IN THE SUPREME COURT OF THE STATE OF OREGON
MANDAMUS PROCEEDING

STATE EX REL MARY LEE NELSON, MICHAEL NELSON, JUDY HUFF, SAMUEL JOHNSON, and CHAD SULLIVAN, electors of Oregon,
Petitioner, Petitioner on Review

v.

LAVONNE GRIFFIN-VALADE, Secretary of State of Oregon,
Respondent, Respondent on Review.

and

Donald J. Trump and Donald J. Trump for President 2024, Inc.
Intervenors-Respondent

S070658

INTERVENORS-RESPONDENTS' MEMORANDUM IN OPPOSITION TO MANDAMUS

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I.

INTRODUCTION

Relators want this Court and Secretary of State LaVonne Griffin-Valade to wade into Presidential politics by issuing a writ of mandamus declaring Donald J. Trump ineligible for the Presidency and removing him from the Oregon primary ballot. That is inappropriate for several reasons.

First, Relators lack standing. They assert no interest in this case other than the generalized interest in elections shared by all Oregon citizens. That is not sufficient to invoke this Court's mandamus jurisdiction. Across the nation and across several presidential elections, many challenges to candidates' eligibility have failed for lack of standing. This one does too.

Second, the Secretary correctly recognizes that Oregon law does not authorize her to police presidential primary candidates' qualifications. Oregon's election statutes tell the Secretary exactly what criteria to apply in determining which presidential candidates shall appear on primary ballots. Those specific criteria do not include any inquiry into a candidate's eligibility to be President. Multiple other States have similar statutes, and their courts have held that state officials lack authority to examine the qualifications of presidential primary candidates. The same is true in Oregon: Secretary Griffin-Valade has correctly concluded that state law does not require or allow her to do what Relators want her

to do.

Third, mandamus is not the appropriate remedy here, for multiple separate reasons. For one thing, Relators are asking this Court to resolve a complex factual dispute that has never been addressed by the Secretary, and as to which no factual record exists. Determining that a presidential candidate "engaged in insurrection" in violation of the Fourteenth Amendment—which Relators want this Court to do—is the opposite of the kind of clear legal duty enforceable by mandamus and is outside the scope of authority of the secretary of State. Additionally, Relators have not established that the ordinary course of law is inadequate here. Oregon law expressly allows for a direct appeal of the Secretary's actions or inactions, and there is no reason Relators could not have followed that ordinary path, and a request to do so now is untimely. Their evident preference to skip the Oregon Administrative Procedures Act and normal appellate process does not remotely warrant the exercise of this Court's extraordinary mandamus jurisdiction.

Fourth, under the U.S. Constitution, disputes over a presidential candidate's qualifications are non-justiciable political questions. A long line of decisions from across the country—and again, spanning several presidential election cycles—recognizes that deciding who can be President is committed by the Constitution to the electoral and legislative processes, not the courts. The Constitution certainly does not contemplate questions of presidential qualifications being decided

piecemeal in a 51-jurisdiction marathon of ballot-access litigation.

Fifth, long-settled law establishes that Section Three can be enforced only as prescribed by Congress—not under state law as Relators seek.

Sixth, even if Section Three of the Fourteenth Amendment were enforceable by mandamus in this Court, it does not apply to these factual circumstances. Relators' suit is premature because even when Section Three applies, it bars only *holding* office, not running for it. Moreover, Section Three does not apply to the Presidency at all.

Seventh and finally, President Trump simply did not violate Section Three. The events of January 6 included serious crimes and violence by others, but they did not amount to an "insurrection" within the meaning of the 14th Amendment. On top of that, President Trump did nothing to "engage in" the riot at the Capitol—to the contrary, he instructed the crowd to protest "peacefully" and, when violence occurred, he called for it to stop.

For all these reasons, the writ should be denied.

II.

REASONS FOR DENYING THE WRIT

A. Relators Lack Standing.

Pursuant to ORS 34.105, a "relator" on whose relation a mandamus proceeding is brought must be a "beneficially interested party." Thus, "[f]or 50

years," settled Oregon law has "held that mandamus requires that a relator … have a private interest in or claim the immediate benefit of the act sought to be coerced." *Marteeny v. Brown*, 321 Or App 250, 274–75, 517 P3d 343, 358 (2022) (cleaned up). This means that a relator "must [have] more than just an interest in common with the public generally." *State ex rel. Young v. Keys*, 98 Or App 69, 72, 778 P2d 500, 502 (1989); *accord Marteeny*, 321 Or App at 275, 519 P3d at 358.

Relators here badly fail that test. They prominently admit that the only "interest" they seek to enforce "is the correct application of the U.S. Constitution to the content of Oregon election ballots." (Pet 1.) That is an interest that they share with every other citizen of Oregon. None of the Petitioners is running against President Trump in the Republican primary. None of them alleges (or could allege) that President Trump's presence on the primary ballot will prevent them from voting for their preferred candidate. In fact, none of them alleges that they plan to vote in the Republican presidential preference primary at all. (St. Facts at 8-9). As Defendant Secretary of State points out, the Republican Party presidential nominee is actually decided by party rule at a national convention by elected delegates. ORS 248.315. The individuals who vote on those delegates are called Precinct Committeepersons and have already been elected. The right to free association with respect to political party nominees has been fervently protected from interference by the States. *See Democratic Party of United States v. Wisconsin*, 450

US 107, 121–22, 101 S Ct 1010, 1019 (1981) (Overturning the Wisconsin Supreme Court and ruling the political parties nominating processes were protected against state infringement).

Plaintiffs-Relators have no special, individual, or unique role in that process, different than any other voter, which could qualify as a beneficial interest. Plaintiffs-Relators assert that only Mary Lee Nelson is even a registered Republican who registered on November 30th, 2023—which was too late to become an elected Precinct Committeeperson.

The mandamus precedents cited by Plaintiffs-Relators illustrate that this is not enough. Relators can point to no precedent in which a generalized interest in election law was held to support standing to seek mandamus relief. Rather, the ballot-access cases they cite were mostly brought by candidates or initiative proponents who themselves sought ballot access. *See State ex rel Kristof v. Fagan*, 369 Or 261, 263, 504 P3d 1163, 1165 (2022); *State ex rel. Sajo v. Paulus*, 297 Or 646, 648, 688 P2d 367, 369 (1984); *Roberts v. Myers*, 260 Or 228, 229, 489 P2d 1148, 1148 (1971); *Bradley v. Myers*, 255 Or 296, 297, 466 P2d 931, 931–32 (1970). The only other cases Relators cite are ones that were brought by candidates for office who sought to have their rivals removed from the ballot. *McAlmond v. Myers*, 262 Or 521, 523, 500 P2d 457, 458 (1972); *Pense v. McCall*, 243 Or 383, 385, 413 P2d 722, 723 (1966).

Relators' lack of standing is not unusual. Many courts around the country have considered challenges to President Trump's eligibility, based on arguments similar to Relators' here. A large number of those courts have dismissed such claims due to the plaintiffs' lack of standing. *E.g.*, *Castro v. Scanlan,* 86 F4th 947, 2023 US App LEXIS 31016 (1st Cir. 2023); *Castro v. Fontes,* 2023 US Dist LEXIS 215802, 2023 WL 8436435, at *1 (D Ariz Dec. 5, 2023) (collecting cases); *Clark v. Weber*, 2023 US Dist LEXIS 189172, 2023 WL 6964727 (CD Cal Oct. 20, 2023); *Schaefer v. Trump*, 2023 US Dist LEXIS 184731, 2023 WL 6798507 (SD Cal Oct. 13, 2023); *Caplan v. Trump*, No. 2023 US Dist LEXIS 199051, 2023 WL 6627515, at *1 (SD Fla Aug. 31, 2023).

When past plaintiffs challenged other presidential candidates' qualifications in previous election cycles, most courts reached the same conclusion. *E.g., Hollander v. McCain*, 566 F Supp 2d 63, 71, 2008 US Dist LEXIS 56729 (DNH 2008), *Cohen v. Obama*, 2008 US Dist LEXIS 100011, 2008 WL 5191864, *1 (DDC Dec. 11, 2008); *Berg v. Obama*, 586 F3d 234, 239, 2009 US App LEXIS 24805 (3d Cir 2009); *Kerchner v. Obama*, 612 F3d 204, 207, 2010 US App LEXIS 13608 (3d Cir 2010); *Drake v. Obama*, 664 F3d 774, 781–82, 2011 US App LEXIS 25763 (9th Cir 2011); *Sibley v. Obama*, 866 F Supp 2d 17, 20, 2012 US Dist LEXIS 78245 (DDC 2012); *Grinols v. Electoral Coll.*, 2013 US Dist LEXIS 73446, 2013 WL 2294885, at *10 (ED Cal May 23, 2013), *aff'd*, 622 F Appx 624,

2015 US App LEXIS 19125 (9th Cir 2015); and *Taitz v. Democrat Party of Mississippi*, 2015 US Dist LEXIS 178814, 2015 WL 11017373, at *20 (SD Miss Mar 31, 2015); *Const. Ass'n ex rel. Rombach v. Harris*, 2021 US Dist LEXIS 185859, 2021 WL 4442870, at *2 (SD Cal Sept 28, 2021); *Booth v. Cruz*, 2016 US Dist LEXIS 12087, 2016 WL 403153, at *2 (DNH Jan 20, 2016), *report and recommendation adopted*, 2016 WL 409698 (DNH Feb 2, 2016) ("[A]n individual voter challenging the eligibility of a candidate for President lacks standing to assert a claim based on the general interests of the voting public.") (citation omitted)); *Fischer v. Cruz*, 2016 US Dist LEXIS 47131, 2016 WL 1383493, at *2 (EDNY Apr 7, 2016). While those decisions did not consider standing under Oregon's mandamus statute, they illustrate the same general principle: ballot-disqualification claims cannot be brought by just anyone, and simply believing that a candidate is barred from office does not generate standing to sue about it.

In short: if Relators had standing to seek mandamus based only on their desire to have the law correctly applied, then the statutory beneficial-interest requirement would mean nothing at all. That is not the law. The petition should be dismissed for lack of standing.

B. Oregon Law Does Not Authorize State Officials to Exclude Presidential Candidates From A Primary Ballot Based On Eligibility Concerns.

The Secretary and the Solicitor General have concluded that the Secretary lacks authority to exclude a presidential candidate from the primary ballot based on

the candidate's alleged ineligibility. Their reasoning is straightforward and correct: Oregon law specifically instructs which names may appear on a presidential primary ballot, and those instructions neither require nor permit any inquiry into a candidate's eligibility.

As relevant here, the Secretary of State has only those "duties as shall be assigned to [her] by law." Or Const Art VI, Sec 2. As this Court long since explained in a different context, the Secretary's "duties and powers … are limited and controlled by the constitution and statutes, and he cannot go beyond them." *Boyd v. Dunbar*, 44 Or 380, 382, 75 P 695, 696 (1904).

On the topic at hand, Oregon statutes speak very clearly. ORS 249.078 provides that "[t]he name of a candidate for a major political party nomination for President of the United States shall be printed on the ballot only" if one of two conditions is met. The first condition is if "the Secretary of State … determine[s] that the candidate's candidacy is generally advocated or is recognized in national news media." ORS 249.078(1)(a). That statute applies here, and the Secretary of State is given sole discretion to determine who is generally advocated or recognized. The second, alternative condition is if the Secretary of State timely receives a "nominating petition described in this section." ORS 249.078(1)(b). The only requirement that "this section" describes for the nominating petition is that it must contain the signatures, names, and addresses of 1,000 voters from each

Congressional district who belong to the candidate's party. ORS 249.078(2).

That is all that the statute provides: presidential primary candidate names "shall be printed on the ballot" if one of those two conditions is met. "[I]n the statutory context, in ordinary usage, 'shall' creates a mandatory duty." *Friends of Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 346 Or 415, 426, 212 P3d 1243, 1249 (2009) (cleaned up). The statute does not create any exceptions to this duty or authorize any other investigation by the Secretary of State, much less an adjudication of what would equate to criminal charges. Thus, if a presidential primary candidate satisfies the statutory criteria, no plausible reading of the statute allows the Secretary—or any State official—to exclude him or her from the ballot because of a qualification dispute.

This conclusion is reinforced by the fact that, under other statutes, when Oregon election statutes *do* authorize candidates' names to be stricken from the primary ballot based on ineligibility, they *exempt* presidential candidates. ORS 249.020 and 249.031 allow candidates to file for a primary ballot by submitting "a nominating petition or declaration of candidacy" that includes, among other things, "a statement that the candidate will qualify if elected." ORS 249.031(1)(f). And ORS 249.004(1) authorizes the Secretary to "verify the contents of the documents filed with" her. Thus, when these statutes apply, they authorize the Secretary to determine whether a candidate is eligible for the office he or she is seeking. In

other words—to the extent that Oregon law authorizes the Secretary to remove candidates from the ballot based on alleged disqualifications, it comes from these statutory provisions.

But the Legislature has *exempted* presidential primary candidates from these provisions. As ORS 249.078 instructs, presidential candidates in primary elections are determined "*only*" by the separate procedures identified in that section (involving media coverage and voter petitions). And none of those procedures involves any statement by the candidate at all, let alone an attestation that he or she is qualified to be President. As a result, nothing in Oregon election statute authorizes or requires the Secretary to determine whether a presidential candidate meets the qualifications for office.

Oregon similarly exempts presidential candidates from its statutory procedures for correcting ballots to remove candidate names. ORS 254.115(1)(c), 254.165(1). For most elected positions, the statutes require that a primary ballot include "[t]he names of all candidates … who have not died, withdrawn, or become disqualified." ORS 254.115(1)(c). But the statute specifies that this *does not apply* to "[t]he names of candidates … for President of the United States." ORS 254.115(1)(e). *Those* names appear on the ballot as long as the candidates have "qualified for the ballot under ORS 249.078"—which refers to media coverage and voter petitions—and contain no provision for removing disqualified candidates.

In this regard, Oregon is in good company among the States. Other States' election statutes similarly require most election candidates to file for office and attest to their eligibility, but they exempt presidential primary candidates from that requirement. Similarly to Oregon, these States direct that candidates for presidential primary ballots instead be identified from news reporting, or by the state parties, or both. *See Davis v. Wayne Cnty. Election Comm'n*, 2023 Mich App LEXIS 8382, 2023 WL 8656163, at *11–12, *14 (Mich Ct App Dec. 14, 2023) (discussing Michigan's statutory framework); *Growe v. Simon*, 997 NW2d 81, 82, 2023 Minn LEXIS 571 (Minn. 2023) (discussing Minnesota election laws). When plaintiffs in those States—represented by the same counsel as Relators here—have challenged President Trump's eligibility, those States' courts have agreed with Secretary Griffin-Valade's position and held that their election laws do not require or permit state election officials to make any inquiry into presidential primary candidates' qualifications. In fact, the only State court to have barred President Trump from the ballot—Colorado—expressly held that "Colorado's Election Code differs from other states' election laws" because it *does* require presidential primary candidates to affirm their qualifications. *Anderson v. Griswold*, 2023 Co 63, 86 n. 10, 2023 WL 8770111, at *8–9, *18 n.10 (Co Dec. 19, 2023).

In summary, Oregon law tells the Secretary of State exactly how to compile the presidential primary ballot. Those instructions do not require, or even permit,

any investigation of whether candidates are eligible to be President. Thus, the Secretary does not have the duty—or even the power—to do what Relators want the Court to order her to do. That disposes of Relators' claims. The petition must be denied.

C. Mandamus Relief Is Procedurally Inappropriate Here.

Even setting aside Relators' lack of standing and their facially meritless reading of Oregon's election statutes, they have failed to establish the procedural prerequisites for the extraordinary mandamus relief that they seek. That is true for two independent reasons. First, the relief Relators seek requires the adjudication of disputed facts, and so mandamus will not lie. And second, the ordinary appellate process offers Relators another plain, speedy, and adequate remedy, so they were required to follow that route rather than seeking mandamus.

1. Mandamus Cannot Compel the Discretionary Adjudication of a Novel and Controversial Candidate-Disqualification Theory.

Under Oregon law, "mandamus is an extraordinary remedy." *Oregon State Hosp. v. Butts*, 358 Or 49, 56, 359 P3d 1187, 1190 (2015) (cleaned up). By statute, "[a] writ of mandamus may be issued" only "to compel the performance of an act which the law specially enjoins, as a duty resulting from office." ORS 34.110. Moreover, "though the writ may require" a government official "to exercise judgment … it shall not control judicial discretion." *Id.* "[A]s a general rule," then, "mandamus lies to require [government officers] to act, but it will not compel them

to decide disputed questions of fact in a particular way." *State ex rel Kristof v. Fagan*, 369 Or 261, 279, 504 P3d 1163, 1173 (2022) (quoting *State ex rel Ware v. Hieber*, 267 Or 124, 128, 515 P2d 721 (1973)); *accord, e.g., Oregon State Hosp. v. Butts,* 358 Or 49, 58–59, 359 P3d 1187, 1192 (2015). Put another way, "a writ of mandamus can be used to compel the execution … of a duty prescribed by law, but not to control the exercise of that duty, when the act to be done involves the exercise of judgment or discretion." *Kristof*, 369 Or at 279, 504 P3d at 1173 (cleaned up). For that reason, when constitutional questions "rest on factual as well as legal determinations," and "the secretary has not had the opportunity to develop a record," they are "inappropriate for this court's original mandamus jurisdiction." *Id.* at 285–86, 504 P3d at 1177.

That is exactly the situation here. Relators seek a writ ordering the Secretary of State "to exclude Donald J. Trump from" the ballot on the ground that he is not qualified for the Presidency for having engaged in insurrection—or else to show cause why she should not be so ordered. (Pet 23–24.) Even assuming that the Secretary were authorized by Oregon law to address whether a presidential candidate is qualified (and she is not, as shown above), Relators' request is manifestly an attempt to compel the Secretary to decide this complex factual and legal dispute in a particular way—without any factual record ever having been compiled or any findings of fact ever having been made. That relief is not available

in mandamus.

Nor could the problem be fixed by simply directing the Secretary to *consider* whether President Trump is qualified. Relators do not request that relief, and even if they had, it would not be warranted. That is because Relators' argument suffers from a more fundamental problem. Even if the statutes on which Relators rely applied to presidential primary elections—and they do not, as explained above—they at most would *permit*, but not require, the Secretary to assess candidate qualifications. The only relevant statute that even arguably applies to presidential primary elections is ORS 254.165(1), which directs that: "If the filing officer determines that a candidate has died, withdrawn or become disqualified … the name of the candidate may not be printed on the ballots." When this statute applies, it *permits* the Secretary to make a qualification determination—but nothing in it *requires* or "specially enjoins" the Secretary to do so. The statute does not say that the Secretary must or shall determine whether any candidate has died or become disqualified. It simply directs the Secretary what to do *if* she does make such a determination.[1] Presidential candidates who are no longer actively

1. The law is different with respect to candidates for elected positions other than the Presidency. For those other positions, Oregon law expressly requires that primary ballots "*shall state* *** [t]he names of all candidates … who have not died, withdrawn or become disqualified," and "*may not* contain the name of any person other than those." ORS 254.115(1)(c), (3)(a) (emphasis added). But the statute

campaigning frequently appear on Oregon primary ballots as Oregon's May primary occurs so late in the cycle[2]. The Secretary of State clearly has no historical practice or duty to remove them.

Mandamus relief is available only to compel government officials to perform duties that the law requires—not to compel them to perform tasks that the law permits but does not require. If Oregon law even allows removing disqualified candidates from Oregon's presidential primary ballot at all, this task clearly falls into that second category. Thus, mandamus will not lie to compel a duty that does not exist for an eligibility inquiry or the exercise of discretion.

2. There Are Other Plain, Speedy, and Adequate Remedies.

In addition, Relators' request for mandamus is improper because the normal appeal process is available. "[T]his court has noted that, ordinarily there will be no reason why issues of election law, like any other, cannot be decided by the Court of Appeals." *Couey v. Atkins*, 357 Or 460, 483, 355 P3d 866, 880 (2015) (cleaned up). That is the situation here.

