction Congress gave state officials a secessionist's dream: a new *constitutional* basis to not only eliminate pro-Union candidates from the ballot, but also nullify acts of that official, including their enactment or enforcement of federal legislation. *See* Baude & Paulsen, *supra*, at 17-35. The Reconstruction Congress didn't do that.

The imprudence of Petitioners' approach remains obvious today. Petitioners and their amici define "engag[ing]" in an "insurrection or rebellion" or aiding "enemies" remarkably broadly. On their theory, these terms cover any support, including "speech," for anyone's "'concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect.'" Petitioners' Br. 45-49; *cf. United States v. Greathouse*, 26 F. Cas. 18

(C.C.N.D. Cal. 1863) (Field, J.) (insurrection or rebellion are no less than treason); *accord, e.g.*, 37 Cong. Globe 2173 (1862) (Sen. Howard) (insurrection or rebellion "nothing more nor less than treason"). Petitioners emphasize that Section Three contains "no minimum threshold of violence or level of armament." Petitioners' Br. 47. Given Petitioners' broad definitions, their position that a wide range of state officials can independently enforce Section Three would court anarchy. Even opponents of former President Trump have foreseen the partisan escalation that this theory invites, and condemned their theory as generating a "nightmare of uncertainty." *See* Lessig, *supra*.

Here are just a few of the possible implications of leaving this decision to the States, keeping in mind Petitioners' broad definitions of the disqualifying terms:

- Vice President Harris, President Biden, and their staffs advocated for, marched with, and provided material support to rioters in the wake of George Floyd's death in 2020.[2] These rioters stormed the White House, injuring police officers and forcing the President and his family and staff to shelter in a bunker.[3] Over the course of several weeks, these rioters killed people, attacked and in some instances took over several government buildings, caused billions of dollars in property damage, and sought to establish alternative "governments" in the form of so-called "autonomous zones" across multiple U.S. cities.[4] If a state official believes that President Biden or Vice

[2] *E.g.*, Marcus, *Meet the Rioting Criminals Kamala Harris Helped Bail Out of Jail*, The Federalist (Aug. 31, 2020), perma.cc/9S6A-NBBG; Lange & Honeycutt, *Biden staff donate to group that pays bail in riot-torn Minneapolis*, Reuters (May 30, 2020), perma.cc/5FBJ-MTST; @JoeBiden, X (Aug. 28, 2020), perma.cc/GSH6-W9EP.

[3] *E.g.*, Hoffman, *More than 60 Secret Service officers and agents were injured near the White House this weekend*, CNN (May 31, 2020), perma.cc/5H3J-Q2BD; Leonnig, *Protesters' breach of temporary fences near White House complex prompted Secret Service to move Trump to secure bunker*, Wash. Post (June 3, 2020), perma.cc/E75G-XTJL.

[4] *E.g.*, Holcombe & Boyette, *Seattle police to remove concrete barriers around precinct that was temporarily vacated during George Floyd protests*, CNN (Apr. 3, 2021), perma.cc/KMJ8-VU5U; *Retired St. Louis police captain killed during unrest sparked by George Floyd death*, CBS News (June 3, 2020), perma.cc/69RN-EYAM; McEvoy, *14 Days of Protests, 19 Dead*, Forbes (June 8, 2020), perma.cc/P4YA-MJ5W; Deese, *Vandalism, looting following Floyd death sparks at least $1B in damages nationwide: report*, The Hill (Sept. 16, 2020), perma.cc/T2N4-KC67; Boyd, *Death Toll*

President Harris aided these efforts, he may eliminate President Biden and Vice President Harris from the ballot. And because these actions preceded the 2020 election, that would mean that the United States has not had a valid President since January 2021 and that all federal criminal convictions, regulations, and laws enacted since then are subject to legal challenge as "*ultra vires*." Baude & Paulsen, *supra*, at 29.

