STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT LABRANT, ANDREW BRADWAY, NORAH MURPHY, WILLIAM NOWLING,

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant,

DONALD J. TRUMP,

Intervening Party.

Case No. 23-000137-MZ
Hon. James Redford

EXHIBIT A TO 10/23/2023 MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY GERARD N. MAGLIOCCA

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STATEMENT OF AMICUS CURIAE

Gerard N. Magliocca is the Samuel R. Rosen Professor at the Indiana University Robert H. McKinney School of Law. He files this brief in support of Petitioners because this case presents important questions within his professional expertise, namely, the history of the drafting and early implementation of Section 3 of the Fourteenth Amendment.[1]

In 2020, Professor Magliocca drafted an article on Section 3 of the Fourteenth Amendment that was made publicly available on the Social Science Research Network (SSRN) before January 6, 2021 and was published shortly thereafter. *See* Gerard N. Magliocca, "Amnesty and Section Three of the Fourteenth Amendment," 36 *Constitutional Commentary* 87 (2021). This article is cited as reliable authority by courts and litigants in Section 3 cases. *See, e.g.*, *Cawthorn v. Amalfi*, 35 F.4th 245, 259 (4th Cir. 2022). Professor Magliocca is also the author of a biography of Congressman John A. Bingham, who was one of the drafters of the Fourteenth Amendment as a member of the Joint Committee on Reconstruction.[2]

INTRODUCTION

> No Person shall 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, or under any State, who, having previously taken 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, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than amicus curiae or his counsel made a monetary contribution to its preparation or submission.

[2] *See* Gerard N. Magliocca, *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment* (2013).

Section 3 of the Fourteenth Amendment is the constitutional expression of President Lincoln's pledge in his Second Inaugural Address: "With malice toward none, with charity for all." Instead of imposing criminal punishments or other harsh penalties on former officials who served the Confederacy, the Framers of the Fourteenth Amendment chose only to exclude them from office. Moreover, they gave Congress the exclusive power to forgive these officials if the public interest warranted their return to office. This Court must now apply these principles to the January 6, 2021 attack on the Capitol and to Donald Trump's role in that attack.

This *amicus* brief relies on history to answer four legal questions. First, is the public use of violence by a group of people to prevent or hinder the execution of the Constitution an insurrection within the meaning of Section 3? Second, does the phrase "engaged in insurrection" in Section 3 include words as well as deeds? Third, does Section 3 apply to a former President who took an oath to "preserve, protect, and defend" the Constitution? Fourth, may Section 3 be enforced by state courts without an Act of Congress? The answer to all four questions is "Yes."

ARGUMENT

I. A Section 3 insurrection occurs when a group of people use public violence to prevent or hinder the execution of the Constitution.

When the Fourteenth Amendment was adopted in 1868, "insurrection" was understood to include any public use or threat of violence by a group of people to prevent or hinder the execution of law. An insurrection was not limited to attempts to overthrow the government.[3] The language

[3] For a contemporary example, see Iowa Code § 718.1 (2022) ("An insurrection is three or more persons acting in concert and using physical violence against persons and property thereof, with the purpose of interfering with, disrupting, or destroying the government of the state or any subdivision thereof, or to prevent any executive, legislative, or judicial officer or body from performing its lawful function.").#

of Section 3 restricts the types of insurrections that trigger disqualification, because the insurrection must be against the Constitution of the United States. See U.S. Const., amend. XIV, § 3 (stating that disqualification occurs when a relevant official has taken an oath "to support the Constitution of the United States" and "shall have engaged in insurrection or rebellion against the same"). Thus, Section 3 applies to any public use of violence by a group of people to prevent or hinder the execution of the Constitution itself.