Mandamus is appropriate only when there is no other "plain, speedy, and

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does not allow presidential candidates to be removed from the ballot on that basis. *See* ORS 254.115(e).

2. Ted Cruz, Tulsi Gabbord, Elizabeth Warren, and Bernie Sanders all publicly dropped out prior to Oregon's 2016 or 2020 primary but the Secretary's election records show appeared.

adequate remedy." ORS 34.110. This Court has described that limitation on mandamus relief as "an overarching, fundamental, and time-honored requirement." *State ex rel. Portland Habilitation Ctr., Inc. v. Portland State Univ.*, 353 Or 42, 49, 292 P3d 537, 542 (2012) (footnote omitted). Moreover, the Court has clarified that "[w]hether the ordinary remedy is 'speedy'" depends on whether "the decision of a circuit court" could "be expedited as readily as can the proceeding in mandamus." *Sajo*, 297 Or at 649, 688 P2d at 370. "The time required for appeals is not a factor" in the speediness analysis, because parties "are not entitled by right to a decision of this court." *Id.*

For these reasons, this Court has explained that "[g]enerally, a petition for mandamus relief is not the accepted and proper way to secure judicial review of decisions of the Secretary of State under the election laws." *State ex rel Ofsink v. Fagan*, 369 Or 340, 342, 505 P3d 973, 974 (2022) (quoting *Sajo*, 297 Or at 648, 688 P2d 367). That is because

> [o]ther statutory remedies are available to address such decisions. *See, e.g.*, OAR 165-014-0028(6) (providing for review of the secretary's orders concerning compliance with procedural constitutional requirements in the Marion County Circuit Court under ORS 183.484, which governs judicial review of orders in other than contested cases, or under ORS 246.910, which governs appeals by persons adversely affected by orders made by the secretary under any election law); ORS 34.105 - 34.240 (providing for mandamus actions in circuit court); ORS 28.010 - 28.160 (providing for declaratory judgment actions).

Id.

Especially relevant here is ORS 246.910, which allows appeals to the circuit court—and from there to the Court of Appeals—from "any act or failure to act by the Secretary of State." The statute even authorizes the courts to "give precedence on their dockets to" such appeals. ORS 246.910(4). "A direct appeal is generally a plain, speedy, and adequate remedy." *Hill v. Johnson*, 371 Or 494, 498, 539 P3d 204, 207 (2023). Thus, the availability of a direct appeal—such as that under ORS 246.910—precludes mandamus relief "unless the relator would suffer a special loss beyond the burden of litigation by" following normal procedure. *Fredrickson v. Starbucks Corp.*, 363 Or 810, 814, 429 P3d 727, 729 (2018) (quoting *State ex rel. Auto. Emporium Inc. v. Murchison*, 289 Or 265, 1171, 611 P2d 1169 (1980)).

Relators cannot show any special loss here. Their claims could have been fully addressed pursuant to these normal statutory procedures. The primary election is not until May 2024, and the Secretary of State reports that ballots must be finalized no later than March 21, 2024. (Sec. of State's Mem 1.) By contrast, Relators admit that President Trump announced his candidacy in November 2022 (Pet 2), and the grounds for disqualification that Relators allege have existed unchanged since then. Relators even specifically asked the Secretary to declare President Trump ineligible on July 12, 2023. (*Id.* at 1.) This timeframe has allowed Relators ample opportunity to follow the normal appeal process set forth by ORS 246.910, or to use the other statutory proceedings noted by this Court in *Ofsink*.

The mere fact that they have chosen not to do so cannot make mandamus appropriate. Otherwise, mandamus relief would be available at the option of any litigant, even where the law offers other remedies. Moreover, Relators' request is untimely. Relators alleged that they made their first written appeal to the Secretary of State seeking this remedy on July 12, 2023. (Pet. iv). Appeals of Secretary of State *actions* or *inactions*, under ORS 246.910, such as Plaintiff's-Relators here fall under ORS Chapter 183 and require appeal within 60 days and are thus untimely. *See Reeves v. Wagner*, 295 Or App 295, 306, 434 P3d 429, 436 (2018) stating:

> "[P]laintiffs' exclusive remedy was to seek judicial review of the Election Director's letter under the APA. The Secretary of State is an "agency" subject to the APA. ORS 183.310(1); *Ellis v. Roberts*, 302 Or 6, 18, 725 P2d 886 (1986) (decisions of the Secretary of State under the election laws are orders in other than a contested case); *Strombeck v. Secretary of State*, 128 Or App 142, 145, 874 P2d 1366, *rev den*, 319 Or 572, 879 P.2d 1286 (1994) ("The Secretary of State is a state officer, and the statutes governing the office recognize the applicability of the APA.").

Wagner, 295 Or App at 305.

The cases that Relators cite are not to the contrary. In 1972, this Court held that a direct appeal under ORS 246.910 was not an adequate remedy when a general election was approaching, and there was a risk of "inadequate time for any substitute nominee to campaign effectively." *McAlmond*, 262 Or at 528, 500 P2d at 460 (discussing similar cases). That is not the situation here. As just explained, there has been adequate time before the primary election for litigation in the lower

courts, and the APA or latches bar this attempt to bring direct appeal. On top of that, the campaign for the Republican presidential nomination is ongoing nationwide and already involves multiple candidates.

Relators are left to argue, then, that "exceptional circumstances" should "persuade [the Court] that the issue that relators raise is so novel and significant, and that immediate resolution is so imperative, that we should exercise our discretionary mandamus jurisdiction on an expedited basis." *Ofsink*, 369 Or at 343, 505 P3d 974. This Court has been wary of such arguments. In *State ex rel. Boe v. Straub*, this Court expressly *rejected* an argument that the "major import" of an issue could allow it to "ignore the accepted limitations upon our jurisdiction to hear and decide mandamus proceedings." *Straub*, 282 Or 387, 391, 578 P2d 1247, 1249 (1978) (cleaned up). And in *Sajo*, the Court did reluctantly allow mandamus relief based on the "importance and novelty" of the case—but expressly warned that "[t]his does not mean" that mandamus "will in the future be regarded as the accepted and proper way to secure judicial review of decisions of the Secretary of State under the Election laws." *Sajo*, 297 Or at 648, 688 P2d at 369. Just last year, the Court quoted this language from *Sajo* in reiterating that mandamus "generally" is not available in election-law cases. *Ofsink*, 369 Or at 342, 505 P3d at 974.

For the reasons explained above, this case should not be a special exception. There simply is no reason that ordinary judicial proceedings would not have

worked here. Mandamus is not appropriate.

D. Presidential Qualification Disputes Are Non-Justiciable Political Questions.

Even if Oregon's mandamus and election statutes allowed Relators to bring their claims, the U.S. Constitution does not. A long line of decisions—regarding both President Trump and other candidates—recognizes that disputes over presidential qualifications are non-justiciable political questions. The Constitution contemplates that these disputes will be decided in the political and electoral processes, not in the courts—and certainly not in a 51-jurisdiction ballot-access-litigation marathon in *state* courts. In all events, this particular eligibility dispute is emphatically outside the courts' jurisdiction, because Congress in impeachment proceedings already expressly refused to disqualify President Trump from future office and the United States Senate acquitted him.

Under the federal Constitution, some questions are "entrusted to one of the political branches or involve[] no judicially enforceable rights." *Rucho v. Common Cause*, 139 S Ct 2484, 2019 US LEXIS 4401, *17 (2019). The Constitution places these "political question[s] … beyond the courts' jurisdiction." *Id.*[3] The hallmarks

3. Oregon's state political-question doctrine is similar. *See Putnam v. Norblad*, 134 Or 433, 440–41, 293 P 940, 942 (1930). But even if the standards differed somewhat, the federal standard must control when, as here, the question is whether the federal Constitution removes an issue from judicial competence.

of a non-justiciable political question include: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," (2) "a lack of judicially discoverable and manageable standards for resolving it," (3) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," (4) "an unusual need for unquestioning adherence to a political decision already made," and (5) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 US 186, 217, 82 S Ct 691, 710 (1962).

1. The Overwhelming Majority of Courts Have Held that Disputes About Presidential Candidates' Qualifications are Political Questions.

In a similar challenge to President Trump's appearance on the presidential primary ballot, the U.S. District Court in New Hampshire found that the complaint presented a nonjusticiable political question and observed that "the vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications." *Castro v Scanlan*, 2023 US Dist LEXIS 192925, *20, 2023 WL 7110390 at *9 (DNH Oct 27, 2023) (footnote omitted). The Michigan Court of Claims similarly dismissed a challenge to President Trump's appearance on the primary ballot, holding that a candidate's qualification to the Presidency is "a nonjusticiable

political question." *LaBrant v. Benson*, 2023 WL 7347743, at *10 (Mich Ct Cl Oct. 25, 2023); *see id.* at *10-20.[4]

These decisions are correct—and many other prior decisions agree. Seeking to remove a Presidential candidate from the ballot as ineligible is not a new phenomenon. In previous presidential election cycles, many suits alleged that John McCain, or Barack Obama, or Ted Cruz, or Kamala Harris were barred from the Presidency by the Constitution's "natural born citizen" requirement. When they did issue rulings , the courts regularly held that "the Constitution assigns to Congress, and not to … courts, the responsibility of determining whether a person is qualified to serve as President," so "whether [a candidate] may legitimately run for office … is a political question that the Court may not answer." *Grinols v. Electoral College*, 2013 US Dist LEXIS 73446, *20, 2013 WL 2294885, at *6 (EDCal May 23, 2013).[5] As one court explained:

> If a state court were to involve itself in the eligibility of a candidate to hold the office of President … it may involve itself in national political matters for which it is institutionally ill-suited and interfere

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4. The Plaintiffs-Appellants' application for leave to appeal the December 14, 2023 judgment of the Court of Appeals was considered and denied by Order of the Michigan State Supreme Court on December 27, 2023. *See* App-1-5.

5. Occasionally courts have held they *also* lack jurisdiction because the plaintiffs lack standing—but that does not preclude the presence of a political question. *See Berg*, 586 F3d at 238, 2009 US App LEXIS 24805 (rejecting challenge to President Obama's qualifications on standing grounds, but noting also that it "seemed to present a non-justiciable political question").

> with the constitutional authority of the Electoral College and Congress. Accordingly, the political question doctrine instructs this Court and other courts to refrain from superseding the judgments of the nation's voters and those federal government entities the Constitution designates as the proper forums to determine the eligibility of presidential candidates.

Strunk v. N.Y. State Bd. of Elections, 35 Misc. 3d 1208(A), 950 NYS2d 722 (NY Sup Ct 2012) *aff'd,* 126 AD3d 777 (NY App Div 2015).

Many state and federal courts across the country have reached the same conclusion. *E.g., Grinols*, 2013 US Dist LEXIS 73446, at *20, 2013 WL 2294885, at *6 ("[T]he Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States," so "the question presented by Plaintiffs in this case—whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer."); *Taitz*, 2015 US Dist LEXIS 178814, 2015 WL 11017373, at *20 (SD Miss Mar 31, 2015) (presidential qualification questions "are entrusted to the care of the United States Congress, not this court"); *Robinson v. Bowen*, 567 F Supp 2d 1144, 1147, 2008 US Dist LEXIS 82306 (ND Cal 2008) ("Issues regarding qualifications for president are" political questions "committed under the Constitution to the electors and the legislative branch, at least in the first instance"); *Jordan v. Reed*, 2012 WL 4739216, at *2 (Wash Super Ct Aug 29, 2012) ("The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S.

Constitution."); *Kerchner v. Obama*, 669 F Supp 2d 477, 483 n. 5, 2009 US Dist LEXIS 97546 (DNJ 2009) ("The Constitution commits the selection of the President to [specific and elaborate procedures] …. None of these provisions evidence an intention for judicial reviewability of these political choices."). Similarly, although the Third Circuit dismissed a challenge to the qualifications of then-candidate Obama on alternative jurisdictional grounds, it noted that the challenge likely was also a political question not within the province of the judiciary. *Berg*, 586 F3d at 238, 2009 US App LEXIS 24805.

Relators' attempted counterarguments are insubstantial. The supposedly "leading precedent[s]" they cite from the Ninth and Tenth Circuits (*see* Mem 65–66) do not address the question at hand: whether the courts can resolve a dispute over whether someone is qualified to be President. Instead, those cases involved candidates who *admitted* they were ineligible for the Presidency but sued to be on the ballot anyway. *Lindsay v. Bowen*, 750 F3d 1061, 1064, 2014 US App LEXIS 8480 (9th Cir 2014) ("Nor is this a case where a candidate's qualifications were disputed. Everyone agrees that Lindsay couldn't hold the office for which she was trying to run."); *Hassan v. Colo.*, 495 F Appx 947, 948, 2012 US App LEXIS 18574 (10th Cir 2012) (candidate concededly was not a natural-born citizen who refused to fill out the required form and was disqualified for that reason). In allowing these candidates to be excluded from the ballot, these cases cited

Supreme Court precedents that allow reasonable administrative restrictions on ballot access. *Id.* at 948-949 (citing, *e.g.*, *Munro v. Socialist Workers Party*, 479 US 189, 194–95, 107 S Ct 533 (1986)); *Lindsay*, 750 F3d at 1063–64, 2014 US App LEXIS 8480 (citing, *e.g.*, *Bullock v. Carter,* 405 US 134, 145, 92 S Ct 849 (1972)). The Tenth Circuit expressly decided that its decision would not have precedential effect. *Hassan* at 948.

Relators have identified only one decision in which a court held that a genuine dispute over a qualification was *not* a political question—a Pennsylvania state court case where the court held that Senator Ted Cruz was a natural-born citizen. *Elliot v Cruz*, 137 A3d 646, 2016 Pa. Commw. LEXIS 204 (Pa. Cmw Ct 2016). A few days ago, the Colorado *Anderson* decision held similarly. 2023 WL 8770111, at *24–26. These opinions are decisively outweighed by the numerous authorities to the contrary.

In summary, Relators want this Court to decide a raging political dispute over whether a candidate is qualified to be President. But in arguing that this qualification dispute is not a political question, Relators cite almost exclusively to cases where *there was no qualification dispute*, and everyone agreed the candidate was *not* qualified. When there *is* a dispute—when, as here, the candidate's qualification is the very issue being presented for decision—most courts nationwide have found the issue to be nonjusticiable, and only two outlying

decisions go the other way. The *Castro* court was right: the vast weight of authority *does* find this to be a non-justiciable political question. This Court should follow that approach if this Petition isn't denied for the other reasons above.

2. This Case Bears Multiple Hallmarks of a Political Question.

(a) <u>The Constitution commits presidential qualification disputes elsewhere</u>.

A dispute is not justiciable if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 US at 217, 82 S Ct 691. Here, the Constitution contains numerous and elaborate procedures for determining who can and should be President—and none of them involve adjudication in state courts.

Article II, Section 1 of the Constitution permits state legislatures to direct how electors for President should be appointed. The Twelfth Amendment to the Constitution prescribes that the electors' votes must be "sealed," and may be opened and counted only in a joint session of Congress. This process may include objections to electors or their votes, which Congress then can consider and decide. *See* 3 USC § 15(d)(B)(ii). If this process results in a President-elect who is not qualified, the Constitution specifies further political procedures: under the Twentieth Amendment, "if the President elect shall have failed to qualify" at the beginning of his or her term, "then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the

case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President." Finally, Section Three of the Fourteenth Amendment itself provides an important safety valve: if the voters choose someone who is arguably disqualified, Section Three gives Congress the option to, "by a vote of two-thirds of each House, remove such disability." And Section Five of that Amendment expressly gives "Congress … the power to enforce, by appropriate legislation, the provisions of this article." *See Hansen v. Finchem*, 2022 WL 1468157, at *1 (Ariz. May 9, 2022).

Relators' objections on this score are unavailing. They point out the Constitution allows states to appoint presidential electors (Mem 63-64)—but that of course is not the same as enforcing Section Three or making legally binding decisions about who is qualified to be President. In fact, the Twentieth Amendment to the Constitution recognizes this, by specifying what should be done if the state-appointed electors choose someone who is ineligible to be President. Relators also object that the Constitution's assignment of this responsibility is not as "express[]" or "explicit[]" as Relators would prefer. (*Id.* at 64-65.)[6] But they cite no authority suggesting that it must be. As the courts have repeatedly found, the text of the Constitution creates many processes for choosing who may be President, and for

6. The Colorado *Anderson* decision reasoned similarly. 2023 WL 8770111, at *23–25.

dealing with an ineligible President-elect—and its commitment of these issues outside a state's judiciary can be discerned from its creation of those processes. *That* is the proper test, and it is readily satisfied here.

(b) <u>Conflicting state-court decisions on Presidential candidate qualifications would create practical difficulties and significant potential for chaos</u>.

Another hallmark of non-justiciability is "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 US at 217, 82 S Ct 691. That is present here too. Deciding presidential candidates' qualifications in a patchwork of 51 jurisdiction-specific ballot-access proceedings would be a confusing and crippling morass. It could very well result in situations where a candidate for President was held qualified in some states, but not others. That would be a recipe for chaos, confusion, and constitutional crisis.

Courts have recognized this reality. As the California Court of Appeal held, it would be

> truly absurd … to require each state's election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each [state official] the power to override a party's selection of a presidential candidate. The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results…. [T]he result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines.

Keyes v. Bowen, 189 Cal App 4th 647, 660, 117 Cal Rptr 3d 207, 215–16

(Cal Ct App 2010).[7] The Constitution cannot be interpreted to tolerate the kind of enormously difficult and chaotic situation that Relators are courting here.

(c) <u>The United States Senate already decided the specific political question at issue</u>.

Finally, a dispute may be rendered non-justiciable by "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" or "an unusual need for unquestioning adherence to a political decision already made." *Baker*, 369 US at 217, 82 S Ct 691. Here, Relators' requested relief is particularly inappropriate because it asks this Court to override the Senate's decision to acquit President Trump in its impeachment proceedings—yet another hallmark of a political question.

President Trump was impeached by the 117th Congress and acquitted by the Senate. 167 Cong Rec S733. That impeachment proceeding decided the precise question at issue here: whether Section Three of the Fourteenth Amendment disqualifies Donald Trump from being President. The facts cited by Relators here are the same that were at issue in the impeachment: President Trump's alleged involvement in the events of January 6. Indeed, the impeachment trial was held

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7. The *Keyes* opinion is somewhat ambiguous as to whether it was based on the political-question doctrine or on California election law. *See id.* But the quoted rationale plainly supports a federal constitutional rule.

only a few weeks after the crimes and violence of January 6th, in the very same Senate chamber that was threatened. And the legal theories are the same too: the Article of Impeachment specifically cited Section Three of the Fourteenth Amendment. 167 Cong Rec H165 (alleging that President Trump violated Section Three of the Fourteenth Amendment); *id.* at S129 (confirming that the House of Representatives passed the Articles of Impeachment). The very first paragraph of the House managers' trial brief alleged that "[t]his trial arises from President Donald J. Trump's incitement of insurrection against the Republic he swore to protect." House Impeachment Managers' Trial Br., 1.[8]

The requested remedies are also identical. Because the impeachment proceedings took place after President Trump left office, the only practical effect of a conviction would have been to disqualify him from holding "any Office of honor, Trust or Profit under the United States[.]" US Const Art I, § 3.[9] Again, the very first paragraph of the House managers' trial brief made clear that this was the trial's sole object: "[T]he Senate should convict President Trump and disqualify

8. Available at: https://democrats-judiciary.house.gov/uploaded-files/house_trial_brief_final.pdf.

9. This was widely recognized at the time. *E.g.,* Bertrand, "Legal scholars, including at Federalist Society, say Trump can be convicted," Politico, Jan. 21, 2021, available at https://www.politico.com/news/2021/01/21/legal-scholars-federalist-society-trump-convict-461089.

him from future federal officeholding." *Id.* And the Senate expressly determined that President Trump was "subject to the jurisdiction of a Court of Impeachment for acts committed while President of the United States, notwithstanding the expiration of his term in that office." 167 Cong Rec S609 (daily ed. Feb. 9, 2021).The Senate then proceeded to a verdict, and President Trump was "adjudge[d]" to be "not guilty as charged," was "acquitted of the charge," and, thus, was not disqualified from holding "any Office . . . under the United States[.]" *Id.* at S733 (daily ed Feb. 13, 2021).