- After the Supreme Court heard an abortion case in 2020, Senator Chuck Schumer attempted to impede it from carrying out its lawful duty. He stood before the Court and threatened Justices by name: "I want to tell you Gorsuch. I want to tell you Kavanaugh. You have released the whirlwind and you will pay the price. You won't know what hit you if you go forward with these awful decisions."[5] Democrats continued this rhetoric as the Supreme Court decided *Dobbs*, and their supporters did turn violent. Many supporters illegally protested outside of Justices' homes to intimidate them and still continue to do so.[6] And at least one attempted to assassinate Justice Kavanaugh.[7] Assuming one believes Senator Schumer or his fellow Democrats engaged in conduct tantamount to an insurrection, then by Petitioners' rationale every judicial nominee voted on by them and every law passed by them since then may be invalidated on that basis.

- During the Trump Administration, many prominent Democrats publicly directed their supporters to violently confront Administration officials. As Democratic Congresswoman Maxine Waters said, "If you see anybody from that Cabinet in a restaurant, in a department store, at a gasoline station, you get out and you create a crowd and you push back on them."[8] Around the same time, many Democrat supporters did violently confront Trump Administration officials.[9] Worst of all, a Democrat supporter attempted to commit a mass murder of Republicans when he attacked a Republican baseball practice in advance of the Congressional Baseball Game, shooting at several sitting Republican members and staff and seriously

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Rises To An Estimated 30 Victims Since 'Mostly Peaceful Protests' Began, The Federalist (Aug. 19, 2020), perma.cc/2V7V-NTFP.

[5] *E.g.*, Moreno, *Schumer warns Kavanaugh and Gorsuch they will 'pay the price'*, The Hill (Mar. 4, 2020), perma.cc/TX9J-BUX8.

[6] *E.g.*, Blake, *Yes, experts say protests at SCOTUS justices' homes appear to be illegal*, Wash. Post (May 11, 2022), perma.cc/BEM7-FCU2.

[7] *E.g.*, Honderich, *US man charged with attempted murder of Justice Brett Kavanaugh*, BBC (June 9, 2022), perma.cc/A7T9-XB7P.

[8] *E.g.*, Warmbrodt, *Waters scares Democrats with call for all-out war on Trump*, Politico (June 25, 2018), perma.cc/E7XR-JAV4; Boyd, *10 Times Democrats Urged Violence Against Trump and His Supporters*, The Federalist (Jan. 8, 2021), perma.cc/CQ37-F29E.

[9] *E.g.*, Lurie, *Trump Officials Can No Longer Eat Out in Peace*, Mother Jones (June 23, 2018), perma.cc/JJL3-YP3D.

wounding Representative Steve Scalise.[10] On Petitioners' theory, state officials may disqualify these Democrats or nullify their acts if they determine them to constitute insurrection or rebellion, or giving aid or comfort to the enemies of the United States.

- Elected Democrats have supported, if not facilitated, widescale illegal immigration.[11] Since the Biden Administration took power, the number of foreign terrorists entering the country has increased significantly.[12] Many of these terrorists are members of official foreign-enemy groups.[13] State officials who believe that facilitating their criminal entry and future crimes constitutes aid or comfort to our enemies can remove these Democrats from ballots and nullify acts of this Administration. They could also treat judges appointed by Democrat Senators as illegally appointed without jurisdiction.[14]

Needless to say, just like the events underlying Petitioners' theory, Americans are divided on how to answer these questions. But allowing state officials in their own judgment to remove the offenders from the ballot or nullify federal authority is not something a Reconstruction Congress would prescribe.