A. Ante-Bellum Insurrections.

During the congressional debate on the Fourteenth Amendment, Senators went out of their way to emphasize that Section 3, like the Amendment's other general provisions, was not just about the Civil War. Senator Peter Van Winkle of West Virginia said that Section 3 was "to go into our Constitution and to stand to govern future insurrections as well as the present; and I should like to have that point definitely understood." Cong. Globe, 39th Cong., 1st Sess. 2900 (1866) (statement of Sen. Van Winkle). Senator John Henderson of Missouri similarly declared: "The language of this section is so framed as to disenfranchise from office the leaders of the past rebellion as well as the leaders of any rebellion hereafter to come." *Id*. at 3035–36 (statement of Sen. Henderson); *cf.* "Speech of the Hon. John Hannah," *Cincinnati Commercial*, Aug. 25, 1866, at 2 (declaring that Section 3 meant that "the people by their sovereign act will give to the Constitution a steel-clad armor to shield them from the assaults of faithless domestic foes in all time to come").

The drafters of the Fourteenth Amendment were no strangers to the concept of an insurrection, even prior to the Civil War. The country's most famous antebellum example—the Whiskey Insurrection of 1794 (also called the Whiskey Rebellion)—involved a violent tax protest by farmers that prevented tax collection by federal officials. See Brady J. Crytzer, *The Whiskey*

Rebellion: A Distilled History of an American Crisis (2023); H.M. Brackenridge, *History of the western insurrection in western Pennsylvania: commonly called the whiskey insurrection* (1859). The Whiskey Insurrection occurred in western Pennsylvania and was driven by an unpopular federal tax on distilleries. *See, e.g.,* Ron Chernow, *Alexander Hamilton* 468-78 (2004). Some federal customs officials who tried to enforce the tax were tarred and feathered and others were attacked by armed crowds. President Washington responded by calling out the militia to restore order and later pardoned the only two participants who were convicted of a crime. At no point during the Whiskey Insurrection was there an attempt to overthrow the government, but sources around the time of the Fourteenth Amendment's adoption nevertheless referred to the incident as an insurrection. *See, e.g.*, 2 Joseph Story, *Commentaries on the Constitution of the United States* 116 (3d ed. 1858) (referring to "the insurrection in Pennsylvania, in 1794"); *see also* Cong. Globe, 39th Cong. 1st Sess. 2534 (1866) (statement of Sen. Eckley) (discussing the "whiskey insurrection").

Five years later, another insurrection broke out in Pennsylvania. Fries's Insurrection, also called Fries's Rebellion, was a tax protest in a different part of the state. See Paul Douglas Newman, *Fries's Rebellion: The Enduring Struggle for the American Revolution* (2004). This time the unpopular tax was on property, and the intimidation was directed at federal tax assessors by groups of armed Pennsylvania-Dutch farmers. President Adams followed Washington's example by summoning the militia to restore order and pardoning many of the participants. John Adams, "Proclamation of Pardons," (May 21, 1800) (discussing the "insurrection against the just authority of the United States of sundry persons in the counties of Northhampton, Montgomery, and Bucks, in the State of Pennsylvania" and granting some pardons to "persons concerned in the said insurrection"). The leading modern account of Fries's Rebellion states that those involved "never

intended to make war against the governments of the state or the nation," and no actual violence occurred. Newman, *Fries's Rebellion*, x.

B. Contemporary Authorities on Insurrection.

Ante-bellum dictionaries defined insurrection as any public use or threat of violence by a group of people to prevent or hinder the execution of law. For example, *Webster's Dictionary* defined insurrection as, "A rising against civil or political authority; the open and active opposition of a number of persons to the execution of a law in a city or state. It is equivalent to sedition, except that sedition expresses a less extensive rising of citizens. It differs from rebellion, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction." 1 Noah Webster, *American Dictionary of the English Language* 111 (1828); 1 John Boag, *A Popular and Complete English Dictionary* 727 (1850) (using virtually identical language). Although not expressly stated, the implication was that a "rising against" civil authority would be by the use or threatened use of violence, rather than through peaceful protest.

Contemporary judicial decisions and legal authorities confirm this broad common-law understanding of insurrection.[4] For example, in 1861 Justice John Catron charged a grand jury that an insurrection "must be to effect something of a public nature concerning the United States—'to overthrow the government,' or some department thereof, or 'to nullify and totally hinder the execution of some U.S. law or the U.S. Constitution,' or some part thereof; or to compel its abrogation, repeal, modification or change, by a resort to violence." John Catron, Robert W. Wells

[4] Post-bellum nineteenth-century cases took the same view. *See In re Charge to Grand Jury*, 62 F. 828, 829-30 (D.C.N.D. Ill. 1894) ("Insurrection is 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.").