No court (including this one) could formally review or reverse the Senate's impeachment verdict. The Constitution gives the Senate the sole "authority to determine whether an individual should be acquitted or convicted," and so judicial review is barred by the political-question doctrine. *Nixon v. United States*, 506 US 224, 231, 113 S Ct 732, 736 (1993). But although Relators here do not *say* they want to undo the Senate's verdict, that is exactly the outcome they seek. Just weeks after January 6, the Senate reconvened in the very chamber that was endangered and damaged by the crimes of that day. Yet, the Senate entered judgment refusing to bar President Trump from holding and enjoying "any Office of honor, Trust or Profit under the United States[.]" US Const Art I, § 3. Relators now want this Court to consider exactly the same facts as the Senate and enter exactly the opposite judgment—barring President Trump from holding a future "Office . . .

under the United States[.]" That cannot be done without "expressing lack of the respect due coordinate branches of government." *Baker*, 369 US at 217, 82 S Ct 691.

For all these reasons, Relators' arguments should be raised in our nationwide and statewide political and legislative debates, not in this (or any other) Court.

E. Section Three of The Fourteenth Amendment Can Be Enforced Only as Prescribed By Congress.

Even if the Court had jurisdiction, and even if Oregon law allowed the inquiry that Relators demand, Section Three of the Fourteenth Amendment cannot be enforced in this state-law cause of action, because Congress has not authorized it. For a century and a half after the Fourteenth Amendment's enactment, the unbroken understanding and practice has been that Section Three is enforceable only through procedures prescribed by Constitution or Congress. *See Rosberg v. Johnson*, 2023 US Dist LEXIS 89849, 2023 WL 3600895, at *3 (D Neb May 23, 2023); *Secor v. Oklahoma*, US Dist LEXIS 146122, 2016 WL 6156316, at *4 (ND Ok Oct. 21, 2016). There is no reason to break from that settled law now.

1. A Long and Distinguished History Holds that Section Three is Enforceable Only as Prescribed by Congress.

There is no question that Congress *can* specify how Section Three must be enforced. Section Five of the Fourteenth Amendment expressly states that "Congress shall have the power to enforce, by appropriate legislation, the

provisions of this article." US Const amend XIV, § 5; *see Hansen v. Finchem*, 2022 Ariz LEXIS 168, 2022 WL 1468157, at *1 (Ariz May 9, 2022) ("Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause"). More than a century ago, the Supreme Court held that "it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy." *Ownbey v. Morgan*, 256 US 94, 112, 41 S Ct 433 (1921). Rather, "[i]ts function is negative, not affirmative, and it carries no mandate for particular measures of reform." *Id.*

It is not surprising, then, that the courts have also held that Section Three must be enforced *only* as prescribed by Congress. Just months after the Fourteenth Amendment was ratified, Chief Justice Salmon P. Chase held that Section Three requires Congressionally prescribed enforcement procedures. *In re Griffin*, 11 F Cas 7, 1869 US App LEXIS 1305 (CCDVa 1869) (Chase, C.J.). *Griffin's Case* involved a petition for habeas corpus by a man convicted of a crime in Virginia state court. The state judge had been appointed by the Virginia government loyal to the Union that had met in West Virginia for most of the Civil War—but, during the war, he had been the Speaker of Virginia's rebel House of Delegates and had supported the Confederate military. *Id.* at 22–23. The petitioner, Griffin, therefore sought habeas relief arguing that his conviction was invalid because the judge was disqualified by Section Three. *Id.*

The appeal of the case was heard by Chief Justice Chase, sitting as Circuit Justice in Richmond, Virginia. *Id.* at 7. Griffin argued that Section Three "acts *proprio vigore*, and without the aid of additional legislation to carry it into effect," and "[t]hat it is binding upon all courts, both state and national." *Id.* at 12. Chief Justice Chase noted what a serious mismatch this construction would be for the post-War circumstances. He observed that, by the time the Fourteenth Amendment was proposed and adopted, the post-war governments of the southern states—that is, the legitimate governments recognized as loyal to the Union—were made up of "[v]ery many, if not a majority" of individuals who had supported the Confederacy to some degree. *Id.* at 25. If Section Three of the Fourteenth Amendment had automatic effect as the petitioner argued, the result would be a chaotic undoing of these governments' actions, as explained in *Griffin's Case*, "No sentence, no judgment, no decree, no acknowledgment of a deed, no record of a deed, no sheriff's or commissioner's sale—in short no official act—[would be] of the least validity." *Id.* The Chief Justice explained that he was reluctant to adopt this interpretation. *Id.* at 24.

Instead, Chief Justice Chase held that Section Three "clearly requires legislation in order to give effect to it," because "it must be ascertained what particular individuals are embraced by" Section Three's disability, and "these [procedures] can only be provided for by congress." *Id.* at 26. Therefore, "the

intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability … to be made operative … by the legislation of congress in the ordinary course." *Id.*

There is no record of any widespread outcry or protest about this decision. At least one state supreme court expressly applied *Griffin* to an analogous provision of its state constitution. *Alabama v. Buckley*, 1875 WL 1358, at *13–15 (Ala Dec. 1, 1875). Multiple newspaper editorials of the time—including in Northern states—expressed approval of the decision; only a few appear to have criticized it.[10] And the U.S. Supreme Court was not called upon to revisit Chief Justice Chase's conclusion, either in that case or in any other.

Both before and after *Griffin*, therefore, Section Three has indeed always been enforced as prescribed by Congress. Even before Chief Justice Chase decided *Griffin*, Congress had expressly authorized—indeed, commanded—six other southern States, as a condition of re-admission to the Union, to adopt the substantive provisions of Section Three and then enforce those provisions against candidates for state office. 15 Stat 74 (June 26, 1868) ("[N]o person prohibited from holding office … by section three … shall be deemed eligible to any office in

10. Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. 350 (forthcoming 2024) (manuscript at 478–79, nn. 345–353), https://ssrn.com/abstract=4568771 (collecting many sources).

[the readmitted] states."). Thus, Relators are plainly incorrect in arguing that Reconstruction state courts "enforced Section 3 without federal legislation." (Mem at 10.) Rather, the states in fact enforced state law, which had incorporated the substantive provisions of Section Three.

Relators give examples of this from only two States, North Carolina and Louisiana—both of which were instances in which state courts enforced state law against a state official. And the state law directly stemmed from an express Congressional requirement. 15 Stat 73. Indeed, the Louisiana case was brought under a state law passed in 1868, *State ex rel. Sandlin v. Watkins*, 211 La Ann 631, 631-632, 1869 La. LEXIS 367 (1869) and when a disqualified official argued to the Louisiana Supreme Court that Section Three "is not self-enforcing [but] requires legislation by Congress," the court saw no need to decide the question but instead noted that, in the act of readmission, Congress *had* expressly required Louisiana to enforce Section Three. *id.* at 633–34, which it did through state legislation.

Shortly after *Griffin*, Congress supplied additional Section Three enforcement legislation that also applied in the rest of the States (including Virginia, where *Griffin* had arisen). The federal Enforcement Act of 1870, also known as the Ku Klux Klan Act, contained robust provisions protecting the rights of freed slaves to vote. Also, Section 14 of the Enforcement Act authorized United

States Attorneys—not state officials—in their respective districts to seek writs of *quo warranto* in the federal courts to remove from office anyone who was disqualified by Section Three of the Fourteenth Amendment. 16 Stat. Ch. 114, 143 (41st Cong, 2d Sess 1870). Section 14 even instructed the federal courts to prioritize these proceedings over "all other cases on the docket." *Id.* Similarly, Section 15 of the Enforcement Act provided for separate federal criminal prosecution of anyone who assumed office in violation of Section Three. *Id.* at 143–44.

U.S. Attorneys brought numerous Section 14 *quo warranto* petitions and Section 15 criminal prosecutions. Although many of them did not result in reported opinions, there were as many as 180 such cases just in Tennessee—including against several members of the Tennessee Supreme Court.[11] *See also United States v. Powell*, 27 F Cas 605, 1871 US App LEXIS 1822 (DNC 1871) (Section 15 prosecution). This continued until, in 1872, Congress passed an Amnesty Act by two-third majorities in both houses, which—as Section Three permits—removed Section Three disability for most ex-Confederate officials and supporters. 17 Stat. at 142 (42d Cong 2d Sess May 22, 1872). Finally, in 1898, Congress lifted all

11. Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870,* 49 TENN B.J. 20, at 24-26 (2013).

Section Three disqualifications of any kind. 49 Stat. 132, 432 (55th Cong 2d Sess June 6, 1898). In 1948, Congress repealed the Enforcement Act in its entirety. 62 Stat 869, 993; 62 Stat 683, 808.

After 1898, it does not appear that any state or federal court directly considered Section Three until recently.[12] In 1978, the Fourth Circuit noted Chief Justice Chase's holding "that the third section of the Fourteenth Amendment … was not self-executing absent congressional action." *Cale v. City of Covington, Va.,* 586 F2d 311, 316, 1978 US App LEXIS 7962 (4th Cir 1978).

After January 6, 2021, Congress expressly considered - but declined to revive federal Section Three enforcement procedures. A bill was introduced in the House of Representatives "[t]o provide a cause of action to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States." HR 1405 (117th Cong 1st Sess). Its procedures would have been similar to the old *quo warranto* proceedings: an expedited civil suit by the

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12. Congress did enforce Section Three disqualifications through the mechanisms created by the Constitution itself for judging the qualifications of Members of Congress. Several times following the enactment of the Fourteenth Amendment, the House or Senate voted on whether a member-elect was or was not disqualified by Section Three. Later, in 1919 and 1920, the House again declined to seat a member-elect who had been convicted of espionage. 6 C. Cannon, Cannon's Precedents of the House of Representatives §§ 56-59, (1935) *available at* https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/html/GPO-HPREC-CANNONS-V6-10.htm.

Attorney General in a three-judge U.S. District Court. *Id.* §§ 1(b), (d). But Congress has not enacted this proposal.

2. *Griffin* is Good Authority.

Relators invite this Court to ignore *Griffin* with a smattering of meritless arguments. Their contention that it conflicts with "the plain meaning of Section 3" (Mem at 13) is insubstantial. Chief Justice Chase did not question that Section Three barred many officials from holding office; he simply held that Congress must supply procedures for determining who those individuals were. *Griffin*, 11 F Cas at 26, 1869 US App LEXIS 1305. Nothing in Section Three suggests otherwise. To give a rather direct analogy, in light of *Griffin*'s claimed disqualification of a judge, consider Article III of the Constitution's provision that federal judges hold office "during good Behaviour." It certainly does not contradict "the plain meaning of Article III" to conclude that this requirement is enforceable only by Congress in impeachment proceedings.

Relators assert that Chief Justice Chase "never explained why *state* courts could not provide such proceedings [to enforce Section Three]." (Mem at 15 (cleaned up).) But to a Circuit Justice sitting in Richmond, Virginia in 1869, the reason would have been crystal clear. As explained above, and as Chief Justice Chase described at length in *Griffin*, the post-war southern state governments contained many—perhaps a *majority*—of officials who were likely disqualified by

Section Three. It would have been extraordinarily problematic to allow those state officials to judge each other's qualifications for federal office, under the federal Constitution, without Congress' approval.

Relators contend that *Griffin* "was affirmed on other grounds." (Mem. at 18.) But that is erroneous on at least two levels. First, *Griffin* was not reviewed by any higher court. Although that era's practice allowed simultaneous proceedings in the Circuit Court and the U.S. Supreme Court, the Supreme Court "never announced any conclusion" in *Griffin.* 11 F Cas 7, 1869 US App LEXIS 1305 (reporter's note explaining this). Chief Justice Chase simply noted in his opinion that the Justices had discussed the case, and he relayed their views on it. *Id.* at 27. Second, Chief Justice Chase was careful to label the "other grounds" as unnecessary to his decision. He explained that, because Section Three enforcement procedures must be prescribed by Congress, "it becomes unnecessary to determine … the effect of the sentence of a judge *de facto*." *Id.* He simply added that "I should have no difficulty in" denying habeas corpus on that basis as well, and that the other Justices agreed. *Id.*

Relators contend that Chief Justice Chase's opinion in *Griffin* "contradict[s]" statements he made about Section Three in the separate prosecution of Jefferson Davis. (Mem at 13-14 (citing *In re Davis*, 7 F Cas 63, 90, 102, 1867 US App LEXIS 664 (CCDVa, 1871)).) But Relators mischaracterize Chief Justice Chase's

statements in *Davis.* Relators' citation to page 90 of *Davis* as representing Chief Justice Chase's thinking is incorrect; that page recounts arguments by Davis's attorney. The Chief Justice's actual remark—which was belatedly inserted into the transcript of the trial proceedings *after* Davis was pardoned and the trial was adjourned—was that Section Three might preempt any other penalties (beyond disqualification from office) for former government officials who had supported the Confederacy. *Davis*, 7 F Cas at 102, 1867 US App LEXIS 664. This remark—that Section Three preempts other *penalties*—does not conflict with *Griffin*'s holding that Congress has the sole power to set *procedures* for trying violations of it.[13]

Indeed, Justice Chase properly recognized no contradiction with *Davis* opinion. The critical distinction is that offensive use of the Section Three – to affirmatively remove a person from office – requires implementing legislation from Congress. But defensive use of Section Three – such as in Davis – does not require implementing legislations. And this distinction remains good law. In *Cale* v. *Covington*, the Fourth Circuit held "that the Congress and Supreme Court of the

13. Again, an analogy will illustrate. Suppose that a Constitutional amendment stated that "(1) All crimes involving Piracy shall be punished only by banishment from the United States;" and "(2) No person shall be convicted of Piracy except pursuant to process prescribed by Congress." No one would think that the two provisions of this amendment were contradictory. Chief Justice Chase's alleged remark in *Davis* and his holding in *Griffin* are directly analogous.

time were in agreement [with Chief Justice Chase] that *affirmative relief* under [Section Three] of the amendment should come from Congress….[while] the Fourteenth Amendment provide[s] of its own force as a *shield*.…" (emphasis supplied). However, even if there were some conflict between the *Griffin* holding and the *Davis* remarks, over one hundred years of practice have firmly settled that *Griffin* remains the gold standard. As thoroughly explained by Professor Tillman the concept of constitutional liquidation applies to establish that *Griffin* controls here. *See* App-49–51.

Finally, Relators argue (Mem at 16-17) that Chief Justice Chase's judicial decision should be ignored because, outside the judicial process, he expressed allegedly inconsistent political opinions. If that were the rule, a long line of hallowed precedents would have to go. Moreover, a proper picture of Chief Justice Chase's political views also requires consideration of his long pre-judicial career opposing slavery, advocating for the legal rights of former slaves, acting as one of the most important leaders of anti-slavery Republicans, and serving as Treasury Secretary to finance the Union's efforts to defeat the Confederacy.[14] And

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14. As a lawyer, Chase so frequently defended escapees from slavery that he was known as "the Attorney General for Fugitive Slaves." Barnett, *From Antislavery Lawyer to Chief Justice: The Remarkable but Forgotten Career of Salmon P. Chase*, 63 Case W. Rsrv. L. Rev. 653, 676 (2013). And as a politician, Chase was a prominent "Radical Republican" who took a hardline *against* pro-slavery governments. *Id.* at 671.

importantly, Chief Justice Chase also supported a strong, muscular application of the Fourteenth Amendment, as demonstrated by his joinder in the dissent in *Slaughter-House Cases*. *Slaughter-House Cases*, 83 US 36, 111, 1872 US LEXIS 1139 (1872) (Field, J. dissenting). In all events, as noted, *Griffin* caused southern officials' disqualifications under Section Three to be judged by U.S. Attorneys and federal district courts, rather than by state officials from the former Confederacy themselves. That result was not anti-Reconstruction or favorable for ex-Confederate officials.

All in all, *Griffin* represents the conclusion, "[a]fter the most careful consideration," 11 F Cas at 27, 1869 US App LEXIS 1305, of the sitting Chief Justice of the United Supreme Court about the meaning of Section Three, rendered a mere ten months after Section Three's enactment, on precisely the issue that Petitioners seek to raise here. Both as a matter of *stare decisis* and as a matter of Section Three's original public meaning, *Griffin* is by far the most important authority for this Court's consideration. App-49–52.[15]

3. Post-Civil-War practice does Not Suggest that Section Three can be Enforced Without Federal Legislation.

Relators try to sidestep *Griffin* by pointing to the fact that, even before there

15. See also Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. 350 (forthcoming 2024) (manuscript at 351), https://ssrn.com/abstract=4568771.

was federal enforcement legislation for Section Three, ex-Confederates began seeking, and Congress began enacting, bills that removed the disability for specific people. (Mem at 8-9.) This does not help Relators. They ignore the fact, discussed above, that Congress had much earlier commanded several states to adopt in state law Section Three's provisions as a condition for readmission to the Union. But their argument has an even more obvious and fundamental weakness: since Congress had just adopted the Fourteenth Amendment, it made perfect sense to assume that Congress would imminently provide for its enforcement. Thus, the relief-bill history proves nothing about whether Section Three is self-executing.

Relators also argue (Mem at 10) that ex-Confederates would have "much to lose[ ]by putting their fates in the hands of congressional votes" if Section Three was not immediately enforceable. That does not even make sense. An unsuccessful request for a relief bill had no legal consequences—and if there had been no enforcement procedures, would have had no practical consequences either—so petitioners would have had nothing to lose at all.

The bottom line is that less than a year after the Fourteenth Amendment was enacted, the sitting Chief Justice of the United States held that Section Three requires enforcement legislation. Congress promptly provided that legislation (to the extent it had not done so already), and any minor initial confusion quickly gave way to a uniform nationwide practice that prevailed for as long as Section Three

was enforced in the post-War era and was not questioned for the following century and a half.

Relators provide no reason for upending this well-settled law. So even if this Court had jurisdiction, and even if Oregon law allowed resolution of Relators' ineligibility argument, their petition still should be dismissed because Section Three cannot be enforced through the state-law cause of action they are asserting.

F. Section Three of The Fourteenth Amendment Does Not Apply Here.

If the Court were to reach the merits of Relators' claims—despite all the dispositive obstacles just described—it should nevertheless conclude that they fail. As an initial matter, Section Three of the Fourteenth Amendment simply does not apply here. There are two independent reasons for that. First, Section Three bars *holding* office, not *running for* office. Second, by its terms, Section Three does not apply to Presidents.

1. Section Three does Not Bar Running for Office.

By its plain language, a disqualification under Section Three of the Fourteenth Amendment prohibits an individual only from *holding office*—not from appearing on a ballot or being elected. To be sure, this distinction might not matter if Section Three created a disqualification from office that was permanent and unchangeable, so that a candidate who was disqualified at the time the votes were cast would certainly be unable ever to take office. But Section Three does not do

that; instead, it expressly provides that any disability may be removed by Congress. In fact, immediately after the Fourteenth Amendment was adopted, disqualified individuals frequently ran for office, were elected, and *afterwards* asked Congress to remove the disability—and the courts expressly approved this practice. *Smith v. Moore*, 90 Ind 294, 303, 1883 Ind LEXIS 238 (1883) ("Under [Section Three] . . . it has been the constant practice of the Congress of the United States since the Rebellion, to admit persons to seats in that body who were ineligible at the date of the election, but whose disabilities had been subsequently removed."); *Privett v Bickford*, 26 Kan 52, 58, 1881 Kan LEXIS 13 (1881) (analogizing to Section Three and concluding that voters can vote for an ineligible candidate who can only take office once his disability is legally removed); *Sublett v Bedwell*, 47 Miss 266, 274, 1872 Miss LEXIS 73 (1872) ("The practical interpretation put upon [Section Three] has been, that it is a personal disability to 'hold office,' and if that be removed before the term begins, the election is made good, and the person may take the office."). No authority appears to have concluded that placing such candidates on the ballot was illegal. Indeed, because the modern, government printed, uniform (sometimes called Australian) ballot was not in general use in the United States until after the 1884 election—before that political parties simply provided their own ballots that voters placed in the ballot box—the idea of excluding a candidate from the ballot would not even have been

within the contemplation of those who drafted the Section Three.