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Allowing political

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[10] *E.g.*, Keeley, *Rep. Steve Scalise, Shot by Sanders Supporter, Replies to Request for Evidence of 'Bernie Bros' Being Bad: 'I Can Think of an Example'*, Newsweek (Feb. 20, 2020), perma.cc/3D4C-6SPX.
[11] Montoya-Galvez, *Biden administration sues Texas over floating border barriers used to repel migrants*, CBS News (July 24, 2023), perma.cc/UA4B-DPWA.
[12] Montoya-Galvez, *Are terrorists trying to enter the U.S. through the southern border? Here are the facts.*, CBS News (Oct. 11, 2023), perma.cc/89MW-55PW.
[13] Fleetwood, *DHS Admits Biden's Border Crisis Is Making It Easier For Terrorists To Enter America*, The Federalist (Oct. 11, 2023), perma.cc/X9NK-SXJ6 (citing DHS, *Homeland Threat Assessment* (2024), perma.cc/FML8-TP83).
[14] If this Court rules for Petitioners, it also means that Former President Trump was not the lawful President beyond the afternoon of January 6. That would render invalid and open to legal challenge or nullification any legislation that he signed during that time, any pardons he issued, and arguably any official acts done by the federal executive branch, which was, by this account, acting under the authority of an unconstitutional President. Courts may need to reopen every federal criminal investigation and revisit every pardon made during that time.

opponents to pick each other off ballots based on their normative differences would ruin confidence in our electoral processes.

C. The U.S. Supreme Court has cautioned against state control over similar election issues even outside the Reconstruction context.

Even outside the Reconstruction context, the United States Supreme Court has long warned in broad terms against state control over national election qualifications. "In light of the Framers' evident concern that States would try to undermine the National Government, they could not have intended States to have the power to set qualifications." *Thornton*, 514 U.S. at 810. States cannot even enforce *state* law to disqualify someone from federal office; those qualifications are set and enforced by the federal government, usually Congress. *Id.* at 810-11; *see also Chiafalo* 140 S. Ct. at 2324 n.4 ("if a State adopts a condition on its appointments that effectively imposes new requirements on presidential candidates, the condition may conflict with the Presidential Qualifications Clause"). Indeed, in the aftermath of the Civil War, Congress itself judged whether candidates for federal office were disqualified under *state* law, just like they did for federal law, including Section Three. *See Hinds'* 471.

In fact, the notion of state control over who appears on ballots for federal office would have been unfamiliar to the ratifiers of the Fourteenth Amendment. At the time, state and local governments did not control who was on the ballot at all. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 226 (2010) (Scalia, J., concurring in the judgment). Parties distributed ballots; state and local governments accepted and counted them. *Id.* It would have shocked the ratifiers to hear an argument that Section Three itself empowers state and local officials to intervene at the ballot stage to enforce their views of federal qualifications.

D. Congress has not authorized pre-election enforcement of Section Three in state courts.

The Fourteenth Amendment contemplates a mechanism by which Congress can authorize others to enforce Section Three, but Congress has not done so. Section Five of the Fourteenth Amendment gives Congress "the power to enforce, by appropriate legislation, the provisions of this article," including Section Three. U.S. Const. amend. XIV, §3. That Congress has not exercised that power to authorize private plaintiffs to sue or state officials to adjudicate Section Three means that this determination still belongs exclusively to Congress.

The drafters of Section Three understood that it would require implementing legislation. "If this amendment prevails," its principal proponent explained, "[i]t *will not execute itself*." 39 Cong. Globe 2544 (1866) (Rep. Stevens) (emphasis added). Even when Congress wanted Section Three enforced with respect to *state* offices, it believed that implementing legislation was required. That's why it authorized federal law enforcement actions to remove such officers. *See* Act of May 31, 1870 (First Ku Klux Klan Act), ch. 114, §§14, 15, 16 Stat. 140, 143.

Sure enough, immediately after Section Three was ratified, Chief Justice Chase dismissed a Section Three lawsuit because "legislation by Congress is necessary to give effect to" Section Three. *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869). He said that the removal of disqualified officeholders "can only be provided for by [C]ongress." *Id.* That remains the law today. This Court is therefore not the forum to entertain the underlying Petition.

II. Primary ballot cleansing violates National Republican Amici's First Amendment rights.

Enforcing Section Three at the *primary* stage would also violate the First Amendment rights of National Republican Amici and their members and supporters. "Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections." *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). National Republican Amici help carry out this function, including in the upcoming presidential primary in Minnesota.