& Samuel Treat, *Charge to the Grand Jury By the Court, July 10, 1861* (1861).[5] In *The Prize Cases*, decided during the Civil War, the Supreme Court declared that "[i]nsurrection 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." *The Amy Warwick*, 67 U.S. 635, 665 (1862). And General Order No. 100, issued in 1863 to the Union Army, defined insurrection as "the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government." Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* 42 (1863).

C. The More Stringent Section 3 Standard.

The text of Section 3 placed an important limitation on the common-law definition of insurrection. Only an insurrection against the Constitution itself can lead to disqualification from office. An insurrection against state law or an ordinary federal law is not a Section 3 insurrection. This means that neither of the leading ante-bellum insurrections would have been considered Section 3 insurrections if either had occurred after 1868. The Whiskey Insurrection and Fries's Insurrection each involved resistance to a single federal tax. Neither involved resistance to the Constitution in the way that secession did during the Civil War. This textual limit on the common law of insurrection was intentional. The point of Section 3 was *not* to disqualify from office all those who had engaged in insurrection of whatever kind.

Nevertheless, the historical background to Section 3, like the text itself, confirms that insurrection is not limited to cases of organized rebellion seeking to overthrow the government.

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[5] Justice Catron's jury charge is available on the Library of Congress website at https://www.loc.gov/resource/rbpe.0860070a/?st=gallery.

An insurrection can also be the public use of force by a group to prevent or hinder the execution of the Constitution of the United States. This is so even if the insurrectionists believe that their cause is just or lawful. Many Confederates thought that secession was a just and lawful act grounded in the principles of the Declaration of Independence. They still engaged in insurrection according to Section 3.

In sum, a Section 3 insurrection occurs when a group of people use public violence to prevent or hinder the execution of the Constitution itself.

II. The phrase "engaged in insurrection" includes any voluntary words or deeds in furtherance of an insurrection against the Constitution.

Though Section 3 disqualifications frequently involved individuals who served in the Confederate government or army, the provision was not limited to such cases. Rather, the phrase "engaged in insurrection" was understood during Reconstruction to refer to any voluntary act in furtherance of an insurrection against the Constitution. And an act in furtherance of a Section 3 insurrection could be by words as well as deeds, so long as the words encouraged such an insurrection. This broad definition of "engaged" makes sense, given that a Section 3 insurrection is a grave constitutional offense but does not lead to any criminal punishment.

A. Attorney General Opinions.

The United States Attorney General issued opinions in 1867 interpreting federal statutes interpreting the language of Section 3 prior to its ratification that gave the phrase a broad reading.[6] The Attorney General stated that "engaged in rebellion" required "some direct overt act, done with the intent to further the rebellion." 12 Op. Att'y Gen. 141, 164 (1867). That opinion went on to

[6] The Attorney General was construing the First and Second Military Reconstruction Acts, which used the proposal for Section Three as the standard for disenfranchising voters in the ex-Confederate states from voting in elections for conventions to write new state constitutions and to ratify the Fourteenth Amendment.

emphasize that "in the sense of this law persons may have engaged in rebellion without having actually levied war or taken arms," and that "wherever an act is done voluntarily in aid of the rebel cause . . . it must work disqualification under this law." *Id.* at 161, 165. And yet again it emphasized that "[a]ll those who, in legislative or other official capacity, were engaged in the furtherance of the common unlawful purpose, or persons who, in their individual capacity, have done any overt act for the purpose of promoting the rebellion, may well be said, in the meaning of this law, to have engaged in rebellion." *Id.* at 161-62. In a later opinion, the Attorney General clarified that while "[d]isloyal sentiments, opinions, or sympathies would not disqualify[,] . . . when a person has, by speech or by writing, incited others to engage in rebellion, he must come under the disqualification." 12 U.S. Op. Att'y Gen. 182, 205 (1867).