In fact, States are prohibited from accelerating qualifications for elected office to an earlier time than the Constitution specifies. The Ninth Circuit's decision in *Schaefer v. Townsend* illustrates that. There, a California law required congressional candidates to be residents of the state at the time when they were issued their nomination papers—rather than "when elected," as the Constitution says. 215 F3d 1031, 1038, 2000 US App LEXIS 14189 (9th Cir. 2000). The Ninth Circuit held that this was an unconstitutional attempt by California to change the Constitutionally-prescribed qualification. *Id.* at 1038–39; *see US Term Limits, Inc v Thornton*, 514 US 779, 827, 115 S Ct 1842, 1866 (1995) (States do not "possess the power to supplement the exclusive qualifications set forth in the text of the Constitution.").

The same logic applies to Section Three. Both the text of the Constitution and historical practice show that Section Three (when it applies) bars a person from *holding* office, not *running for* or *being elected to* office. Relators therefore may not use Section Three to prevent a candidate from even running.

2. Section Three does Not Apply to the President.

As relevant here, Section Three of the Fourteenth Amendment applies only to someone who has "previously taken an oath … as an officer of the United States … to support the Constitution." Therefore, Relators' claim that President Trump is

disqualified depends upon him coming within the meaning of those terms. But reading this phrase in harmony with the rest of the Constitution makes quite clear that it does not cover the President. First, the Constitutional phrase "Officers of the United States" consistently excludes the President. Second, the Constitution does prescribe an oath "to support" the Constitution—but it specifies that the President *does not take* that oath, but instead takes a different one.

(a) <u>The constitutional phrase "Officers of the United States" excludes the President</u>.

(i) *Constitutional references to "officers of the United States" uniformly exclude the President*.

Section Three lists many elected figures to whom it applies, such as members of Congress and state legislators. It does not similarly name the most prominent elected official in the entire country—the President. This suggests that Presidents are not included. It is not linguistically likely that the framers would have specifically named other elected positions, but then referred to the Presidency in Section Three's catch-all generic reference to "officers of the United States." Indeed, the Constitutional text strongly indicates that they did *not* do that.

The phrase "Officers of the United States," as used in the original Constitution, *never* refers to elected positions.[16] The phrase "Officers of the United

16. *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(1) N.Y.U. J.L. & LIBERTY 1 (2021); Josh Blackman & Seth Barrett Tillman,

States" appears three times in the original Constitution—in three consecutive sections of Article II, dealing with the Executive Branch.[17] Each of these provisions clearly excludes the President.

First, Section 2 of Article II empowers the President 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[.]

US Const Art II, § 2. Presidents, of course, do not appoint themselves or their successors—and the Constitution does not "otherwise provide[] for" the President's appointment, because it requires the President to be *elected.* Therefore, this reference to "Officers of the United States" plainly excludes the President.

Second, Section Three of Article II requires that the President "shall Commission all the Officers of the United States." US Const. Art II, § 3. Presidents do not commission themselves or their successors, so they cannot be "Officers of the United States" for these purposes.

Third, Section 4 of Article II provides requirements for impeachment of

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Sweeping and Forcing the President into Section 3, 28(2) Tex. Rev. L. & Pol. 350 (forthcoming 2024) (manuscript at 535), https://ssrn.com/abstract=4568771 (citing to the Impeachment Clause, the Appointments Clause, and the Commission Clause as textual support).

17. Article II uses the plural phrase "Officers of the United States," whereas Section Three includes the singular "officer of the United States." But neither Relators nor any authority has ever suggested that this difference is material.

"[t]he President, Vice President and all civil Officers of the United States." US Const Art II, § 4. This also shows that the President is not included in the "Officers of the United States"—otherwise, there would be no need for the separate listing. If Section 4 had appeared in isolation, there might be some question whether the President and Vice President were listed as *examples* of officers of the United States—so that the text might effectively refer to "[t]he President, Vice President and all *other* civil Officers of the United States." But Article II's text and history rule out that meaning. As noted above, Section 2 *does* expressly refer to "all other Officers of the United States," so if Section 4 also meant that, it would say that. In fact, in the Constitutional Convention, the original draft of Section 4 did refer to the President, Vice President, and "other civil Officers of the U.S."—but the Framers changed it to "all civil Officers."[18] On top of that, immediately preceding Section Four's reference to "The President, Vice President and all civil Officers of the United States" is Section Three's requirement that the President "Commission *all* the Officers of the United States." US Const Art II, § 3 (emphasis added). Since that definitively excludes the President (as just explained), it is extraordinarily unlikely that the Constitution's very next sentence, in Section Four, would use such an ambiguous signal to give similar words a very different meaning.

(ii) ***This specific meaning of "officers of the United States" has been recognized throughout our legal history.***

18. 2 Records of the Federal Convention of 1787, 545, 552, 600 (Farrand ed 1911).

Relators appear to concede that, during the Founding era, the phrase "Officers of the United States" excluded the President. They argue that, "[b]y the 1860s," the meaning of this phrase had changed and had come to include the President. (Mem at 33.) But Relators are severely mistaken: the constitutional meaning of "officers of the United States" as excluding the President has been recognized by a long list of eminent authorities throughout our nation's history.

In the 1830s, Justice Joseph Story's magisterial *Commentaries on the Constitution of the United States* discussed this precise issue. With respect to the Impeachment Clause, Justice Story stated that "the enumeration of the president and vice president, as impeachable officers, was indispensable," because "the clause of the constitution … does not even affect to consider them officers of the United States," and that "they were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States."[19]

Less than twenty years after the adoption of the Fourteenth Amendment, the U.S. Supreme Court observed that there was a "well established definition" of "[w]hat is necessary to constitute a person an officer of the United States:" specifically, that "[u]nless a person in the service of the government … holds his place by virtue of an appointment by the president, or of one of the courts of justice

19. Story, Commentaries (Lonang Inst. 2005) § 791.

or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States." *United States v. Mouat*, 124 US 303, 306, 8 S Ct 505, 506 (1888). Although *Mouat* was interpreting a federal statute, its reference to the Constitution's Appointments Clause—and its consideration of who qualifies "strictly speaking" as an officer of the United States—makes clear that the Court was referring to the constitutional term. Similarly, in the 1870s a Senator stated that "the President is not an officer of the United States," and an influential treatise stated that "[i]t is obvious that … the President is not regarded as 'an officer of, or under, the United States.'"[20]

This definition continued in more recent times. In 1969, future Chief Justice William Rehnquist authored a memo for the White House Office of Legal Counsel explaining that "[g]enerally, 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."[21] In 1974, future Justice Antonin Scalia reiterated in a different OLC memorandum that "when the word 'officer' is used in the Constitution, it invariably refers to someone *other*

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20. Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. 350 (forthcoming 2024) (manuscript at 535), https://ssrn.com/abstract=4568771 (quoting *Congressional Record Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap*, at 145 (1876), and David A. McKnight, *The Electoral System of the United States* at 346 (1878)).

21. *Closing of Government Offices in Memory of Former President Eisenhower*, at 3, https://perma.cc/P229-BAKL.

than the President or Vice President …. This … has led the Department of Justice consistently to interpret the word in other documents as not including the President or Vice President unless otherwise specifically stated."[22] In 2007, citing *Mouat,* the OLC reaffirmed "that an individual not properly appointed under the Appointments Clause cannot technically be an officer of the United States."[23] And in 2010, Chief Justice Roberts stated in an opinion for the Supreme Court that "[t]he people do not vote for the 'Officers of the United States.' They instead look to the President." *Free Enterprise Fund v. PCAOB*, 561 US 477, 498, 130 S Ct 3138, 3155 (2010).

In short, the Constitution uses the term of art "officer of the United States" to refer to non-elected functionaries who exercise governmental power. This specific contextual meaning excludes the President. Because "officer of the United States" is a Constitutional term of art with a specific meaning, it is inapposite for Relators to point out (Mem 30-37) that the Constitution refers to the Presidency as an "office" generally, or that various *non*-constitutional sources refer to the

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22. *Applicability of 3 C.FR. Pt. 100 to the President and Vice President*, at 2, https://perma.cc/GQA4-PJNN.

23. *Officers of the United States Within the Meaning of the Appointments Clause*, at 116 (Apr. 16, 2007), https://www.justice.gov/file/451191/download#:~:text=The%20Appointments%20Clause%20provides%3A%20%5BThe%20President%5D%20shall%20nominate%2C,of%20Law%2C%20or%20in%20the%20Heads%20of%20Departments.

President as an "officer"—or sometimes even an "officer of the United States." The nature of a term of art is that it applies to specific words used in a specific context (here, the U.S. Constitution); similar words used in other contexts may have a different meaning. In almost all of Petitioners' examples, there is no indication that the speaker or writer intended to use the phrase in the strict Constitutional sense.[24] As explained above, when the phrase *is* used in the Constitutional sense, it excludes the President.

(b) Section Three's requirement of an "oath to support the Constitution" also excludes the President.

If more were needed to show that Section Three does not cover the President, it can be found in the other prerequisite to a Section Three disqualification—that the officer of the United States took an "oath…to support the Constitution of the United States." This is an explicit reference to a constitutionally prescribed oath that the President *does not take*.

This language in Section Three is a direct reference to the Oaths Clause of Article VI of the original Constitution, which requires many government officials to "be bound by Oath or Affirmation, to support this Constitution." These are the

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24. To give just one example, in *United States ex rel. Stokes v. Kendall*, the court was distinguishing the President's limited authority from the King of England's absolute sovereignty—not discussing the technical meaning of words in the Constitution—when it stated that "[t]he president himself … is but an officer of the United States." 26 F Cas 702, 753, 1837 US App LEXIS 248 (CCDDC 1837).

only two times that the Constitutional text refers to "support[ing]" the Constitution, and both of them do so in connection with an oath. No reasonable reading of Section Three can dismiss this parallel as unintentional. The officers covered by Section Three are those who take the Article VI oath.[25]

And the Article VI oath is taken by practically every state and federal official in the United States *except for the President*. Article II, Section 1 of the Constitution prescribes, word-for-word, a *different* oath for the President—an oath that does not refer to "support" for the Constitution, but instead includes a promise to "preserve, protect, and defend the Constitution." The President is inaugurated with that oath, not the Article VI oath.

Unable to deny this, Relators claim (Mem at 40-42) that Section Three's specific language "an oath … to support the Constitution" is actually a generic reference both to Article VI's non-presidential "Oath … to support this Constitution" and to Article II's differently-worded presidential oath. That is unlikely. Although the Article II and Article VI oaths undoubtedly have similar

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25. This was the view of a leading constitutional scholar, writing contemporaneously with the ratification of the Fourteenth Amendment. *See* George Washington Paschal, *The Constitution of the United States Defined and Carefully Annotated* xxxviii (1868) (opining that the Article VI oath and Section 3 apply to "precisely the same class of officers"); *id.* at 250 n.242 (Section 3 is "based upon the higher obligation to obey th[e Article VI] oath"); *id.* at 494 (noting that the "persons included in this [Section 3] disability are the same who had taken an official oath under clause 3 of Article VI").

meanings, Relators cite nothing to suggest that anyone actually thought that specific references to the unique language of one of them would naturally include the other.[26]

In addition to being facially unlikely, such a reading is incompatible with the constitutional context of Section Three. As explained above, there is a well-established Constitutional tradition of using the words "officers of the United States" to exclude the President. In that context, the drafters of Section Three (1) used that same phrase, and then (2) deliberately copied the language of another provision of the Constitution that *also* excludes the President. This cannot be dismissed as inadvertence.

Therefore, all of the textual evidence is quite plain: Section Three was drafted to exclude the President, and that alone disposes of Relators' claims. President Trump has never held any government office other than the Presidency. As a result, Section Three simply does not apply.

(c) Neither the Presidency nor the Vice-Presidency is an office "under . . . the United States."

The Constitution creates five positions: President, Vice-President, Senator,

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26. Relators' citation to Pomeroy's 1885 constitutional-law treatise (Mem at 41) certainly does not show anything like that. Relators appear to be referencing section 666 of the treatise—which does not address Section Three, and which simply argues that the President's oath does not by itself give him greater power or responsibility than other officials.

Representative, and Presidential Elector; but the text of Section Three excludes the President and Vice-President. This omission is controlling. "The expression of one thing implies the exclusion of others."[27] *See* ORS 174.010.

Further, Section Three identifies two distinct, separate categories of offices to which it applies. One may not "be" a Senator, Representative, or Elector. *Or* one may not "hold" any office "under the United States, or a State." The first category identifies specific Constitutional positions. The second refers to other offices one "holds." "[N]othing is to be added to what the text states or reasonably implies."[28] *See id*. The exclusion of the President from the first category cannot imply the opposite—that the most important elected, Constitutional position is implicitly (and silently) included in a generalized, catch-all phrase of "officers . . . under the United States."

Section Three also lists disqualified positions in descending order from the weightiest Constitutional position (Senator) to the lowest (state officers). It is illogical to exclude the most important Constitutional offices (the President and Vice President) in the enumerated list, while silently including them in a general, catch-all focused on less important offices.

Legislative history demonstrates that the drafters rejected inclusion of the

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27. Bryan A. Garner & Antonin Scalia, Reading Law, 96–98 (West, 2012)
28. *Ibid*. at 87–91.

Presidency as an office covered by Section Three. Courts properly infer legislative intent by comparing committee drafts to the final language. *See Nixon*, 506 US at 231–32, 113 S Ct 732 (rejecting second to last draft and relying on the plain textual language); *Lee v. Weisman*, 505 US 577, 613, 112 S Ct 2649 (1992) (Souter, J., concurring) (looking to sequence of amendments); *Utah v. Evans*, 536 US 452, 474, 122 S Ct 2191 (2002) (reviewing previous drafts); *District of Columbia v. Heller*, 554 US 570, 604, 128 S Ct 2783 (2008) (analysis of precursors to amendment); *Id*. at 590 n. 12 (Stevens, J. dissenting) (relying on previous draft); *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S Ct 2141, 2180–81, 2023 US LEXIS 2791 (2023) (analyzing Thaddeus Stevens' introduced version of the Fourteenth Amendment); *Evenwel v. Abbott*, 578 US 54, 66, 136 S Ct 1120 (2016) (same).

Representative McKee introduced into the House of Representatives the first draft of Section Three, which began "No person shall be qualified or shall hold the office of *President or Vice-President* of the United States, Senator or Representative in the national congress." 39 Cong. Globe 1st Sess. 919 (1866). (emphasis supplied). Congress consciously removed the offices of the Presidency and Vice Presidency from this list, substituting instead presidential Electors. Indeed, Professor Kurt Lash has thoroughly described how Representative McKee's version was considered by drafters, and how the final version

substantially departed from this early draft. App-19–20.

In addition, McKee's draft included other officers, using the phrase "any office now held under appointment from the President of the United States, requiring the confirmation of the Senate." App-19. This language was broadened to explicitly include lesser federal offices not subject to Senate consent, and state offices. This change—to include lesser federal and state officials—is consistent with the decision to remove explicit language removing the top national elected official. Indeed, any inference that the catch-all phrase "officers . . . under the United States" simultaneously included the higher office of President cannot overcome the notable and conscious exclusion of the Presidency and Vice Presidency.

This approach to the Presidency is consistent with use of the phrase "office under the United States" in US Const Art I, which refers to appointed federal offices, not the presidency. Article I, Section 6, Clause 2 states in full:

> No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time: and no person holding any office under the United States, shall be a member of either House during his continuance in office.

US Const Art I, § 6, cl 8.

That clause prohibits a person from first being elected Senator or Representative and then subsequently being appointed federal office at the same

time, or likewise holding an office and subsequently becoming a Senator or Representative. The phrase "holding any office under the United States" as used in Article I parallels "being appointed to any civil Office under the Authority of the United States." Thus "office under the United States" properly refers to an appointed office, not an elected President or Vice-President. And the Framers never considered that a person might hold two federal elected offices simultaneously.

This approach is also consistent with the original interpretation of the emoluments clause, which states,

> "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

US Const Art I, § 9, cl 8. George Washington himself personally received and kept a portrait of French King Louis XVI from the French government, as well as a key to the Bastille. Those gifts remain in Mount Vernon to this day.

Finally, this interpretation is entirely reasonable. Section Three responded to the Civil War. Purposeful removal of the Presidency was not error, but entirely rational. First, the framers were focused, first and foremost, on disloyal, oath-breaking state officers. They did not have concerns about former presidents because no former living president still lived in 1868 and the Presidency itself was (and is) the only nationally unifying elected office who represents all Americans.

As a symbol of national unity, that office is open to all. Finally, as a practical matter, the framers had little concern that a former confederate could become President based on the restrictions on Presidential Electors, the large Northern population base, and the expected voting strength of emancipated slaves. History proves their wisdom and foresight.

G. President Trump Did Not Engage In Insurrection.

Finally, Relators' claims fail because their core contention is wrong: President Trump did not engage in insurrection within the meaning of Section Three. Again, there are two reasons for this. First, although the riot at the Capitol on January 6, 2021, was awful and should never have happened, it did not reach the scale or scope of being an "insurrection." And second, President Trump himself did nothing to "engage in" the rioters' actions at the Capitol.

1. The Riot of January 6 was Not an "Insurrection or Rebellion."

Section Three applies only if there was an "insurrection or rebellion." There was not one here.

Both before and after ratification of the Fourteenth Amendment, Congressional debates confirmed that Section Three's references to "insurrection" and "rebellion" describe types of treason—not any lesser crime. 37 Cong. Globe 2d Sess, 2173, 2189–91, 2164–67 (1862); 41 Cong. Globe 2d Sess, 5445–46 (1870). Section Three appears to have been modeled on two primary sources. One

was the original Constitution's Treason Clause, which defines "[t]reason against the United States" as "levying War against them, or … adhering to their Enemies, giving them Aid and Comfort." The other source was Section 2 of the Second Confiscation Act, enacted a few years before the Fourteenth Amendment, which punished anyone who "shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States … or give aid or comfort thereto. 12 Stat 589, 627 (1862); *see* 18 USC § 2383.These sources illustrate the meaning of Section Three's terms.

Even during the Civil War, the courts construed these terms in the Confiscation Act relatively narrowly. The year after the Act became law, Justice Field—a Lincoln appointee—held that the Insurrection Act prohibits only conduct that "amount[s] to treason within the meaning of the constitution." *United States v. Greathouse*, 2 F Cas 18, 21, 1846 US App LEXIS 439 (CCND Cal 1863). In the same case, another judge confirmed that, for these purposes, "engaging in a rebellion and giving it aid and comfort[] amounts to a levying of war," and that insurrection and treason involve "different penalt[ies]" but are "substantially the same." *Id.* at 25 (Hoffman, J.)

Dictionaries of the time confirm that "insurrection" meant a "rebellion of citizens or subjects of a country against its government," and "rebellion" as "*taking*

up arms traitorously against the government."[29] Because Section Three was enacted in the aftermath of a horrific civil war in which over 600,000 combatants died, it makes sense that "insurrection" was understood at the time to mean the taking up of arms and waging war upon the United States.

This means that there is a crucial difference between insurrections and political riots—even riots that disrupt government processes. To be sure, an "insurrection," for purposes of Section Three, may be more localized or less organized than a full-scale military campaign with organized opposing armies. But it must involve more than an attempt (even an organized, violent attempt) to disrupt government processes in protest at how they are being carried out. It must instead involve an effort to break away from or overthrow the government's very authority.