A party's right to select candidates is protected by the First Amendment. "[T]he processes by which political parties select their nominees" are subject to the "limits imposed by the Constitution." *California Democratic Party v. Jones*, 530 U.S. 567, 572-73 (2000). "It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments." *Eu v. San Francisco Cnty. Democratic Cent. Committee*, 489 U.S. 214, 224 (1989). "'The ability of the members of the Republican Party to select their own candidate ... unquestionably implicates an associational freedom.'" *Jones*, 530 U.S. at 575 (ellipsis in original). It is "central to the exercise of the right of association." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986)

When a State intrudes "upon the selection of the party's nominee," it violates that First Amendment right. *Jones*, 530 U.S. at 577 n.7; *accord Cousins v. Wigoda*, 419 U.S. 477, 487-88 (1975). Among other things, that means "ballot access must be genuinely open to all, subject to reasonable requirements" such as objective popular-support metrics. *Lubin v. Panish*, 415 U.S. 709, 719 (1974). States must always leave it up to a party and its members "to select a 'standard bearer who best represents the party's ideologies and preferences.'" *Eu*, 489 U.S. at

224; *see also Republican Party of Connecticut*, 479 U.S. at 216 (primary is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community").

Removing former President Trump from the ballot violates this right. It denies ballot access to one of the Party's potential candidates. It ruptures the "process[] by which [Republicans] select their nominees" and denies them their "'ability … to select their own candidate.'" *Jones*, 530 U.S. at 572, 575. And it unconstitutionally puts in the hands of the State rather than the party the right to select a "'standard bearer who best represents the party's ideologies and preferences.'" *Eu*, 489 U.S. at 224. If Republicans cannot nominate the candidate of their choice, then the primary system will no longer be theirs.

Nor can Section Three supersede this First Amendment right. "[T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." Garner & Scalia, *Reading Law: The Interpretation of Legal Texts* 180 (2012). Since Section Three's phrase "hold office" and the First Amendment right of political parties can easily be interpreted harmoniously by not applying Section Three at the primary stage, that harmonious interpretation must prevail. *See* Cooley, *A Treatise on the Constitutional Limitations Which Rest the Legislative Power of the States of the American Union* 58 (1868) ("one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together").

Even if they did conflict, the conflict would be governed by the general-specific canon and the First Amendment would win. Even "when conflicting provisions simply cannot be reconciled," "the specific provision is treated as an exception to the general rule." Garner &

Scalia, *supra*, at 183. The First Amendment carves out one specific protected right—of political parties to select their own candidates at the primary stage—from Petitioners' vast construction of Section Three's prohibitions. That specific protection must prevail.

III. Section Three does not apply to former Presidents.

Section Three applies only to people who have previously taken the Article VI Oath to support the Constitution. A prerequisite to Section Three disqualification is "an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States." U.S. Const. amend. XIV, §3. But that is not the oath that Presidents take. They take the Article II oath to "preserve, protect, and defend the Constitution." U.S. Const. art. II. And they are not and never have been considered "executive … Officers … of the United States" under the Article VI Oath Clause. This exclusion of the presidency makes sense because the drafters had no former Presidents on their minds.

A. Presidents do not take an oath "to support" the Constitution.

Everyone who drafted Section Three was familiar with the Article VI Oath Clause, which was part of the original Constitution. Article VI requires an "Oath" of "Senators and Representatives," "Members of the several State Legislatures," and "all executive and judicial Officers, both of the United States and of the several States." U.S. Const. art. VI. They must take an oath to "support this Constitution." *Id.*; *see also Illinois v. Krull*, 480 U.S. 340, 351 (1987). Congress has always required this oath by law. *See* 5 U.S.C. §3331 (to "support" the Constitution).