These interpretive opinions by the Attorney General carried great weight at the time for the meaning of Section 3. President Andrew Johnson and his Cabinet approved of the Attorney General's interpretation, despite the President's opposition to the proposed Fourteenth Amendment. They expressly considered and adopted the formulation that "engaging in rebellion . . . must be an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose." See 6 James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* 528-31 (1897) ("In Cabinet," June 18, 1867, summary item 16); *id.* at 552-56 ("War Dep't, Adjutant-General's Office, Washington," June 20, 1867). They also expressly embraced the determination that "[d]isloyal sentiments, opinions, or sympathies would not disqualify, but where a person has by speech or writing incited others to engage in rebellion he must come under the disqualification." *Id.* at 531. President Johnson issued a directive laying out these interpretations and commanded Union Army generals in the South to follow them. *See id.* at 552-56.

B. Judicial Decisions.

Contemporary judicial decisions confirm that "engaged in insurrection" was read broadly. In 1869, the North Carolina Supreme Court upheld a Section 3 disqualification and defined "engaged in insurrection" as "[v]oluntarily aiding the rebellion, by personal service or by contributions, other than charitable, of anything that was useful or necessary." *Worthy v. Barrett*, 63 N.C. 199, 203 (1869). Similarly, in an early case involving the application of the 1870 Ku Klux Klan Act, a federal circuit court charged a jury that to have "engaged" in insurrection or rebellion meant "a voluntary effort to assist the Insurrection or Rebellion, and to bring it to a successful termination." *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D. N.C. 1871). Thus, an individual could be disqualified under Section 3 without personally engaging in violence and without being charged with or convicted of any crime.

In sum, the phrase "engaged in insurrection" should be read broadly to include any voluntary words or deeds that further an insurrection against the Constitution of the United States or contribute anything useful or necessary to such an insurrection.

III. Section 3 applies to a former President who took an oath to "preserve, protect, and defend" the Constitution.

A former President is an "officer of the United States" subject to disqualification under Section 3. There are at least two historical reasons for that conclusion. First, the relevant sources make clear that an officer for purposes of Section 3 includes anyone who held an office requiring an oath to support the Constitution. The oath was at the heart of Section 3's text and purpose. Second, the President was repeatedly described as an "officer of the United States" immediately preceding and following Section 3's proposal by Congress.

A. The Oath Makes the Officer.

The text of what became Section 3 was introduced in the Senate. Section 3 was described as a new qualification for office comparable to the requirement that the President be a natural-born citizen. *See* Cong. Globe, 39th Cong., 1st Sess. 2901 (1866) (statement of Sen. Trumbull) (observing that neither Section 3 nor the Natural-Born Citizen Clause were criminal punishments). Senator Jacob Howard of Michigan explained that the proposal was limited to individuals who had previously taken an oath to support the Constitution because: "Where a person has taken a solemn oath to support the Constitution of the United States there is a fair moral implication that he cannot afterward commit an act which in its effect would destroy the Constitution of the United States without incurring the guilt of at least moral perjury." *Id.* at 2898 (statement of Sen. Howard).

Supporters of Section 3 repeatedly articulated Senator Howard's reliance on the oath to justify the provision:

- "[Section 3] is a measure of self-defense . . . . [L]ooking to the future peace and security of this country, I ask whether it would be just or right to allow men who have thus proven themselves faithless to be again intrusted with the political power of the State. . . . Shall we again trust men of this character, who, while acting under the obligation of the oath to support the Constitution of the United States, thus betrayed their country and betrayed their trust?" *Id.* at 2918 (statement of Sen. Willey).

- "[T]he theory of" Section 3 is "that persons who have violated the oath to support the Constitution of the United States ought not to be allowed to hold any office." *Id.* at 2897–98 (statement of Sen Hendricks).

- Section 3 "is intended as a prevention against the future commission of offenses, the presumption being … that the man who has once violated his oath will be more liable to violate his fealty to the Government in the future." *Id.* at 2916 (statement of Sen. Grimes).

While the Framers of Section 3 took care to ensure that any disqualifications from office would not be applied to all insurrectionists, the American people were told that *any person* who broke his oath to uphold the Constitution under that provision was excluded from *any position* in national or state government unless Congress granted a waiver. *See, e.g.*, "Speech of Hon. John A. Bingham,"

New Hampshire Statesman, Aug. 24, 1866, at 1 (explaining to voters that Section 3 meant that "no man who broke his official oath with the nation or State, and rendered service in this rebellion shall, except by the grace of the American people, be again permitted to hold a position, either in the National or State Government").