The events at the Capitol on January 6 included serious crimes and violence, with some level of organization. But they did not involve any organized attempt to break away from or overthrow the government. Rioters entered the Capitol, clashed with law enforcement, invaded restricted areas, damaged property, and interrupted Congress' proceedings. But after a few hours, they left, and Congress

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29. *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* (12th ed 1868) (emphasis added).

counted the electoral votes early the next morning. No evidence shows that the rioters were attempting to actually overthrow the government. Indeed, insurrection is a federal crime defined by statute, *see* 18 USC § 2383—but no one, including President Trump, has even been *charged* with that crime, let alone convicted of it, in connection with January 6. In the impeachment proceedings, the Senate found President Trump *not guilty* of insurrection.

Relators do not seriously argue that the January 6 riot was an attempt to overthrow or break away from the government. Instead, they contend (Mem at 46) that it qualifies as an insurrection because "it sought to block Congress from fulfilling [a] core constitutional duty," and because it occurred at the seat of government. Relators cite no authority to suggest that these criteria qualify something as insurrection, and they plainly do not. Most federal government buildings throughout our nation—and especially in Washington, D.C.—are full of officials charged with fulfilling constitutional duties. That does not mean that any violent protest oriented toward disrupting government business in those buildings is "insurrection." Riots like that may be more or less serious in degree, and the circumstances of the January 6 riot certainly fall toward the more serious end of the scale. But this *is* a difference in degree, not in kind. Even a gravely serious riot of this kind remains a riot, not insurrection.

The crimes and violence that occurred on January 6 were repugnant to any

objective observer. But riots like that one—even political riots that impede important government functions—are not "insurrections" or "rebellions" in the Constitutional sense.

To be sure, the Colorado Supreme Court, by a slim 4-3 majority, affirmed that the events of January 6, 2021, constituted insurrection. But this decision was deeply flawed and unpersuasive precedent.

First, the majority opinion recognized that there is no accepted definition of insurrection as used in Section Three, *id*. at ¶¶ 179-181, 183, but it endorsed one anyway. The definition advanced in Colorado – that insurrection is (1) a public use of force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States, *id*. at ¶ 182, is so broad as to include nearly any effort by two or more people to obstruct federal law. Indeed, it would include organized obstruction of mail delivery by the U.S. Post Office.

Second, "the truncated procedures and limited due process provided by [Colorado law] [were] wholly insufficient to address the constitutional issues currently at play." *Anderson*, 2023 CO 63, ¶ 330, 2023 Co 63, 86 n. 10, 2023 WL 8770111 (Samour, J. dissenting). The Colorado hearing was a "procedural Frankenstein" *Id.* at ¶ 339, where President Trump was subjected "to the substandard due process of law" *Id.* at ¶ 236:

> There was no basic discovery, no ability to subpoena documents and compel witnesses, no workable timeframes to adequately investigate and

> develop defenses, and no final resolution of many legal issues affecting the court's power to decide the Electors' claim before the hearing on the merits.
>
> There was no fair trial either: President Trump was not offered the opportunity to request a jury of his peers; experts opined about some of the facts surrounding the January 6 incident and theorized about the law, including as it relates to the interpretation and application of the Fourteenth Amendment generally and Section Three specifically; and the court received and considered a partial congressional report, the admissibility of which is not beyond reproach.[30]

Id. at ¶ 340-341.

Third, the majority opinion improperly approved the district court's use of the January 6th report as evidence. This was a highly partisan report, that has been rightfully denounced. Use of the Report as an evidentiary basis was and remains a deeply flawed endorsement of partisan politics—not a dispassionate analysis of admissible evidence, subject to judicial tests for reliability.

2. President Trump did Not "Engage in" the January 6 Riot.

Regardless of whether the January 6 riot qualified as an "insurrection" (and it did not), Relators do not plausibly allege that President Trump "engaged in" it. The only conduct that Relators point to by President Trump is (i) unsuccessfully arguing that the announced result of the election was incorrect and should be

30 *Griswold,* 2023 Co 63 at ¶¶ 340-341.

changed, (ii) giving a speech on January 6 that repeated those arguments and asked the gathered crowd to "peacefully and patriotically make your voices heard," and (iii) watching television reports of the events at the Capitol before repeatedly asking the crowds for "peace" and to "go home." Both legally and factually, this does not amount to "engaging in" the January 6 riot.

(a) Section Three does not prohibit pure speech.

Section Three's disqualification has never been interpreted to apply broadly to anyone who was claimed to be associated in any way with an alleged insurrection. Rather, it refers only to active assistance to an ongoing insurrection. In particular, Section Three cannot properly be interpreted to extend to speech about an alleged insurrection that has not even begun yet.

As explained above, Section Three was modeled partly on the Second Confiscation Act, which provided penalties for anyone who "shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection." But the framers of the Fourteenth Amendment, enacted six years later, omitted any reference to inciting or setting on foot an insurrection. Instead they limited Section Three to "engag[ing] in" insurrection. This indicates that allegedly promoting a future insurrection does not come within Section Three.[31]

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31. Relators state in a footnote that this is "irrelevant" because "[n]o historical evidence suggests that Congress[] … meant to *exclude* incitement." (Mem at 53 n.40.)

Contemporaneous practice confirms that this was how the framing generation understood Section Three. In 1870, the House of Representatives considered whether a member-elect was disqualified by Section Three who, before the Civil War began, had voted in the Kentucky legislature for a resolution to "resist [any] invasion of the soil of the South at all hazards." 41 Cong Globe at 5443. The House found that this was *not* disqualifying under Section Three. *Id.* at 5447. Also in 1870, the House considered the qualifications of a Representative-elect from Virginia who, before the War, had voted in the Virginia House of Delegates for a resolution that Virginia should "unite" with "the slaveholding states" if "efforts to reconcile" with the North should fail, and who stated that Virginia should "if necessary, fight."[32] The House found that this too was not disqualifying under Section Three.[33] By contrast, at nearly the same time, the House *did* disqualify a candidate who "had acted as colonel in the rebel army" and "as governor of the rebel State of North Carolina."[34]

Relators' contrary arguments are unpersuasive. They cite only three sources

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But Congress' deliberate choice to omit ***the word incitement itself*** is obvious evidence of an intent to exclude incitement.

32. *Hinds' Precedents of the House of Representatives* at 477 (1907).

33. *Ibid* at 477–78.

34. *Ibid* at 481, 486.

to support their assertion that "[e]ngagement" in insurrection "can include incitement" (Mem at 52)—and none of them do. Two of Relators' sources establish only that *members of a rebel government or military* can engage in insurrection through words. For instance, Relators partially quote a 19th-century Attorney General who, in context, was discussing incitement *by Confederate government officials:*

> [O]fficers who, during the rebellion, discharged official duties not incident to war, but only such duties as belong to a state of peace, and were necessary to the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion or disqualified. Disloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion he must come under the disqualification.[35]

Similarly, Relators observe (Mem at 58) that commanders of an insurrectionary force may engage in insurrection by giving "marching orders or instructions to capture a particular objective." Neither of these examples remotely considers a stand-alone example of incitement. Relators' only other authority is an 1894 jury instruction interpreting a statute that expressly prohibited incitement. *In re Charge to Grand Jury*, 62 F 828, 829–30, 1894 US Dist LEXIS 67 (ND Ill 1894). That obviously sheds no light on whether incitement is covered by a provision that, like

35. 12 Op Att'y Gen at 205, https://www.google.com/books/edition/Official_Opinions_of_the_Attorneys_Gener/FGVJAQAAMAAJ?hl=en&gbpv=0.

Section Three, omits that word.

Even if Relators were correct that "engaging" under Section Three could include incitement, that legal standard would still be quite high. Courts have consistently and clearly defined incitement in the First Amendment context—and it would be very strange if speech that fell short of *inciting* insurrection under the First Amendment could still qualify as *engaging in* insurrection under the Fourteenth. Under the First Amendment, [e]ven "advocacy of the use of force or of law violation," or of "'the duty, necessity, or propriety' of violence," falls short. *Brandenburg v. Ohio*, 395 US 444, 447–48, 89 S Ct 1827, 1830 (1969). The "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coal.*, 535 US 234, 253, 122 S Ct 1389, 1403 (2002); *Nwanguma v. Trump*, 903 F3d 604, 610, 2018 US App LEXIS 25686 (6th Cir 2018). "What is required, to forfeit constitutional protection," is speech that (1) "specifically advocates for listeners to take unlawful action" and (2) is likely to produce "*imminent* disorder"—not merely "illegal action at some indefinite future time. *Nwanguma*, 903 F3d at 610, 2018 US App LEXIS 25686 (cleaned up); *Hess v. Ind.*, 414 US 105, 108–09, 94 S Ct 326, 328–29 (1973) (emphasis added). And, as the Supreme Court recently underscored in *Counterman v. Colorado*, it requires a showing of "specific intent … equivalent to purpose or knowledge." 600 US 66, 81, 2023 US LEXIS 2788 (2023) (citing *Hess*, 414 US at 109, 94 S Ct 326).

(b) President Trump never called for or supported crimes or violence.

As just described, Section 3 "engag[ing]" does not include incitement—and if it did, the threshold for incitement certainly would not be lower than the well-established First Amendment threshold. But it is not strictly necessary for the Court to decide that issue. Under that standard or any other reasonable standard, it is readily apparent as a factual matter that President Trump did nothing that could qualify as engaging in or inciting the January 6 riot.

Disputes over election outcomes are not new in our democracy. Most such disputes are highly contentious. In all such disputes, one side loses and finds its claims to have won the election rejected. But it is not in our constitutional tradition to treat the losers of those disputes as insurrectionists.

That is the case with President Trump. As is widely known, after now-President Biden was announced as the winner of the 2020 election, President Trump made a series of public statements, and took a series of public actions, challenging the correctness of that outcome and arguing in favor of various remedial actions. In particular, President Trump argued that Vice President Pence had authority under the Constitution to take certain actions that would result in President Trump being certified as the winner of the election. These arguments and efforts were unsuccessful, and Congress certified now-President Biden as the winner. Although President Trump continued to disagree with that result, he

promptly promised—and delivered—an "orderly transition" of power to President Biden.[36] This by itself cannot possibly implicate Section Three. Whatever else might qualify as "engag[ing] in insurrection," contesting an election outcome certainly does not.

On January 6, President Trump gave an impassioned speech to a large crowd gathered in Washington in support of his arguments that he should be certified the election winner.[37] Relators apparently contend that this speech amounted to some sort of instruction to engage in violence or crimes. But there is nothing to support that contention. The core of the President's speech did give instructions to the crowd—but those instructions expressly told the crowd *to be peaceful*:

> [W]e're going to walk down to the Capitol, and we're going to cheer on our brave senators and congressmen and -women, and we're probably not going to be cheering so much for some of them because you'll never take back our country with weakness. You have to show strength and you have to be strong. We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated. I know that everyone here will soon be marching over to the Capitol building to peacefully and

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36. Statement of President Donald Trump, https://x.com/DanScavino/status/1347103015493361664?s=20; *see Trump agrees to 'orderly transition' of power*, Politico, Jan. 7, 2021, *available at* https://www.politico.com/news/2021/01/07/trump-transition-of-power-455721#:~:text=%E2%80%9CEven%20though%20I%20totally%20disagree,Trump%20said%20in%20a%20statement.

37. *E.g.,* https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6.

> patriotically make your voices heard.[38]

And at the conclusion of his speech, President Trump instructed the crowd similarly:

> [W]e're going to walk down Pennsylvania Avenue, I love Pennsylvania Avenue, and we're going to the Capitol and we're going to try and give—the Democrats are hopeless. They're never voting for anything, not even one vote. But we're going to try and give our Republicans, the weak ones, because the strong ones don't need any of our help, we're going to try and give them the kind of pride and boldness that they need to take back our country. So let's walk down Pennsylvania Avenue. I want to thank you all. God bless you and God bless America. Thank you all for being here. This is incredible. Thank you very much. Thank you.[39]

These remarks expressly contemplated that Congress would complete its certification of the election results through "voting" and "count[ing] the electors." No part of the President's speech included any call for violence, criminal activity, or disrupting Congress' proceedings. As a D.C. Circuit judge remarked at argument last year, "the President didn't say break in, didn't say assault members of Congress, assault Capitol Police, or anything like that." *Blassingame v. Trump*, No. 22-5069 (DC Cir Dec. 7, 2022) argument transcr at 74:21-25 (Rogers, J.). Reading the transcript of the speech confirms this. The President asked the crowd to be "strong" and remarked that "Republicans are constantly fighting like a boxer with

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38. *Ibid.*

39. *Ibid.*

his hands tied behind his back." But he said nothing to contradict his express instructions that the crowd protest "peacefully and patriotically."

This cannot possibly have been "engagement" in violence that had begun well before President Trump finished his speech. Relators apparently are building their case on an allegation of implicit encouragement—combined with explicit discouragement—of an alleged future insurrection. They cite no authority suggesting that Section Three could cover that. President Trump gave an impassioned speech instructing the crowd to "peacefully" advocate for specific Congressional action. Whatever else might qualify as "engag[ing] in" the January 6 riot, that does not.

Nor can President Trump's conduct *during* the January 6 riot possibly amount to "engag[ing] in" it. While rioters were in the Capitol, Relators do not allege that President Trump did anything affirmative to help them or their crimes. Relators' wish that President Trump had managed to *stop* the riot sooner cannot somehow be transformed into his *engaging in* it. Claims that the President has failed properly to execute the law are categorically non-justiciable. *United States v. Texas*, 599 US 670, 678–81, 2023 US LEXIS 2639 (2023). Such concerns are to be policed by Congress and the electorate, not the courts. *Id.* at 685, 2023 US LEXIS 2639. That is especially true to the extent that Relators suggest President Trump should have made different decisions with respect to deploying the National

Guard—a President's discretionary decision-making regarding the use of military force is *emphatically* outside the province of judicial review. *Martin v. Mott*, 25 US 19, 31–32, 1827 US LEXIS 378 (1827). In particular, the President has exclusive, unreviewable, discretionary authority to decide whether to call out the militia to address even an undoubted insurrection. *Luther v. Borden*, 48 US 1, 44–45, 1849 US LEXIS 337 (1849). Therefore, in accord with the ordinary English, President Trump's alleged *inaction* while rioters were in the Capitol certainly does not qualify as "engaging in" anything.

And the President's affirmative actions did not remotely constitute engagement in the events at the Capitol. For a short while after the riot began, President Trump continued to articulate his criticisms of the announced election result and his arguments for changing it. But within minutes of Congress going into recess, President Trump tweeted that protesters should "support our Capitol Police and Law Enforcement" and "Stay peaceful!"[40] From that moment on, the President's public statements were exclusively calls for peace and an end to the riot. Shortly thereafter, the President tweeted again, "asking for everyone at the U.S. Capitol to remain peaceful" and to "respect the Law and our great men and

40. @realDonaldTrump, TWITTER, (Jan. 6, 2021, 2:38pm), https://twitter.com/real-DonaldTrump/status/1346904110969315332.

women in Blue," and calling for "No violence!"[41] The President then released a minute-long video, which repeated his position that the announced election result was wrong but stated:

> [Y]ou have to go home now. We have to have peace. We have to have law and order, we have to respect our great people in law and order. We don't want anybody hurt…. This was a fraudulent election, but we can't play into the hands of these people. We have to have peace. So go home…. I know how you feel. But go home, and go home in peace.[42]

Later that evening, the President again tweeted that the rioters should "[g]o home with love & in peace."[43] This tweet was deleted by Twitter. About two hours after that, Congress re-convened to certify now-President Biden as the winner of the election.

Relators obviously believe that President Trump was too slow in pivoting from calling for a change in the announced election result to calling for a stop to the crimes being committed at the Capitol. But that is not something a court may

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41. @realDonaldTrump, TWITTER (Jan. 6, 2021, 3:13pm), https://twitter.com/real-DonaldTrump/status/1346912780700577792.

42. *President Trump Video Statement on Capitol Protesters*, https://www.c-span.org/video/?507774-1/president-trump-video-statement-capitol-protesters. A transcript can be found at: https://www.presi-dency.ucsb.edu/documents/vide-otaped-remarks-during-the-insurrection-the-united-states-capitol.

43. Brooke Singman, *Trump says election was 'stolen' and 'these are the things and events that happen' tells people to 'go home'*, Fox News (Jan. 6, 2021, 6:44 PM EST) https://www.foxnews.com/politics/trump-tells-protesters-to-go-home-maintaining-that-the-election-was-stolen-amid-violence-at-the-capitol.

second-guess and, in any event, simply does not qualify as "engaging in" those crimes.

President Trump unsuccessfully contested an election outcome. He gave an impassioned speech to a crowd, repeating his arguments and calling for peaceful protest in support of them. And after the protest turned violent, he repeatedly called for it to stop. This course of conduct met with the deep disapproval of many Americans. But neither the whole of it nor any part is included within any reasonable interpretation of the phrase "engag[ing] in insurrection." Relators' claims therefore are meritless.

III.

CONCLUSION

The Petition should be dismissed for lack standing, lack of jurisdiction, and because Plaintiffs-Relators sought mandamus for a political question for which they had other remedies. In the alternative this petition should be denied because the remedy is reserved for Congress, and because Section 3 does not apply here.

CERTIFICATE OF COMPLIANCE WITH TYPE SIZE REQUIREMENTS

Type size

I certify that the size of the type in this brief is not smaller than 14 points for both the text of the brief and footnotes.

Dated: December 29, 2023

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PROOF OF SERVICE

Certificate of Filing

I certify that on December 29, 2023, I filed the original of INTERVENORS-RESPONDENTS' MEMORANDUM IN OPPOSITION TO MANDAMUS by efiling with the Supreme Court Administrator at this address or via the electronic filing system:

Oregon Supreme Court
1163 State Street
Salem, Oregon 97301-2563

Certificate of Service

I certify that on December 29, 2023, I served a copy of this **Answering Brief** by e-filing and e-mail to the following attorneys:

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INDEX OF APPENDICES

Order

Michigan Supreme Court
Lansing, Michigan

December 27, 2023

166470 & (122)(133)(134)(137)(138)(140)

ROBERT LaBRANT, ANDREW BRADWAY, NORAH MURPHY, and WILLIAM NOWLING,
Plaintiffs-Appellants,
v

SC: 166470
COA: 368628
Ct of Claims: 23-000137-MZ

SECRETARY OF STATE,
Defendant-Appellee,

and

DONALD J. TRUMP,
Intervening Appellee.

_____/

On order of the Court, the motions for immediate consideration are GRANTED. The motions of Republican National Committee, National Republican Senatorial Committee, and National Republican Congressional Committee; Professor Kurt T. Lash; Constitutional Accountability Center; and Citizens for Responsibility and Ethics in Washington to file briefs amicus curiae are GRANTED. The amicus briefs submitted on December 22, 2023 are accepted for filing. The application for leave to appeal the December 14, 2023 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

WELCH, J. (*dissenting*).

As I noted in an earlier appeal in this matter, "[w]hether a potential presidential candidate is constitutionally ineligible to appear on the ballot pursuant to the Insurrection Clause of the Fourteenth Amendment, US Const, Am XIV, § 3, and whether the judiciary can decide that question before an election are questions of monumental importance for our system of democratic governance." *LaBrant v Secretary of State*, ___ Mich ___, ___ (December 6, 2023) (Docket No. 166373) (WELCH, J., dissenting). While I disagreed with this Court's decision to not grant the appellants' earlier bypass application, the Court of Appeals moved with extraordinary speed to work through significant legal questions and promptly issued a thoughtful opinion. Considering the importance of the legal questions at issue and the speed with which the appellants and the judiciary have moved, I believe it is important for this Court to issue a decision on the merits.

The only legal issue properly before the Court is whether the Court of Claims and the Court of Appeals erred by holding that the Michigan Secretary of State lacks legal authority to remove or withhold former President Donald J. Trump's name from

Michigan's 2024 presidential primary ballot. I agree with the Court of Appeals that under MCL 168.614a and MCL 168.615a, the Secretary of State must place Trump on the primary ballot "regardless of whether he would be disqualified from holding office by" US Const, Am XIV, § 3. *Davis v Wayne Co Election Comm*, ___ Mich App ___, ___ (December 14, 2023) (Docket Nos. 368615 and 368628); slip op at 18. As the Court of Appeals correctly observed, "where the relevant statutes require the Secretary of State to place any candidate" who has been identified by the relevant political party "on the presidential primary ballot, and confers no discretion to the Secretary of State to do otherwise, there is no error to correct." *Id*. at 21.