Section Three applies to officers who took the Article VI oath. Section Three refers to an "oath." U.S. Const. amend. XIV, §3. It refers to the same exact categories of people who take that oath: "a member of Congress," "a member of any State legislature," "an officer of the United States," or "an executive or judicial officer of any State." *Id.* And it refers to not just any oath, but the oath to "support the Constitution." *Id.* The drafters of Section Three were referring to the same oath "to support" the Constitution everybody already knew. "Generally, 'identical words used in different parts of the same statute are ... presumed to have the same meaning.'" *Robers v. United States*, 572 U.S. 639, 643 (2014). Congress's decision to refer to the Article VI oath in Section Three makes sense because that was the relevant oath for every past officeholder possibly within Congress's contemplation.

But Presidents have never taken the Article VI oath. The statute carrying into effect the Article VI Oath Clause confirms that it applies to a wide range of government officials "*except the President*." 5 U.S.C. §3331 (emphasis added). There is "no historical evidence that the President has ever taken a separate oath pursuant to the Article VI Oath or Affirmation Clause." Tillman & Blackman, *Offices and Officers of the Constitution Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation* Clauses, 62 S. Tex. L. Rev. 349, 423 (2023).

Presidents take a different oath. Their oath is prescribed by Article II. *See* U.S. Const. art. II, §1; *see also Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 415 (1950) ("For the President, a specific oath was set forth in the Constitution itself. Art. II, §1."). In that oath, they do not swear to "support" the Constitution, as Section Three requires. They swear to "preserve, protect, and defend the Constitution." *See* U.S. Const. art. II, §1 ("I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and

will to the best of my ability, preserve, protect and defend the Constitution of the United States"). Former President Trump has never taken the Article VI oath "to support" the Constitution as used in Section Three, but only the Article II oath. He therefore falls outside the coverage of Section Three.

B. The President is not an "officer of the United States" because that phrase never includes the President in the Constitution.

The presidency is also not listed in Section Three among those positions whose past oath would subject them to Section Three. Section Three applies only to a "member of Congress," "officer of the United States," "member of any State legislature," or "executive or judicial officer of any State." U.S. Const. amend. XIV, §3. Petitioners contend that the President must be an "officer of the United States." Petitioners' Br. 36-45. He is not. That is why he is not required to take the Article VI Oath, even though it applies to "all executive … Officers … of the United States." U.S. Const. art. VI. And it is consistent with the most eminent authorities on whether the phrase "officer of the United States" includes the President.

When Section Three was ratified, it was a matter of public knowledge that the President was not an "officer of the United States" for constitutional purposes. In his famous *Commentaries*, Joseph Story wrote that because the Constitution's Impeachment Clause lists the President, Vice President, "and *all civil officers* (not all *other* civil officers)," that means that the President and Vice President were "contradistinguished from, rather than ... included in the description of, civil officers of the United States." 2 Joseph Story, *Commentaries on the Constitution of the United States* 260 (1833).

Less than a decade after the Fourteenth Amendment's ratification, at least two Senators said the same thing. Senator Newton Booth said that "the President is not an officer of the United States." *Congressional Record Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap* 145 (1876). Senator Boutwell said that "according to the Constitution, as well as upon the judgment of eminent commentators, the President and Vice-President are not civil officers." *Id.* at 130. Around the same time, a treatise confirmed what Justice Story wrote: "[i]t is obvious that ... the President is not regarded as 'an officer of, or under, the United States.'" Mcknight, *The Electoral System of the United States* 346 (1878).