In 1869, the North Carolina Supreme Court's opinion upholding the Section 3 disqualification of a local official emphasized the importance of the oath in defining a Section 3 officer. *Worthy v. Barrett*, 63 N.C. 199 (1869). In *Worthy*, the court affirmed the decision by a county commission to refuse to seat an elected sheriff. 63 N.C. at 200. The court held that, having previously taken an oath to the Constitution and then having engaged in insurrection by holding office under the Confederacy, the sheriff "ought to be excluded from taking [the oath] again, until relieved by Congress." *Id*. at 204. The *Worthy* court stated it knew of no way "better to draw the distinction between an *officer* and a mere *placeman* than by making his oath the test. Every officer is required to take not only an oath of office, but an oath to support the Constitution . . . of the United States." *Id.* at 202. In other words, "*[t]he oath to support the Constitution is the test*." *Id.* at 204 (emphasis in original).

Based on this definition of "officer," a former President plainly qualifies. Article II of the Constitution requires that, "[b]efore he enter on the Execution of his Office," the President take an oath to "preserve, protect, and defend the Constitution of the United States." Art. II § 1. Indeed, this is the only oath that is explicitly enumerated in the Constitution's text. And the legislative history indicates that Section 3 was designed specifically to "strik[e] at those who have heretofore held high official position, and who therefore may be presumed to have acted intelligently." Cong. Globe, 39th Cong, 1st Sess. 3036 (1866) (statement of Sen. Henderson). For that reason, it would

defy the evident historical purpose of Section 3 to disqualify lower-level officials from any public office while allowing an insurrectionist former President to hold the presidency.

The fact that the presidential oath of office does not include the word "support" is irrelevant. In 1870, a federal judge instructed a grand jury in a Section 3 case that "[t]he oath which shall have been taken need not be in the precise language of the amendment: 'To support the Constitution of the United States.'" "Charge of Judge Emmons, of Michigan, to the United States District Court Grand Jury," *The Tennessean*, Dec. 4, 1870, at 3. The relevant test for constitutional oaths was whether "substantially, though not literally, they include an obligation to the Federal power." *Id.* Likewise, a leading constitutional law treatise published in 1868 stated: "The senators and representatives, the members of state legislatures, and all executive and judicial officers of the states and of the nation, are also required to take an oath to support the Constitution. The President's oath is but an amplification of this; it enters into more detail, but does not add another compulsive clause. The solemn promise in particulars 'to preserve, protect and defend the Constitution,' does not imply more than the equally solemn promise in generals 'to support' it." John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 443 (New York: Hurd & Houghton, 1868).

B. Contemporary sources referred to the President as an officer of the United States.

There is also ample evidence from Reconstruction that the President was considered an "officer of the United States" without reference to his oath. Notably, President Andrew Johnson repeatedly described himself as "the chief executive officer of the United States" in high-profile proclamations establishing provisional governments in many ex-Confederate States in 1865. *See* Andrew Johnson, "Proclamations Reorganizing a Constitutional Government," in 6 Richardson, *Messages and Papers of the Presidents*, 312-16, 318-25, 326-31 (reprinting President Johnson's

executive proclamations establishing new governments in North Carolina, Mississippi, Georgia, Texas, Alabama, South Carolina, and Florida). These references, combined with others made while the Fourteenth Amendment was under consideration calling the President the "executive officer of the United States," support the view that the President is an "officer of the United States" for purposes of Section 3. *See, e.g.,* Cong. Globe., 40th Cong., 2d Sess. Supp. 236 (1868) (statement of Mr. Evarts) (describing his client, President Johnson, as "the Executive Officer of the United States" during Johnson's Senate impeachment trial); Cong. Globe., 40th Cong., 2d Sess. 513 (1868) (statement of Rep. Bingham) ("It is vain that gentlemen stand here and intimate that the President, because he is the executive officer of the United States . . . is above any statute of the country."); "Major General Butler: His Address to the Citizens in Court House Square Last Evening," *Chicago Tribune*, Oct. 18, 1866, at 4 (reprinting a speech by Representative Benjamin Butler stating that "the President is, in himself, one department of the Government, and when he speaks, he speaks as the Chief executive officer of the United States").