Appellants argue that because the state has delegated to political parties the role of selecting primary candidates, this makes the political parties limited purpose state actors subject to the Fourteenth Amendment of the United States Constitution. See *Smith v Allwright*, 321 US 649 (1944) (holding that the Democratic Party of Texas was a state actor subject to the federal Constitution); *Terry v Adams*, 345 US 461 (1953) (holding that political-party-controlled primaries are subject to the Fifteenth Amendment); *Nixon v Condon*, 286 US 73 (1932) (concluding that the Fourteenth Amendment applies to the conduct of political parties using delegated government authority to conduct state primaries). The decisions in *Nixon*, *Smith*, and *Terry* each involved ballot access questions, and in each case, the United States Supreme Court held that a political party could not deny a voter access to the primary ballot box for discriminatory reasons. Appellants further argue that Michigan courts have recognized that *Nixon*, *Smith*, and *Terry* apply to Michigan political parties when they act as "agencies of the state" in the presidential primary process. See, e.g., *Grebner v Michigan*, 480 Mich 939, 940-941 (2007) (citing *Nixon*, *Smith*, and *Terry*); *Fifth Dist Republican Comm v Employment Security Comm*, 19 Mich App 449, 454 (1969) (citing *Smith*, characterizing a political party as a state actor subject to constitutional restrictions when it is entrusted by the state with a role in a primary election). On the basis of these cases, appellants argue that the political parties are state actors for purposes of putting forward candidates for the presidential primary, and thus, the political parties are subject to the United States Constitution.

If this premise is true, then political parties might have a constitutional obligation to ensure that proposed presidential primary candidates are constitutionally eligible to hold the office of President before submitting their names to the Secretary of State for inclusion on the primary ballot. But this does not affect the Secretary of State's limited role and authority under MCL 168.614a and MCL 168.615a in relation to presidential primary elections. Under MCL 168.614a(3) and MCL 168.615a(1) and (2), the Secretary of State must place names on the primary ballot based upon a survey of "individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination," MCL 168.614a(1), and a "list of individuals whom [the chairpersons of each political party] consider to be potential presidential candidates for that party," MCL 168.614a(2). The Secretary of State must also include on the primary ballot an "individual who is not listed as a potential presidential candidate under section 614a . . . if he or she

files a nominating petition with the secretary of state no later than 4 p.m. on the second Friday in December of the year before the presidential election year" and the nominating petition is valid. MCL 168.615a(2). While MCL 168.615a(1) permits the Secretary of State to withhold from the primary ballot the name of a potential presidential candidate if the candidate makes such a request in an affidavit filed "no later than 4 p.m. on the second Friday in December of the year before the presidential election year," the appellants have not cited any other provision of the Michigan Election Law, MCL 168.1 *et seq*., that gives the Secretary of State the discretion or legal authority to remove or withhold a potential presidential candidate's name from the primary ballot. While there may be some merit to the argument that political parties are limited purpose state actors who must comply with the United States Constitution when submitting candidate names as part of the presidential primary process, no political party is a party to this litigation.

The appellants have also notified this Court that on December 19, 2023, a majority of the Colorado Supreme Court held that Trump is disqualified from holding the office of President under Section Three of the Fourteenth Amendment of the United States Constitution and that therefore, under the Colorado Election Code, it would be wrongful for the Colorado Secretary of State to list him as a candidate on the Colorado Republican presidential primary ballot in 2024. *Anderson v Griswold*, ___ P3d ___; 2023 CO 63 (Colo, 2023). The Colorado Supreme Court's decision was preceded by a lengthy evidentiary proceeding in a trial court that developed the factual record necessary to resolve the complicated legal questions at issue. The legal effect of the decision from Colorado has been stayed for a short period, and Trump has indicated his intent to seek leave to appeal in the United States Supreme Court.

Significantly, Colorado's election laws differ from Michigan's laws in a material way that is directly relevant to why the appellants in this case are not entitled to the relief they seek concerning the presidential primary election in Michigan. As noted by the *Anderson* majority:

> The [Colorado] Election Code limits participation in the presidential primary to "qualified" candidates. § 1-4-1203(2)(a) ("[E]ach political party that has a *qualified* candidate . . . is entitled to participate in the Colorado presidential primary election." (emphasis added)); *see also* §§ 1-4-1101(1), -1205, C.R.S. (2023) (allowing a write-in candidate to participate in the presidential primary election if he or she submits an affidavit stating he or she is "qualified to assume" the duties of the office if elected). As a practical matter, the mechanism through which a presidential primary hopeful attests that he or she is a "qualified candidate" is the "statement of intent" (or "affidavit of intent") filed with the Secretary. *See* § 1-4-1204(1)(c) (requiring candidates to submit to the Secretary a notarized "statement of intent"); § 1-4-1205 (requiring a write-in candidate to file a notarized "statement of intent" in order for votes to be counted for that candidate and

> stating that "such affidavit" must be accompanied by the requisite filing fee). [*Id*. at __; slip op at 22-23.]

The appellants have identified no analogous provision in the Michigan Election Law that requires someone seeking the office of President of the United States to attest to their legal qualification to hold the office.

Under MCL 168.558(1), candidates for most political offices in Michigan must file with the Secretary of State an affidavit of identity. This affidavit must be submitted with a "nominating petition, qualifying petition, filing fee, or affidavit of candidacy for a federal, county, state, city, township, village, metropolitan district, or school district office in any election" (if applicable) and must be filed within one business day after officially being nominated for "federal, state, county, city, township, or village office at a political party convention or caucus . . . ." *Id*. The affidavit of identity must include "a statement that the candidate meets the constitutional and statutory qualifications for the office sought[.]" MCL 168.558(2). Under Michigan law, materially false statements in an affidavit of identity can be grounds for withholding a candidate's name from the ballot or removing a candidate's name from the ballot. But Trump is not seeking to appear on the primary ballot by way of a nominating petition under MCL 168.615a(2), and "[t]he affidavit of identity filing requirement does not apply to a candidate nominated for the office of President of the United States or Vice President of the United States." MCL 168.558(1). While the wisdom and purpose of such a policy choice is open to debate, that debate rests with the Legislature.

Under MCL 168.558, MCL 168.614a, and MCL 168.615a, the Secretary of State is not legally required to confirm the eligibility of potential presidential primary candidates. She lacks the legal authority to remove a legally ineligible candidate from the ballot once their name has been put forward by a political party in compliance with the statutes governing primary elections. I would affirm the Court of Appeals' ruling on this issue, which still allows appellants to renew their legal efforts as to the Michigan general election later in 2024 should Trump become the Republican nominee for President of the United States or seek such office as an independent candidate. Finally, while not adopted by the Court of Appeals, I would also vacate the Court of Claims' analysis and application of the political question doctrine as unnecessary dicta considering the court's conclusions on the

merits as to the primary election and ripeness as to the general election.[1] For these reasons, I respectfully dissent.

[1] The Court of Appeals also held that the appellants' argument that former President Trump is legally ineligible to appear on the November 2024 general election ballot is not yet ripe for judicial review because he has yet to prevail in the Michigan presidential primary and has not received the official nomination of the Republican Party at the party's national convention. While I question whether, under the present circumstances, such a claim is unripe for judicial review until a candidate becomes the official nominee of a political party, the Court of Appeals' ruling on ripeness as to the general election ballot was not appealed to this Court.

DATE FILED: November 27, 2023 7:24 PM
FILING ID: 2E1A6BCA9FBC6
CASE NUMBER: 2023SA300

SUPREME COURT STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80202	
Original Proceeding District Court, City and County of Denver, Colorado, Case No. 2023CV32577	
In Re: **Petitioners-Appellees/Cross-Appellants:** **NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT,** and **CHRISTOPHER CASTILIAN**, v. **Respondent-Appellee:** **JENA GRISWOLD,** in her official capacity as Colorado Secretary of State, v. **Intervenor-Appellee:** **COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,** an unincorporated association, **Intervenor-Appellant/Cross-Appellee:** and **DONALD J. TRUMP.**	▲ **COURT USE ONLY** ▲
Attorney for Amicus Curiae Constitutional Law Professor Kurt Lash: David W. Illingworth II, Colo. Attorney #52718 ILLINGWORTH LAW LLC 1145 Ptarmigan Dr. Woodland Park, CO 80863 (405) 593-9136, dwillingworth@hotmail.com Professor Kurt T. Lash, University of Richmond School of Law 316 N. 27th St. Richmond Virginia, 23223 (626) 644-1864, klash@richmond.edu	Supreme Court Case Number: 2023SA00300
BRIEF OF AMICUS CURIAE PROFESSOR KURT T. LASH IN SUPPORT OF RESPONDENT-APPELLEE AND INTERVENORS-APPELLEES	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all relevant requirements of C.A.R. 28, 29, and 32, including all formatting requirements set forth in those rules. Specifically, I certify that:

This amicus brief complies with the applicable word limit set out in C.A.R. 29(d) (4,750 word limit for amicus briefs filed in support of merits briefs). It contains 4,720 words.

I acknowledge that this brief may not be accepted if it does not comply with C.A.R. 28, 29, and 32.

s/ David W. Illingworth II
David W. Illingworth II, #52718

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Identity and Interest of Amicus Curiae

Kurt T. Lash is a professor at the University of Richmond School of Law. He teaches and writes about the history and original understanding of the Constitution. He has published multiple books on the history of the Fourteenth Amendment, including THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (Cambridge University Press, 2014) and, most recently, THE RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS (2 volumes) (University of Chicago Press, 2021). He has an interest in advancing an historically accurate judicial interpretation of the Fourteenth Amendment, including Section Three.

No party participated in preparing this brief. Professor Lash volunteered his time to prepare this brief with assistance from volunteer attorneys.

Summary of Argument

Section Three of the Fourteenth Amendment, when enforced under powers granted by Section Five, prevented the leaders of the recent rebellion from returning to Congress, holding any state level office, or receiving any appointment by Democrat President Andrew Johnson, absent congressional permission. Its focus was on rebellious disruption of state level decision-making and the potentially disruptive appointments by Andrew Johnson.

This much is clear. Much else is not. Section Three does not expressly cover the nationally elected office of President of the United States or address whether it can be enforced in the absence of congressional enforcement legislation. There are strong textual, structural, historical and commonsense reasons to conclude that Section Three does *not* include the office of President. Similar reasons suggest no person can be disqualified under Section Three in the absence of congressional enforcement legislation. At best, on these matters the text and available historical record are ambiguous.

Argument

I. TEXT, STRUCTURE, CONGRESSIONAL PRECEDENT AND HISTORICAL CONTEXT COLLECTIVELY SUPPORT AN INTERPRETATION OF SECTION THREE THAT EXCLUDES THE OFFICE OF PRESIDENT OF THE UNITED STATES.

A. THE COURT MUST DETERMINE WHETHER THE PRESIDENCY IS A "CIVIL OFFICE" "UNDER THE UNITED STATES."

> The relevant portion of Section Three of the Fourteenth Amendment declares: 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 . . .[1]

[1] U.S. Const., amend. XIV, Section Three.

The text does not expressly cover the position of President of the United States. That position is covered only if the framers and ratifiers understood the phrase "*any office, civil or military, under the United States*" impliedly included the office of the President. Put another way, the court must determine whether the President of the United States holds a "civil office" that is "under the United States."

Petitioners and supporting amici would have this court believe the issue turns on whether the President is an "officer" who holds an "office."[2] This is not correct. Such references are irrelevant to determining the meaning of this portion of Section Three. The question the court must resolve is whether the framers or ratifiers thought that the President holds a "*civil* office" "*under the United States*." This is a much more precise and historically difficult question. Thankfully, it is one that both Congress and legal authorities had authoritatively resolved by the time of the Fourteenth Amendment.

B. CONGRESSIONAL PRECEDENT AND CONSTITUTIONAL TREATISES AT THE TIME OF THE FOURTEENTH AMENDMENT INTERPRETED "CIVIL OFFICERS UNDER THE UNITED STATES" IN A MANNER THAT EXCLUDED THE PRESIDENT OF THE UNITED STATES.

[2] See Petitioner's Brief at 24-25; Const. Accountability Center ("CAC") amicus at 4; Graber Amicus at 10.

At the time of the Fourteenth Amendment, well known congressional precedent and the most respected legal treatise in the country both rejected the idea that the President of the United States was a "civil officer" "under the United States."

In 1799, the United States Senate had to determine whether a Senator fell within the meaning of the Impeachment Clause's reference to "The President, Vice President and all civil Officers of the United States."[3] In what became known as "Blount's Case," the Senate ruled that Senators were *not* "civil officers of the United States."[4] As James Asherton Bayard, Sr. explained, "it is clear that a Senator is not an officer under the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it."[5] This reading of the Impeachment Clause remains the standard reading to this day.[6]

In his influential COMMENTARIES ON THE CONSTITUTION, Joseph Story discussed Blount's Case and the constitutional meaning of "civil officer."[7]

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[3] Art. II, Section 4.
[4] See, Impeachment of William Blount, record at https://bit.ly/47bgOKK.
[5] Id. at p. 2258.
[6] See, Vik Amar and Akhil Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113, 115 (describing the Senate's ruling in Blount's Case as correct).
[7] See, Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 259 (1833) (3 volumes).

According to Story, in Blount's Case the early Senate had likely concluded that "civil officers of the United States" were those who "derived their appointment from and under the national government."[8] "In this view," Story explained, "the enumeration of the president and vice president, as impeachable officers, was *indispensable*; for they derive, or may derive, their office from a source paramount to the national government."[9] Story's analysis equally applies to Section Three: Had the framers meant to include the position of President, it would have been "indispensable" to expressly say so, since the President is not a "civil officer" "under the government of the United States."

The Framers of the Fourteenth Amendment accepted the authority of Story's Commentaries and they cited and quoted his work during congressional debates.[10] Members of the Thirty-Ninth Congress also were aware of Blount's Case. In the previous Congress, Senator Reverdy Johnson had reminded his colleagues that, according to Bayard's argument in Blount's Case, "it is clear that a Senator is not an officer under the Government. The Government consists of the President, the Senate,

[8] Id.
[9] Id. at 259-60.
[10] See, e.g., Speech of John Bingham, February 28, 1866, *in* 2 RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS 115 (2 vols) (Kurt Lash, ed., 2021).

and House of Representatives, and they who constitute the Government cannot be said to be under it."[11]

Given this long-standing precedent and the authoritative status of Story's Commentaries, it is reasonable to presume the framers drafted Section Three with the understanding that judges would rely on Story's Commentaries (and Blount's Case) in interpreting the meaning of "civil offices" "under the United States." Indeed, it would have been negligent of them not to do so.

This is true even though not every member of Congress agreed with Story. One month after Congress sent the amendment to the states, a four-member committee issued a report suggesting that Story's analysis of Blount's Case was "incautious." ("The Conkling Report").[12] Conceding Story might be correct in a "technical sense," the committee thought an "enlarged" view of the Constitution should include Senators as civil officers.[13] Nevertheless, the committee advised that Congress avoid the entire issue since "this is not, perhaps, a proper case in which to make precedent upon so vital a constitutional question."[14] Congress agreed and

[11] CG, 38th Cong., 1st sess. at 329.
[12] See Cong. Globe, 39th Cong., 1st Sess., at 3940.
[13] Id.
[14] Id. at 3940.

resolved the issue on grounds having nothing to do with Blount's Case and Story's view that the President was not a "civil officer under the United States."[15]

Amicus author Mark Graber is wrong, therefore, when he claims that the Conkling Report establishes that "the House of Representatives firmly rejected any constitutional distinction between the phrases "office under" and an "office of" as they were used in various constitutional provisions, including Section Three of the Fourteenth Amendment."[16] In fact, neither the Report nor the House of Representatives "rejected" anything. Instead, the House accepted the committee's recommendation that Congress avoid "mak[ing] precedent upon so vital a constitutional question."

In sum, before, during and after the Thirty Ninth Congress, Story's analysis of Blount's Case and "civil officers under the United States" remained the authoritative view.

C. CONGRESS CONSIDERED, BUT ULTIMATELY REJECTED, A DRAFT OF SECTION THREE THAT EXPRESSLY BARRED PERSONS FROM QUALIFYING FOR OR HOLDING THE OFFICE OF PRESIDENT OF THE UNITED STATES.

[15] Id. at 3942 (committee suggested resolution), and id. at 3943 (accepting the committee's recommendation).
[16] See, Graber Amicus at 13.

On February 19, 1866, Representative Samuel McKee submitted to the House of Representatives a proposed amendment which declared:

> No person shall be qualified[17] or shall 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, who has been or shall hereafter be engaged in any armed conspiracy or rebellion against the government of the United States . . ..[18]

McKee's proposal expressly named the office of President of the United States, expressly prohibited being "qualified" as well as "hold[ing]" the office, and expressly applied to both past and future rebellions (those "hereafter"). The final draft of Section Three, however, omitted McKee's reference to the office of President or Vice President, persons being "qualified" and future rebellions "hereafter." Newspapers across the country published McKee's original proposal.[19] Accordingly, the public knew that Congress had considered and rejected a draft that expressly disqualified persons from being qualified for, or holding the office of, the President of the United States.

Amici attempt to downplay the significance of McKee's draft, arguing that the Joint Committee never considered the draft and that Senator McKee himself

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[17] Newspapers read this term as meaning "nominated." See, Illustrated New Age (Philadelphia, Pennsylvania), February 20, 1866, p. 1 https://bit.ly/3qVis3z
[18] CG, 39, 1st, p. 919.
[19] See, e.g., Boston Daily Advertiser (Boston, Massachusetts), March 14, 1866, p. 4.

desired to have only "loyal" Americans "rule the country."[20] Both arguments miss the point. First, there is no doubt that the Joint Committee knew of McKee's draft. Committee members serving in the House would have been in the room when McKee presented his proposal and delivered a major speech explaining its content.[21] Second, and more importantly, the *public* (and future ratifiers) knew that Congress had received, and ultimately rejected, a draft that expressly addressed the office of President of the United States. This knowledge, when combined with the actual text and structure of Section Three (discussed below), provided the ratifiers an additional significant reason to presume the framers knew how to draft a clause that included the office of President but intentionally chose not to do so.

D. THE JOINT COMMITTEE DRAFT OF SECTION THREE PROTECTED THE PRESIDENCY BY PROTECTING THE ELECTORAL COLLEGE

On April 30, 1866, the Joint Committee submitted a five-sectioned Fourteenth Amendment. Section Three of that Amendment declared:

> Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.[22]

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[20] See, e.g., CAC amicus at 14 n.1; Graber amicus at 17.
[21] Cong. Globe., 39th Cong., 1st Sess. at 1162 (March 3, 1866).
[22] 2 RECONSTRUCTION AMENDMENTS at 156.

Instead guarding the presidency by disqualifying rebels from holding the office of President of the United States (as had McKee's prior draft), the Joint Committee guarded the presidency by disenfranchising rebels from voting for electors of the President of the United States. The final draft of Section Three adopted this same approach.

In the debates that followed, not a single member proposed altering the amendment to address the office of President of the United States. Instead, a number of Republicans insisted that the proposal did not adequately secure a trustworthy electoral college. Michigan Representative John Longyear, for example, complained that Section Three would be "easily evaded by appointing electors of President and Vice President through their legislatures, as South Carolina has always done."[23] Fellow Joint Committee member Jacob Howard agreed, noting that the current draft "would not prevent rebels from voting for state representatives or prevent state legislatures from choosing rebels as presidential electors."[24]

The final version of the Fourteenth Amendment addressed these complaints by prohibiting leading rebels from *serving* as presidential electors and giving

[23] Id. at 2537.
[24] Id. at 2768.