In the twentieth century, two future Supreme Court Justices came to similar conclusions. Future-Justice Scalia wrote that "when the word 'officer' is used in the Constitution, it invariably refers to someone *other than* the President or Vice President." *Memorandum from Antonin Scalia to Honorable Kenneth A. Lazarus, Re: Applicability of 3 C.F.R. Part 100*, OLC, at 2 (Dec. 19, 1974), perma.cc/GQA4-PJNN. And future-Chief Justice Rehnquist wrote that "statutes which refer to 'officers' or 'officials' of the United States are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive." *Memorandum from William H. Rehnquist to the Honorable Egil Krogh, Re: Closing of Government Offices*, OLC, at 3 (Apr. 1, 1969), perma.cc/P229-BAKL. Recently, one scholar who was initially hopeful about Section Three disqualification concluded that it would not work because the President is not an "officer of the United States." *See* Calabresi, *Donald Trump Should be on the Ballot and Should Lose*, Volokh Conspiracy (Sept. 16, 2023), perma.cc/LP5Y-MJ97 ("In my foolish youth, I once argued mistakenly in print that the President is an 'Officer of the United States.' Thirty-three years of academic research and

writing on the presidency has persuaded me that the words 'officer of the United States' are a legal term of art, which does not apply to the President." (citation omitted)).

The Constitution refers to the Presidency as an "office," *e.g.*, U.S. Const. art. II, but the phrase "officer of the United States"—the one used in Section Three—never encompasses the President. Each of the four other constitutional uses of that phrase confirm as much:

- *Article VI Oath Clause.* Article VI requires an oath of "*all executive* and judicial *Officers* … *of the United States*." U.S. Const. art. VI. No President has ever taken an Article VI Oath. *See* Tillman & Blackman, *supra*, at 423. Indeed, the statute carrying into effect the Article VI Oath Clause confirms that it applies to a wide range of government officials "*except the President*." 5 U.S.C. §3331 (emphasis added).

- *Commissions Clause.* Article II assigns to the President the duty to "commission *all* the *officers of the United States*." U.S. Const. art. II, §3 (emphases added). But "[t]he President has never commissioned himself." Tillman & Blackman, *supra*, at 412. Nor have Presidents received commissions from their predecessors. *See id.* That unbroken practice would be unconstitutional if "all the officers of the United States" included the President.

- *Appointments Clause*. Article II assigns to the President the power to "appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all* other *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, §2 (emphases added). Again, since the President does not appoint himself, the phrase "all other Officers of the United States" does not include him. And his "appointmen[t]" is not otherwise provided for because the President is not "appoint[ed]" at all—he is elected. *See* U.S. Const. amend. XII; *id.* art. II.

- *Impeachments Clause*. Last, Article II describes the impeachment process for the "President, Vice President, and *all* civil *officers of the United States*," U.S. Const. art. II, §4. (emphasis added). The first two items would be superfluous if "all" of the "officers of the United States" included the President. *But see* Garner & Scalia, *supra*, at 174 ("If possible, every word ... is to be given effect."). And because the last category does not contain the word "other," it is not a catch-all clause that also comprehends the first two categories, but rather a distinct third category. Again, that's because the President is *never* a constitutional "officer of the United States."

Drafting history confirms what the text suggests. When the Impeachments Clause was drafted, it initially referred to the President, Vice President, and "*other* civil officers of the U.S."

2 *The Records of the Federal Convention of 1787*, at 545, 552 (Farrand ed., 1911). But upon further deliberation, the drafters changed the Impeachments Clause to remove the word "other." *Id.* at 600. That change does not make sense if the President is an "officer of the United States."

It is unsurprising that Section Three does not reach beyond those who took the Article VI oath. First, at the time, *all* former Presidents had previously taken the Article VI oath as state or federal officeholders before their elections, so reaching further would have been unnecessary. Second, there were no former Presidents on the drafters' minds at all anyway. Only one former President had joined the Confederacy, but he was dead. *See John Tyler*, White House Historical Ass'n, perma.cc/23RJ-AWWJ. It is fantastic of opponents of former President Trump to say that the drafters anticipated and expanded Section Three to reach him.

IV. Section Three does not cover holding the presidency.

Even if former President Trump had taken the Article VI Oath, Section Three does not disqualify *anyone* from becoming the President. By its terms, Section Three disqualifies people only from holding the following positions: "Senator or Representative in Congress," "elector of President and Vice-President," or "any office, civil or military, under the United States, or under any State." U.S. Const. amend. XIV, §3.