Some scholars draw a distinction between the phrases "officers of" the United States and an "office under the United States."[7] They argue that, even if the Presidency is an "office under the United States," that the president himself is not an "officer of" the United States. On this theory, if a former President had never held any public office *other* than the presidency, and later engaged in insurrection, that individual would not be disqualified by Section 3. Put another way, although that former President held an "office," he would not have been an "officer" when he took the oath of office.

[7] *See* Josh Blackman & Seth Barrett Tillman, *"*Is the President an 'officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment," 15 *New York University Journal of Law and Liberty* 1 (2021).

Even assuming that this contested interpretation of the original Constitution is correct, Section 3 makes no such distinction between an office and an officer. For all the reasons explained above, it was well understood that an officer in Section 3 was simply someone who held a public office that required an oath to the Constitution. Moreover, the President at the time that Section 3 was proposed repeatedly called himself "the chief executive officer of the United States" in proclamations that were widely reprinted in newspapers because they involved the vital question of how the ex-rebel states would be governed.

Finally, the most relevant contemporary debate expressly *disclaimed* any technical distinction between "officer of" and "office under." In one case decided in the same year that Section 3 was proposed, a select committee of the House of Representatives considered whether Representative Roscoe Conkling of New York violated federal law by simultaneously serving as a federal prosecutor and as a congressman. The committee unanimously rejected Conkling's defense, part of which hinged on a distinction between "officer of" and "officer under":

> "[A] little consideration of this matter will show that 'officers of' and 'officers under' the United States are (as said by Mr. Dallas in this Blount case, p. 277) 'indiscriminately used in the Constitution. . . . It is irresistibly evident that no argument can be based on the different sense of the words 'of' and 'under . . . . In either case he has been brought within the constitutional meaning of these words . . . because they are made by the Constitution equivalent and interchangeable."

Cong. Globe 39th Cong. 1st Sess. 3935, 3939 (1866).

In short, Section 3 disqualifies anyone who engaged in insurrection after swearing an oath to support the Constitution, up to and including former Presidents.

IV. Section 3 is a constitutional requirement that can be enforced by state courts without authorization from Congress.

State courts routinely enforce federal constitutional provisions in civil and criminal cases pursuant to state statutes and procedural rules. Section 3 is no exception. The text of the provision

gives Congress an exclusive role only in granting a disqualification waiver. Precedent confirms that state courts can enforce Section 3 without congressional authorization and that Congress granted Section 3 waivers in anticipation of state court enforcement.[8]

A. State Court Decisions and Congressional Waivers.

The clearest evidence that state courts can enforce Section 3 without congressional authorization is that state courts did enforce Section 3 before Congress enacted general enforcement legislation. As described earlier, the North Carolina Supreme Court enforced Section 3 in 1869 and expressly relied on a state statute to do so. *See Worthy v. Barrett*, 63 N.C. 199, 200 (1869) (relying on North Carolina Acts of 1868, ch. 1, § 8); *In Re Tate*, 63 N.C. 308 (1869) (citing *Worthy* as controlling authority); *cf. State ex rel. Downes v. Towne*, 21 La. Ann. 490 (1869) (considering a Section 3 disqualification case under state law but declining to reach the merits). Congress did not enact general Section 3 enforcement legislation until 1870. *See* First Ku Klux Klan Act, ch. 114, § 14, 16 Stat. 140, 143-44 (1870).

Moreover, Congress granted Section 3 waivers to many individuals prior to enacting general enforcement legislation. *See* "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," ch. 1, 16 Stat. 607-613 (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," ch. 5, 15 Stat. 436 (1868). People needed to apply to Congress for a waiver

[8] One state official enforced Section 3 against a congressional candidate. In 1868, the Governor of Georgia refused to certify the election of John Christy to the House of Representatives on Section 3 grounds. See 1 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States, ch. 14, at 470 (1907). Christy was the editor of a pro-Confederate newspaper during the Civil War. See Cong. Globe, 40th Cong. 3d Sess. 1767 (1869) (statement of Rep. Butler) (accusing Christy of "sustaining the confederate government" through his newspaper work).

through a private bill and would have done so only if they thought that a waiver was needed. A waiver was needed because people were subject to removal and disqualification by state courts. Section 3 waivers would have been pointless in 1868 or 1869 (especially in the ex-Confederate states readmitted to the Union) if state courts were without power to enforce Section 3 in the absence of federal implementing legislation. Put another way, Congress could not have "removed" a disability that did not exist.