Congress the power "to enforce, by appropriate legislation, the provisions of this article."[25]

E. THE FINAL DRAFT OF SECTION THREE ALSO PROTECTED THE PRESIDENCY BY SECURING A TRUSTWORTHY ELECTORAL COLLEGE

The final draft of Section Three, in relevant section, declares:

> 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, . . .[26]

Like the Joint Committee draft, this final draft does not address the office of President of the United States. Also like the Joint Committee draft, the final draft focused on securing trustworthy presidential *electors*. Unlike the prior draft, which had prohibited rebels from voting for electors, this final version prohibited leading rebels from *serving* as presidential electors.

Had the framers of Section Three intended to include the President in the catch-all reference to "civil" officers "under the United States," they were remarkably negligent. Members knew about Blount's Case and they were well aware of broadly accepted authority of Story's Commentaries on matters of constitutional interpretation. Had they intended to include the office of President, they risked being

[25] U.S. Const. XIV amend., Section Five.
[26] U.S. Const. XIV amend., Section Three.

thwarted by any judge owning a copy of Story's Commentaries. More likely, the drafters were not negligent. They simply chose to protect the presidency through the device of a trustworthy electoral college.

1. A COMMONSENSE READING OF SECTION THREE INTUITIVELY SUGGESTS THAT THE GENERAL "CATCH-ALL" PROVISION DOES NOT INCLUDE THE HIGH POSITION OF PRESIDENT OF THE UNITED STATES.

Even those ratifiers unfamiliar with Blount's Case or Story's Commentaries could have reasonably read the text as excluding the position of President of the United States.

Section Three enumerates the apex political positions of Senator and Representatives, followed by a clause dealing with the electors of a third apex position, the President of the United States. These expressly enumerated positions are then followed by a general catch-all provision referring to "all offices, civil or military under the United States." This text and structure intuitively suggests that the framers expressly named every apex political position they intended to include and, thus, intentionally excluded the position of President. The legal term for this

commonsense reading of a legal text is *expressio unius est exclusio alterius*" ("the inclusion of one thing means the exclusion of another").[27]

This intuitive approach to reading legal texts led one of the most sophisticated lawyers in the Senate to conclude that Section Three excluded the office of the President. In an extended speech on the proposed Fourteenth Amendment, Senator and former United States Attorney General Reverdy Johnson remarked: "[former rebels] may be elected President or Vice President of the United States, and why did you omit to exclude them?"[28] Republican Senator Lot Morrill then interjected: "Let me call the Senator's attention to the words "or hold any office, civil or military, under the United States."[29] Johnson, who was in the middle of an extended speech, conceded, "[p]erhaps 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."[30]

Petitioners claim the Johnson-Morrill exchange "reveal[s] a clear intent to cover the office of the presidency."[31] This is obviously hyperbole, as no single

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[27] See, Scalia, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW 25-26 (1997).
[28] CG, 39th, 1st sess., at 2899.
[29] Id.
[30] Id. (emphasis added)
[31] Petitioners Brief at 23.

exchange by two people who had nothing to do with drafting Section Three can establish the "clear intent" of both Houses of Congress.

But more importantly, petitioners miss the interpretive significance of the exchange. If the text and structure of Section Three "misled" the former Attorney General of the United States into thinking Section Three excluded the office of President of the United States, then ordinary *ratifiers* could have been just as easily "misled." Nor would the public have known about Morrill's "correction." Although multiple newspapers published substantial portions of the framing debates, no newspaper seems to have reported the Johnson-Morrill exchange. Thus, any ratifier who knew about Blount's Case, Story's Commentaries, or simply applied a commonsense approach to reading Section Three likely would have shared Johnson's initial view that the office of the President has been excluded.

2. NO RATIFIER DESCRIBED SECTION THREE AS DISQUALIFYING ANYONE FROM BEING PRESIDENT OF THE UNITED STATES.

Despite intense historical research by the parties in this case, and by multiple scholars who have investigated the issue for several years, no one has yet discovered a single example of a ratifier reading Section Three as including the office of President of the United States.

Petitioners point to scattered pieces of ratification period evidence which they claim support their reading of Section Three. The examples are few and none of them involve the ratifiers. Most do not even involve Section Three. For example, petitioners and some amici cite John Vlahoplus's article in which he claims to have discovered an 1866 newspaper article arguing that removing Section Three would "leave 'Robert E. Lee . . . as eligible to the Presidency as Lieut. General Grant.'"[32] In fact, the writer is *not* referring to Section Three, but is simply criticizing the south's belief that "a rebel is as worthy of honor as a Union soldier; that Robert E. Lee is as eligible to the Presidency as Lieut. General Grant."[33] Amici also cite an article in the GALLIPOLIS JOURNAL which they claim involves a discussion of Section Three's inclusion of the President of the United States.[34] It turns out the essay does not reference Section Three, but instead refers to an earlier draft.[35]

One final piece of evidence involves an essay in the MILWAUKEE DAILY JOURNAL which presumes that Jefferson Davis could be president if he received a

[32] See John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. 1, 7 n.37 (2023). See also, Petitioner's Brief at 39; CAC Amicus at 14.
[33] See Indianapolis Daily Journal, July 12, 1866, p. 2.
[34] See, Gallipolis Journal (Gallipolis, Ohio), Feb. 21, 1867. Cited by CAC Amicus at 14.
[35] See 2 RECONSTRUCTION AMENDMENTS, at 219 (quoted above).

"two-thirds vote of congress."[36] The fact that the only shred of (accurately described) historical evidence involves a single sentence in a Milwaukee newspaper simply illustrates the paucity of historical evidence supporting the petitioner's reading of Section Three.

Petitioners repeatedly insist that Section Three must be read to prevent rebels like Jefferson Davis from becoming President.[37] To the extent that anyone at the time seriously worried about Jefferson Davis, their concerns focused on possible disloyal votes in the electoral college or Davis's return to *Congress*. An 1868 newspaper essay, for example, called for the enforcement of Section Three in order to prevent electors in the State of Texas from casting their votes for "Jefferson Davis for President and Alexander Stephens for Vice President."[38] T. F. Withrow warned an Iowa gathering that Section Three was essential because, otherwise, "Jefferson Davis [may] be made eligible to the Cabinet or Senate, after he is pardoned, as he probably will be." Others scoffed at even this possibility. Speaking in opposition to the Fourteenth Amendment, New Hampshire's T. J. Smith mocked Republican fears

[36] Milwaukee Daily Sentinel, *Shall We Have a Southern Ireland*? (July 3, 1867); Petitioner's Brief at 26.
[37] Petitioner's Brief at 4, 11, 15, 25, 26, 27, 52,
[38] Daily Austin Republican (Austin, Texas), September 1, 1868, p. 2.

"that unless this amendment is adopted, that same Jefferson Davis will get back into *Congress*[.]"[39]

No Reconstruction Republican was concerned about the country electing Jefferson Davis President of the United States, much less believed the Constitution must be amended to prevent such a possibility. The very idea was no more than a punchline to a joke.[40]

II. IT IS REASONABLE, NOT ABSURD, TO READ SECTION THREE AS PROTECTING THE PRESIDENCY BY SECURING A TRUSTWORTHY ELECTORAL COLLEGE.

Some scholars and the petitioner claim that it would be absurd to read Section Three as not disqualifying rebels from being elected President of the United States.[41] On the contrary, it would have been absurd for either Congress or the Country to add a non-existent problem to their already long list of issues requiring immediate constitutional attention.[42] Worse, such a solution would have needlessly disenfranchised the loyal electorate throughout the country. None of the problems facing the country in 1866 required such an antidemocratic solution.

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[39] Weekly Union (Manchester, New Hampshire), July 31, 1866, p. 2 (emphasis added).
[40] Tiffin Tribune, Speech of Hon. John A. Bingham, July 18, 1872 (Joke about "President" Davis eliciting "laughter").
[41] See, e.g., See William Baude and Michael Paulsen, *The Sweep and Force of Section Three*, 172 U. Penn. L. Rev. at 111; Pet. Brief at 30.
[42] See, RECONSTRUCTION AMENDMENTS, at 5-14.

The two major concerns driving the adoption of Section Three involved *state* level politics where former leading rebels might foment local resistance and the ill-considered pardons and appointments of Democrat President Andrew Johnson.[43] This is why Section Three focuses on presidential appointments (civil offices under the government of the United States) and decisions made at a state level (Senators, Representatives, electors, and state offices). When it came to guarding the national presidency, a reasonable strategy involved doing so by way of the electoral college.

One amicus insists that the framers could not presume the "loyalty" of the electoral college and cites, as supposed proof, the participation of former confederate soldiers in Georgia's 1868 slate of presidential electors.[44] Their "proof" is a non-sequitur. Unless the argument is that former soldiers could never again be loyal to the United States, their participation in southern politics proves nothing at all.

In fact, moderate Republicans believed that many participants in the rebellion had either been coerced into supporting the Confederacy or would become loyal American once leading rebels had been removed from political power. As Senator

[43] See, e.g., Benjamin F. Butler, New York Tribune (New York, New York), November 26, 1866, p. 8 ("I charge Andrew Johnson with improperly, wickedly and corruptly using and abusing the constitutional power of pardons for offenses against the United States, and in order to bring traitors and Rebels into places of honor, trust and profit under the Government of the United States").
[44] See Graber Amicus at 18.

Daniel Clark explained during the Section Three debates, "I much prefer that you should take the leaders of the rebellion, the heads of it, and say to them, 'You never shall have anything to do with this Government,' and let those who have moved in humble spheres return to their loyalty and to the Government."[45] During those same debates, Senator William Windom declared that "if leading rebels are to be excluded from office, State as well as Federal, there is a reasonable probability that the *loyal* men of the South will control it."[46]

Securing a trustworthy electoral college required a combination of Section Three and Section Five. As Thaddeus Stevens noted in regard to the Joint Committee's draft of Section Three, "it will not execute itself."[47] When Congress passed the final version of Section Three, Stevens warned "I see no hope of safety unless in the prescription of proper enabling acts, which shall do justice to the freedmen and enjoin enfranchisement as a condition precedent."[48]

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[45] CG, 39th, 1st Sess. at 2771.
[46] CG 39th Cong. 1st Sess. at 3170
[47] Cong. Globe, 39th Cong., 1st sess., at 2544. Mark Graber incorrectly claims Steven's prior statement "you must legislate to carry out many parts of it" referred to Section Three. See Graber Amicus at 8 fn. 19. Graber omits the full quote which shows that Stevens at that point was referring to the Fourteenth Amendment as a whole, not to Section Three: "I say if this *amendment* prevails you must legislate to carry out many parts of it." Id. One of those "parts" was Section Three.
[48] CG, 39th, 1st. at 3148.

Congress accepted Steven's advice. In 1867, Congress passed the Reconstruction Acts which guaranteed black participation in the establishment of new state governments and the appointment of new presidential electors.[49] Those newly appointed, and primarily Republican, electors went on to provide the votes necessary to elect former Union General Ulysses S. Grant president of the United States in the elections of 1868.[50] As New York Governor Reuben E. Fenton explained just months before the official ratification of the Fourteenth Amendment, the Republican strategy of focusing on the electoral college had worked:

> It is well known that there was a large body of Union electors distributed throughout the South consisting of those who were never in sympathy with the rebellion, and those who, though numbered with the insurgents, were ready to accept the results of war and return to their old allegiance. . . . There was also a large body of men, composing two fifths of the whole population, born on the same soil, equally true to the Government, and equally powerless because they were disfranchised. If these two classes were allowed to act together in the use of the rights of our common manhood, it will be seen that the only obstacle was peaceably removed; as together, they outnumbered the rebel electors who prevented the work of reconstruction.[51]

III. BOTH FRAMERS AND MEMBERS OF RATIFYING ASSEMBLIES INSISTED THAT ENFORCING SECTION THREE REQUIRED ENABLING LEGISLATION

[49] See RECONSTRUCTION AMENDMENTS, at 388, 391.
[50] See Eric Foner, RECONSTRUCTION 343 (revised ed. 2014).
[51] See, Commercial Advertiser (New York, New York), January 7, 1868, p. 4.

As the election of 1868 illustrates, Republicans understood that Section Three required congressional enforcement. This is clear from Thaddeus Stevens repeated declarations that Section Three "will not execute itself" and that it required "proper enabling acts." (cited above)

There were two particular reasons why Section Three could not be enforced without enabling legislation. First, as Stevens noted, it could not possibly *work* absent such legislation. The framers knew this. Secondly, it would not be constitutionally appropriate to disqualify anyone prior to a judgment by an impartial tribunal. As Thomas Chalfant noted during the Pennsylvania Ratification Debates, although it was *possible* to read Section Three so that "no legal conviction is required before the disqualification attaches," such prior restraint would be absurd. [52]Instead, "you will say, and say properly, that in order to make this section of any effect whatever, the guilt must be established. I grant it."[53] Chalfant insisted Congress would have to create a politically neutral tribunal.[54] Throughout his extended remarks, Chalfant presumed that every ratifier in the room agreed with him that that

[52] Appendix, Daily Legislative Record Containing the Debates on the Several Important Bills Before the Legislature of 1867 (Harrisburg 1867), at LXXX. Digitized copy on file with author.
[53] Id. (emphasis added)
[54] See, Kurt Lash, *The Meaning and Ambiguity of Section Three* 45 (SSRN, forthcoming).

no person could properly be disqualified under Section Three prior to an adjudication by a legislatively established tribunal. In the hundreds of pages of debate in the Pennsylvania assembly, I have not found a single example of anyone who thought otherwise.

Soon after the ratification of the Fourteenth Amendment, Congress passed an Enforcement Act that specifically included provisions enforcing the restrictions of Section Three.[55] In his remarks on the proposed bill, Lyman Trumbull explained that such legislation was necessary because Section Three "provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution."[56]

IV. CONCLUSION

Text, structure, congressional precedent, commonsense interpretation, and politically strategic considerations all support a reading of Section Three which guards the Presidency by way of the electoral college and not by disqualifying any person from seeking the office of President of the United States. It is equally reasonable to read the text as requiring the prior enactment of enforcement legislation. At best, the text remains ambiguous on all these matters.

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[55] Act of May 31, 1870, 16 Stat. 140, 143.
[56] The Crisis (Columbus, Ohio), May 5, 1869, p. 2 (reporting on the debates of April 8, 1869).

The court below correctly rejected petitioners' claims to the contrary and should be affirmed.

Respectfully submitted 27th day of November 2023,

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CERTIFICATE OF SERVICE

I certify that on this 27th day of November 2023, the foregoing was electronically served via e-mail or CCES on all counsel and parties of record.

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In Re: **Petitioners-Appellees/Cross-Appellants:** **NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT,** and **CHRISTOPHER CASTILIAN**, v. **Respondent-Appellee:** **JENA GRISWOLD,** in her official capacity as Colorado Secretary of State, v. **Intervenor-Appellee:** **COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,** an unincorporated association, **Intervenor-Appellant/Cross-Appellee:** and **DONALD J. TRUMP.**	▲ ▲ **COURT USE ONLY**
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BRIEF SUBMITTED BY PROFESSOR SETH BARRETT TILLMAN AS *AMICUS CURIAE* IN SUPPORT OF INTERVENOR-APPELLANT/CROSS-APPELLEE DONALD J. TRUMP	

CERTIFICATE OF COMPLIANCE

In accordance with Colorado Appellate Rule ("C.A.R.") 28(a)(1), the undersigned hereby certifies that this amicus brief complies with all requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32. This brief was prepared using Microsoft Word and uses a proportionally spaced face (Times New Roman, 14-Point). The total number of words, as measured by the word count of the word-processing system used to prepare the brief, is 4,740.

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INTEREST OF *AMICUS CURIAE*

Professor Seth Barrett Tillman, an American national, is a member of the regular full-time faculty in the Maynooth University School of Law and Criminology, Ireland / Scoil an Dlí agus na Coireolaíochta Ollscoil Mhá Nuad. Professor Tillman's Statement of Interest is stated more fully in the accompanying Motion for Leave to file this brief.

No party participated in preparing this brief.

INTRODUCTION

The District Court below made two threshold rulings. First, the District Court held that Colorado law provided a cause of action to enforce Section 3 of the Fourteenth Amendment. Second, the District Court held that because the presidency was not an "Officer of the United States," Donald J. Trump was not covered by Section 3. But for the second ruling, the District Court would have ordered the removal of Trump from the presidential ballot. The latter holding is correct, but the former holding is in error.

In an omnibus ruling, the District Court deemed it "irrelevant" whether Section 3 is self-executing, because the court found that the Colorado Election Code provided a sufficient cause of action. However, the District Court failed to address a landmark ruling on Section 3: Chief Justice Salmon P. Chase's ruling in *Griffin's Case*. 11 F. Cas. 7 (C.C.D. Va. 1869). This decision, rendered within a year of Section 3's ratification, held that Section 3 is *not* self-executing, and that Section 3's enforcement requires a federal statute. Under Chase's opinion, state law is insufficient to enforce the disqualification provision. Moreover, *Griffin's Case*, and subsequent authorities, liquidated the meaning of Section 3. And *Griffin's Case* is consistent with a core premise of Reconstruction: *Section 3 empowered the federal government to control state elections and office-holding, and not the other way around*. On appeal, this Court should follow *Griffin's Case*.

The second threshold question is whether the President is an "Officer of the United States." The answer to this question was *no* in 1788, was *no* in 1868, and is *no* today. In the Constitution of 1788, the phrase "Officers of the United States" was used in the Appointments Clause, the Commissions Clause, the Oath or Affirmation Clause, and the Impeachment Clause. In none of these clauses is the President an

"Officer of the United States." The President does not appoint himself, does not commission himself, and takes his own presidential oath. Moreover, the Impeachment Clause expressly distinguishes between the President and the "Officers of the United States."

Justice Joseph Story's celebrated *Commentaries on the Constitution* in 1833 reaffirmed that the President is not an "Officer of the United States." Between 1866 and 1868, there were voluminous debates in Congress and in the States about Section 3 of the Fourteenth Amendment. To date, no one has located any record of anyone stating that the President is an "Officer of the United States" for purposes of Section 3. None. But there is contemporaneous evidence saying the opposite.

In the years, decades, and sesquicentennial following 1868, there has been a constant stream of authorities—Supreme Court decisions, Attorney General opinions, scholarship, and more—that support the same conclusion: the President is not an "Officer of the United States."

Petitioners and their *Amici* do not meaningfully attempt to rebut this 150+ years of history. Rather, they make three interpretive moves. First, they insist that the actual language used in the Constitution is irrelevant, and there is no difference between an "office," an "officer," an "officer of the United States" and an "office . . . under the United States." *Potato, potahto, tomato, tomahto, let's call the whole thing off*. And nearly all of their arguments flow from this flawed assumption. Second, petitioners disregard evidence from 1788 through 1866, and from 1868 through the present day, as if the continuous tradition of meaning that came before and after the 39th Congress is irrelevant. And third, petitioners hyper-focus on the intentions and expected applications of members of Congress at the time Section 3 was enacted, even though those framers had no reason to be concerned with a future

insurrection involving a former President who had only taken one oath of office—the presidential oath of office—and attempted to run for re-election.

The District Court was correct to reject each of these arguments. And this Court should affirm the District Court's ruling based on the text, history, and tradition of Section 3.

I. Petitioners' Requested Relief is Barred by *Griffin's Case* (1869)

The District Court's October 25, 2023 omnibus order explained that: "whether Section 3 is self-executing is *irrelevant* because Petitioners are proceeding under Colorado's Election Code which provides it a cause of action." Omnibus Order at 19. This was legal error.

In *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869), Chief Justice Chase held that Section 3 is *not* self-executing. Moreover, Chase held that Section 3 could *only* be put into effect on behalf of a party seeking affirmative relief against the government, e.g., a party seeking habeas relief, if that relief was authorized by a federal statute.[1] Under *Griffin's Case*, the relief sought by Petitioners is barred precisely because Petitioners are seeking affirmative relief against the government to enforce Section 3 absent federal enforcement legislation. The District Court's contrary assertion that a state statute could supply an alternative means to put Section 3 into effect cannot be harmonized with the Chief Justice's 1869 holding. On appeal, this Court should follow *Griffin's Case*. This decision, and subsequent authorities, liquidated the meaning of Section 3. Moreover, post-2020 critical commentary about

[1] *Griffin's Case*, and the doctrine of self-execution, is discussed in some detail in Parts I and II of Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. (forth. 2024), https://ssrn.com/abstract=4568771 (hereinafter "*Sweeping and Forcing*").