The first draft of what became Section Three provided that nobody could "hold the office of President or Vice President of the United States, Senator or Representative in the national Congress, or any office now held under appointment from the President of the United States, and requiring the confirmation of the Senate.…" 39 Cong. Globe 919 (1866). Congress then eliminated "the office of President or vice president of the United States" and enacted Section Three without it. *See* U.S. Const. amend. XIV, §3. Of course, courts "presume

differences in language like this convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017); *see also Thornton*, 514 U.S. at 810 n.20 (deciding election-qualifications questions based in part on "[t]he Framers' decision to reject a proposal allowing for States to recall their own representatives"). It is not for this Court to second-guess the drafters' decision.

If the drafters wanted to use Section Three to overturn presidential elections, it is unlikely that they would have been indirect. Although the drafters identified specifically "member[s] of Congress," "member[s] of any State legislature," and even "*elector[s]* of President and Vice-President," Petitioners contend that they also covered duly elected Presidents—the most important position in America—in the same catch-all class as entry-level bureaucrats. It is more likely that "officer under the United States" referred only to subordinate offices and that the highest offices were identified by name. This follows from the "commonsense principle[] of communication" that drafters communicate major decisions—like whether they are proposing to disqualify duly elected Presidents—with clarity. *Biden v. Nebraska*, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring).

This also makes sense in historical context. "[T]he President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). The drafters of the Fourteenth Amendment were not trying to subvert the national will, but a regional will. Their concerns were with things like "prevent[ing] the intrusion of arch traitor Jefferson Davis into the *Senate*." 39 Cong. Globe 2537 (1866). Section *Two*, which restricted representatives from the former

Confederate States, ensured that no Confederate would soon become President as a matter of math, and nobody mentioned such a concern in the ratification debates.

V. Congress stayed Section Three.

Section Three's final clause allows Congress to eliminate its force. Because it was tailored for a unique crisis, Section Three's last clause provides that "Congress may by a vote of two-thirds of each House, remove such disability." U.S. Const. amend. XIV, §3.

Congress has eliminated the disability of Section Three in full. In 1872, it enacted a law, with two-thirds support in both Houses, that provided blanket removal of any disqualifications under Section Three:

> [A]ll political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.

Act of May 22, 1872, ch. 193, 17 Stat. 142. Because former President Trump is among "all persons whomsoever," and does not fit into any of the exceptions, this statute therefore eliminates "all political disabilities imposed by [Section Three]" as to him.

The 1872 statute completed the plan for what was once going to be guaranteed in Section Three's actual text. The Joint Committee on Reconstruction had originally proposed a draft of Section Three that automatically terminated on "the 4th day of July, in the year 1870." *See Journal of the Joint Committee of Fifteen on Reconstruction* 118 (1914); *see also* 39 Cong. Globe 2460 (1866).

Congress decided, in enacting this 1872 statute, that Section Three was an unusual remedy for an unusual time. It mercifully put Section Three to rest. In fact, the previous

statutes authorizing Section Three enforcement were formally removed in 1948 in a codification that all agreed made no substantive changes to the law—because there was nothing left to enforce going forward. *See* Act of June 25, 1948, ch. 646, §39, 62 Stat. 869, 993; *see also* Act of June 25, 1948, 62 Stat. 683; Barron, *The Judicial Code*, 8 F.R.D. 439 (1949). When political opponents now resurrect Section Three—in state courts, rather than in Congress—to try to remove a candidate from the ballot based on events over which Americans are divided, perhaps it is easy to see why Congress put this provision to rest. Today's decision makers must respect that decision.

CONCLUSION

This Court should deny the petition.

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CERTIFICATE OF DOCUMENT LENGTH

This request complies with the word limitations of Minn. R. Civ. App. P. 132.01 The brief was prepared with proportional font, using Microsoft Word, which reports that the request contains 6,824 words, exclusive of the parts that can be excluded.

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