B. *Griffin's Case* is unique.

In arguing that federal legislation is required to activate Section 3, some commentators rely on Chief Justice Chase's decision riding circuit in *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869). Even assuming that *Griffin's Case* was correctly decided on its facts, the decision is not binding authority and is readily distinguishable from this Section 3 challenge to Donald Trump.[9]

Griffin's Case originated in the "unreconstructed" or "disorganized" state of Virginia, before it was re-admitted to the Union. *Griffin's Case*, 11 F. Cas. 7; Act of Jan. 26, 1870, ch. 10, 16 Stat. 62-63 (readmitting Virginia to the Union). In this unreconstructed state, Chief Justice Chase concluded that an Act of Congress enforcing Section 3 was required to permit a federal court to grant *habeas corpus* relief to a defendant. The defendant was convicted in a trial presided over by a Virginia state judge who was presumably ineligible to serve under Section 3. *Griffin's Case* did not seek to oust an official, was not decided by a state court, and did not involve an effort

[9] A federal judge and scholars (myself included) have questioned the logic of *Griffin's Case*. *See Cawthorn v. Amalfi*, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring in the judgment) (describing the case as "confused and confusing"); Gerard N. Magliocca, "Amnesty and Section Three of the Fourteenth Amendment," 36 *Constitutional Commentary* 87, 102-08 (2021); William Baude and Michael Stokes Paulsen, "The Sweep and Force of Section Three," 172 *University of Pennsylvania Law Review*, at 35-49 (forthcoming 2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751. But this Court does not need to wade into this academic debate.

to apply duly enacted state law to enforce constitutional qualifications for office. Unreconstructed states did not enforce Section 3 on their own because they were under federal military control, had not yet ratified the Fourteenth Amendment, and lacked the ordinary prerogatives of a state, most notably representation in Congress. *See* First Military Reconstruction Act, ch. 153, 14 Stat. 428-430 (1867). In short, the extraordinary circumstances that gave rise to *Griffin's Case* have no counterpart in 21st century Michigan.

Moreover, Chief Justice Chase's interpretation of Section 3 in *Griffin's Case* was contradicted by his position in the treason prosecution of Jefferson Davis. In that case, the Chief Justice supported Davis's argument—again in his capacity as a Circuit Justice in Virginia—that Section 3 barred the treason prosecution, in part because Section 3 "executes itself" and "needs no legislation on the part of congress to give it effect." *See In re Davis*, 7. F. Cas. 63, 90, 102 (C.C.D. Va. 1871). Neither *Griffin's Case* nor *Davis* is binding on this Court, since Chief Justice Chase was acting as a federal circuit judge. But his "contradictory holdings, just a few years apart, draw both cases into question and make it hard to trust [his] interpretation." *Cawthorn v. Amalfi*, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring in the judgment).[10]

In sum, state courts—including this Court—can enforce Section 3 without any authorization from an Act of Congress.

[10] Although the *Davis* case report is dated 1871, Chief Justice Chase's support for Davis's position on Section 3 was recorded as part of a legal proceeding in 1868. *See In re Davis*, 7. F. Cas. at 102. Thus, the "contradictory holdings" in *Davis* and *Griffin's Case* were, in fact, just a few months apart.

CONCLUSION

The public use of violence by a group of people to prevent or hinder the execution of the Constitution of the United States is an insurrection within the meaning of Section 3. The phrase "engaged in insurrection" includes words as well as deeds in furtherance of an insurrection against the Constitution. Section 3 applies to a former President who swore an oath to preserve, protect, and defend the Constitution. And state courts can enforce Section 3 without congressional authorization.

Respectfully submitted,

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