Griffin's Case is deeply flawed. *Griffin's Case* is consistent with a core premise of Reconstruction: Congress, and not the distrusted states, were empowered to enforce Section 3.

A. *Griffin's Case*, and Subsequent Authority, Liquidated the Meaning of Section 3

The Chief Justice of the United States supported *Griffin's Case*. So did *all* his colleagues on the Supreme Court. *Griffin's Case*, 11 F. Cas. 27 ("I am authorized to say that they unanimously concur in the opinion . . . ."). A generation later, in *Ex parte Ward*, 173 U.S. 452, 454–55 (1899), Chief Justice Fuller, for a unanimous Court, cited *Griffin's Case* favorably, on-point, and as good law. There is no hint in *Ward* that *Griffin's Case* is anything but settled law.

Lower federal courts, state courts, and executive branch opinions have expressly adopted *Griffin's Case* as mandating federal legislation in order to enforce the Fourteenth Amendment.[2] There is no hint that any court thought *Griffin's Case*'s central holding was anything but settled law. Likewise, after 1869, courts, domestic and foreign, continued to cite *Griffin's Case* favorably for other propositions of law.[3]

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[2] *See Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978); *State v. Buckley*, 54 Ala. 599, 616 (1875); Va. Op. Att'y Gen. No. 21-003, at 3 (2021).

[3] *Commonwealth v. Chalkley*, 20 Gratt. 404, 409 (Va. 1871); *In re Sheehan*, 122 Mass. 445, 449 (1877); *Sartain v. State*, 10 Tex. Ct. App. 651, 654 (1881); *Head-Money Cases*, 18 F. 135, 143 n.26 (C.C.E.D. N.Y. 1883); *Daniels v. Towers*, 7 S.E. 120, 121–22 (Ga. 1887); *Brooke v. Turner*, 30 S.E. 55, 56 (Va. 1898); *Coyle v. Smith*, 113 P. 944, 948 (Okla. 1911); *Re Toronto R. Co.* (1918) 46 D.L.R. 547 (Ontario C.A.); Ex parte *Klune*, 240 P. 286, 287 (Mont. 1925); *Duane v. Philadelphia*, 185 A. 401, 403 (Pa. 1936); *Calcutt v. FDIC*, 37 F.4th 293, 343 (6th Cir. 2022) (Murphy, J., dissenting), *rev'd on other grounds*, 598 U.S. 623 (2023).

Post-1869 scholarly commentary has consistently described *Griffin's Case* as established law, absent any criticism, if not putting forth substantial praise.[4]

What is the significance of such near-universal acceptance over the course of 150 years? In *The Federalist No. 37*, James Madison explained "All new laws . . . are considered as more or less obscure and equivocal, until their meaning be *liquidated* and ascertained by a series of particular discussions and adjudications." Professor Baude explains that Madisonian "Liquidation was a specific way of looking at post-Founding practice to settle constitutional disputes . . . ." William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 4 (2019); *see also* Abraham Lincoln, *Speech on Dred Scott Decision* (1857). This principle applies to the Constitution of 1788, as well as to the Reconstruction Amendments. The meaning of Section 3 was liquidated by *Griffin's Case* and by a long history of precedent and other authorities citing *Griffin's Case* favorably—all absent any indication that the law remained unclear or, even, unsettled. *Griffin's Case* is not, as Professors Baude and Paulsen wrote, an "appalling" decision that is comparable to *Dred Scott*. *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024). *Griffin's Case* is the fountainhead of Section 3 jurisprudence and ought to control this case.

B. The Most Significant Post-2020 Commentary Criticizing *Griffin's Case* is Deeply Flawed

In the wake of Chief Justice Chase's decision, we have found no opposition to *Griffin's Case* from members of Congress—even among the Radical Republicans that sought vigorous enforcement of Section 3. Even if there were a few members of

[4] Charles Fairman, Reconstruction and Reunion 1864–1868, at 602–07 (1971).

Congress or Section 3 ratifiers who had previously contended that Section 3 did not require federal enforcement legislation, Chief Justice Chase's decision promptly settled the matter.[5]

About one year after *Griffin's Case*, Congress enacted the Enforcement Act of 1870, ch. 114, 16 Stat. 140, 141. This statute created a *quo warranto* mechanism whereby *federal* prosecutors in *federal* courts could remove Section-3-listed office-holders following a defined procedure to determine if such defendants were disqualified by Section 3. We have found no public debates suggesting that those who framed the Enforcement Act of 1870 thought Chief Justice Chase's decision was *wrong*. To the contrary, Congress took the precise action that would be expected by those who believed that Chase decided the self-execution issue *correctly*: the establishment of federal enforcement legislation to remove disqualified individuals. Moreover, Northern and Southern newspapers alike praised Chase's decision.[6] To be sure, there may have been some critical press accounts, but in rapid order *Griffin's Case* became the definitive understanding of Section 3.

It was not until circa 2020 that jurists and commentators discovered that *Griffin's Case* was deeply flawed. Advocates now argue that *Griffin's Case* cannot be reconciled with Chase's earlier decision in the *Case of Jefferson Davis*: a federal treason prosecution.[7] Indeed, critics charge that Chief Justice Chase was ruling in a

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[5] *State* ex rel. *Sandlin v. Watkins* is an example of one of a few post-*Griffin's Case* decisions, which suggested that Section 3 may be self-executing. 21 La. Ann. 631 (1869). However, in this case and others, the court did not distinguish or explain *Griffin's Case*. The court may have been unaware of the decision, which was only a few months old. In any event, *Sandlin* relied on an alternative rationale based on an extant *federal* enforcement statute, so it does not squarely support the Section-3-is-self-executing position. *Id*. at 633–34.

[6] *Sweeping and Forcing*, *supra*, at Part II.B.6.d.

[7] *Griffin's Case* is discussed at length in Part III of *Sweeping and Forcing, supra*.

partisan fashion to pave the way for a future presidential run. This is not usually how courts view decisions written by Supreme Court justices. If psychological projection is now the standard, there are many other decisions that could be tossed onto the Article III ash heap.

More importantly, there is a simple way to reconcile these cases. Griffin, the habeas applicant, sought to use Section 3 as a *sword*—i.e., *offensively as a cause of action supporting affirmative relief*, but he could not do so without enforcement legislation. By contrast, Davis sought to use Section 3 as a *shield*—i.e., as a defense in a criminal prosecution, and he could do so without enforcement legislation. *Cale v. Covington*, decided by the Fourth Circuit Court of Appeals more than a century later, explained this understanding of *Griffin's Case*. The court held "that the Congress and Supreme Court of the time were in agreement [with Chief Justice Chase] that *affirmative relief* under [Section 3 of] the amendment should come from Congress." *Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978) (emphasis added). By contrast, the court observed, the "Fourteenth Amendment provide[s] of its own force as a *shield* under the doctrine of judicial review." *Id.* (emphasis added).[8] The sword-shield distinction is well established in the case law. *See Mich. Corr. Org. v. Mich. Dep't. of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014) (Sutton, J.). Petitioners have no answer for *Cale v. Covington* and related cases.

[8] A recent Fourth Circuit concurrence criticized Chase, but did not acknowledge this circuit precedent. *Cawthorn v. Amalfi*, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring).

C. Section 3 Empowered the Federal Government to Control State Elections, and not the Other Way Around

The District Court did not discuss *Griffin's Case*. Rather, it ruled that the question "whether Section 3 is self-executing is *irrelevant* because Petitioners are proceeding under Colorado's Election Code which provides it a cause of action." Omnibus Order at 19. To the contrary, under Chief Justice Chase's ruling, and with all due respect to state statutes, Colorado election law is *irrelevant*. In light of *Griffin's Case*, the States have no role in enforcing Section 3—that is, no role absent congressional authorization.

This position is supported by a core premise of the Reconstruction Amendments. The idea that the Fourteenth Amendment, absent express federal statutory authorization, allowed the States to operationalize Section 3 only makes sense if state governments could be trusted. But the Fourteenth Amendment and enforcement legislation were enacted precisely because state institutions, state officials, and *even* state courts were *not* considered trustworthy by the national government.[9] Indeed, the idea that Section 3 permitted States, via ballot control, to limit voter and candidate participation for federal positions and to do so absent express federal authorization seems novel and ahistorical. Indeed, the Section 3 cases that Petitioners cite between 1868 and 1870 concerned *state* positions, and not *federal* positions. Section 3 empowered the federal government to control state elections and state office-holding, and not the other way around.

[9] *See* Ex parte *Milligan*, 71 U.S. 2 (1866) (Chase, C.J., concurring) ("In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.").

II. The President is not an "Officer of the United States"

The second threshold question presented in this case is whether the President is an "Officer of the United States." The District Court correctly held that it is not. This Court should affirm the District Court's ruling on this question for three reasons: text, history, and tradition. First, the text: the phrase "Officer of the United States" in the Constitution of 1788 and Section 3 does not refer to the President. Second, the history: since the framing, prominent jurists have maintained that the phrase "Officer of the United States" would not refer to the President. Third, the tradition: there is a constant stream of authority—from courts, executive branch opinions, and scholarship—that supports these textual and history-based positions. The President is not an "officer of the United States."

A. Text: In 1788, 1868, and Today, the President is not an "Officer of the United States"

The Constitution's original seven articles include twenty-two provisions that refer to "offices" and "officers."[10] Some clauses use the words "office" or "officer," standing alone and unmodified. Other clauses use the word "office" or "officer" followed by a modifier, such as "of the United States" or "under the United States." The presumption should be that where the Framers used different office- and officer-language, they conveyed different meanings. These phrases are not interchangeable.

Four provisions of the Constitution of 1788 use the phrase "Officers of the United States." The District Court concluded that these provisions "lead towards the same conclusion—that the drafters of Section Three of the Fourteenth Amendment

[10] *See* Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part II: The Four Approaches*, 61 S. Tex. L. Rev. 321 (2022).

did not intend to include the President as 'an officer of the United States.'" Dist.Ct. at ¶311. Rather, this language referred to appointed positions.

First, the District Court held that the Appointments Clause "distinguishes between the President and officers of the United States." Dist.Ct. at ¶311. Under the Appointments Clause, the President can appoint "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . ."[11] All of the enumerated positions are *appointed*. Moreover, these positions must be "established by Law"—that is created by statute. The reference to "all other Officers of the United States" should be understood in a similar fashion as the expressly enumerated positions: appointed positions that are created by statute. Petitioners agree with this conclusion, but assert that "[b]ecause the President does not appoint himself, language addressing the Appointment Clause's phrase 'other officers' has no bearing on whether the President is an officer." Petrs. Br. at 44. The Appointments Clause demonstrates that although the President holds an "office," he is not an "Officer of the United States" as that phrase is used in the Appointments Clause and the other provisions in the Constitution.

Second, the District Court held that the Impeachment Clause "separates" the President and Vice President "from the category" of "all civil Officers of the United States." Dist.Ct. at ¶311. While the Appointments Clause refers to "all *other* Officers of the United States," the Impeachment Clause refers only to "all civil Officers of the United States." Justice Story observed that the absence of the word *other* in the

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[11] The drafting history of the Appointments Clause is discussed in Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution: Part III, The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. Tex. L. Rev. 349, 387–390 (2023) (hereinafter "*Part III*").

Impeachment Clause "lead[s] to the conclusion" that the President is not "included in the description of civil officers of the United States." 2 Joseph Story, Commentaries on the Constitution of the United States § 791 (1833), https://perma.cc/R2GB-ULUW. Moreover, Story's conclusion is consistent with the drafting history of the Impeachment Clause. Early drafts of the Impeachment Clause included the word "other" at precisely this location, but that word was removed.[12] Petitioners maintain that the President is listed separately from "civil Officers of the United States" because he is "both a military and civil officer." Petrs. Br. at 47. They provide no support for this claim. To the contrary, Justice Story maintained that the President, even as Commander in Chief, is still a civilian officer. *See* 2 Story, *supra*, at § 791. This principle was true in the time of George Washington[13] and in modern times.[14]

Third, the District Court pointed to the Commissions Clause, which provides that the President "shall Commission all the Officers of the United States." Dist.Ct. at ¶311. Petitioners concede, as they must, that the President does not commission himself.[15] Petrs. Br. at 47–48. This concession undermines their approach. If the President must commission *all* the "officers of the United States," and the President does not commission himself, then the President cannot be included in the category of *all* the "officers of the United States."

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[12] *Part III, supra*, at 399–400.

[13] Alexander Hamilton's Treasury Department prepared rolls of federal officials and officers with their compensation. The President was included in the "civil list" and not in the military list. *See, e.g.*, *Report on the Estimate of the Expenditure for the Civil List and the War Department to the End of the Present Year* (Sept. 19, 1789), Founders Online, https://perma.cc/EY2C-867F.

[14] *Roosevelt Is Held Civilian At Death*, New York Times (July 26, 1950) (citing Surrogacy Court).

[15] *Part III*, *supra*, at 416–418.

Fourth, the District Court observed that in the Article VI Oath or Affirmation Clause, "the President is explicitly absent from the enumerated list of persons the clause requires to take an oath to support the Constitution." Dist.Ct. at ¶311. The President would only be covered by the Article VI Oath or Affirmation Clause if he is an "Officer of the United States." However, the District Court recognized that the President's separate Article II oath "provides further support for distinguishing the President from 'Officers of the United States'" in Article VI. Dist.Ct. at ¶311. In addition to the different wording between the Article II and Article VI oaths, this distinction is further supported by the different oaths administered to President George Washington and Vice President John Adams (as President of the Senate), nearly two months apart in 1789.[16] The District Court rightly observed that the "class of officers to whom Section Three applies" is the same "Officers of the United States" in Article VI, which does not include the President. Dist.Ct. at ¶313 n.19.[17]

The District Court was correct to conclude that these four constitutional provisions "lead towards the same conclusion—that the drafters of the Section Three of the Fourteenth Amendment did not . . . include the President as 'an officer of the United States.'" Dist.Ct. at ¶311.

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[16] *Part III*, *supra*, at 423–433.

[17] The District Court's conclusion is further supported by George Washington Paschal's 1868 treatise, which stated that Section 3 "seems to be based upon the higher obligation to obey th[e] [Article VI] oath." George Washington Paschal, The Constitution of the United States Defined And Carefully Annotated 250 n.42 (1868), https://bit.ly/3SXvTvm. The 1876 edition of Paschal's treatise stated more directly that the Article VI oath and Section 3 apply to "precisely the same class of officers." George W. Paschal, The Constitution of the United States: Defined and Carefully Annotated xxxviii (1876), https://bit.ly/3SXDg5K.

B. History: Contemporaneous Sources Recognized that the President was not an "Officer of the United States"

Petitioners describe the District Court's interpretation as "hyper-technical lawyering and 'secret-code' hermeneutics." Petrs. Br. at 50 (citing Baude & Paulsen, *supra*, at 108–09). This hyperbole is misplaced. There is no secret-code here. And Petitioners do not address the evidence that *Amicus* has put forward in the scholarly literature.[18]

In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, "the President is not an officer of the United States." Proceedings of the Senate Sitting for the Trial of William W. Belknap at 145. Instead, Booth stated, the President is "part of the Government." *Id.* Two years later, David McKnight wrote an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'" David A. McKnight, The Electoral System of the United States 346 (1878). This contemporaneous evidence supports the District Court's conclusion that the President is not an "Officer of the United States."

Petitioners and their *Amici* cite a slew of statements from the 1860s in which the President is referred to as an "Officer," the "High Office of the Government," "the chief executive officer of the United States," and more. None of these exchanges were made in the context of Section 3. These references to the President may have

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[18] *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 NYU J. of Law & Lib. 1 (2021) (hereinafter "*Is the President?*").

been made in a more colloquial sense, but they did not state the President was an "Officer of the United States" for purposes of Section 3, or for purposes of the Constitution of 1788. *Amici* have yet to point to a single statement in which anyone argued that the President is an "Officer of the United States" for purposes of Section 3's triggering or jurisdictional clause. Not one.

And there is a good reason why no such evidence has been found. As the District Court acknowledged, President Trump was "the first President of the United States who had not previously taken an oath of office." Dist.Ct. at ¶313 n.20. All prior Presidents had taken some *other* oath. There would have been no reason for those who framed and ratified the Fourteenth Amendment to discuss a person who (1) was elected as President, (2) but had never before taken any *other* constitutional oath, (3) and then engaged in insurrection, (4) and then sought re-election. The District Court concluded that "For whatever reason the drafters of Section Three did not . . . include a person who had only taken the Presidential Oath." Dist.Ct. at ¶313. It is the meaning of the ratified text which controls, and not speculations about unexpressed intentions. *E.g.*, Antonin Scalia, A Matter of Interpretation 38 (1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

C. Tradition: There is a Constant Stream of Authority from the Judicial and Executive Branches That Supports the District Court's Holding

In addition to the text and history of Section 3, there is a constant stream of authority from the Supreme Court and the Executive Branch that support the District Court's conclusion: the President is not an "officer of the United States."[19]

[19] This tradition is discussed at length in *id.* at 24–33.

- *United States v. Hartwell* stated that "[a]n office is a public station, or employment, conferred by the *appointment* of *government*." 73 U.S. 385, 393 (1867) (emphases added). Presidents are not "appointed" by the "government." Rather, Article II describes the President as an "elected" position in several clauses.
- In 1882, Attorney General Brewster, citing Justice Story, stated that the phrase "Officers of the United States" in the Appointments Clause *and* in Section 3 should be read in a similar fashion. Member of Cong., 17 U.S. Op. Att'y Gen. 419, 420 (1882). As discussed above, Story contended that the phrase "officer of the United States" did not extend to the presidency.
- *United States v. Mouat*, decided two decades after ratification, interpreted a statute that used the phrase "officers of the United States." 124 U.S. 303 (1888). The Court observed that a person is "not strictly speaking, an officer of the United States" unless he "holds his place by virtue of an appointment by the president or of one of the courts of justice or heads of departments . . . ." *Id.* at 307.
- In 1918, Attorney General Gregory wrote an opinion that distinguished between elected officials and "officers of the United States." Emps. Comp. Act-Assistant United States Att'y, 31 U.S. Op. Att'y Gen. 201, 202 (1918), https://tinyurl.com/bdesdrrk; *see also* Prosecution of Claims by Members of War Price and Rationing Boards, 40 U.S. Op. Att'y Gen. 294, 296 (1943) (Biddle, A.G.).
- In 1969, future-Chief Justice William H. Rehnquist observed that federal courts do not extend general "officer"-language in statutes to the President,

"unless there is a specific indication that Congress intended to cover the Chief Executive." Memorandum from William H. Rehnquist, Asst. Att'y Gen., to the Honorable Egil Krogh, Re: Closing of Government Offices in Memory of Former President Eisenhower (Apr. 1, 1969), https://perma.cc/P229-BAKL; *see also* Memorandum from Antonin Scalia, Asst. Att'y Gen., to Honorable Kenneth A. Lazarus, Re: Applicability of 3 C.F.R. Part 100 to the Pres. and V.P. (Dec. 19, 1974), https://perma.cc/GQA4-PJNN.

- In *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, Chief Justice Roberts wrote, "[t]he people do not vote for the 'Officers of the United States.'" 561 U.S. 477, 497–98 (2010). To be sure, this case was not about whether the President was an "Officer of the United States." But we have found no indication that anyone cast doubt on the correctness of this statement.

All of this evidence suggests that the meaning of "officer of the United States" was part of a continuous, widely understood legal tradition, starting in 1788, and extending forward into Reconstruction and beyond. Petitioners make no effort to address this long-standing tradition.

Respectfully submitted 27th day of November 2023,

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