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THE SUPREME COURT OF THE STATE OF COLORADO 2 E. 14th Avenue Denver, CO 80203	
Appeal Pursuant to § 1-1-113(3), C.R.S. District Court, City and County of Denver, Case No. 2023CV032577 Honorable Sarah B. Wallace, Judge	
Petitioners-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, and **Intervenors-Appellees:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, and DONALD J. TRUMP.	▲ COURT USE ONLY ▲
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OPENING BRIEF OF PETITIONERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g), because it contains **9478** words.

/s/ Eric Olson

Signature of attorney or party

Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES

ISSUE PRESENTED FOR REVIEW

Did the district court commit reversible error in ruling that Section 3 of the Fourteenth Amendment, which disqualifies people who engaged in insurrection against the Constitution after taking an oath to support the Constitution, does not apply to Presidents who engage in insurrection or to insurrectionists wanting to be President?

INTRODUCTION

Following a five-day trial, the district court found that the violent attack on the United States Capitol on January 6, 2021, was an insurrection against the Constitution with the goal of obstructing the peaceful transfer of presidential power. The district court also found that former President Donald Trump engaged in that insurrection, intentionally inciting a mob to violence in a desperate and unlawful effort to cling to power. By doing so, Trump disqualified himself from holding public office ever again.

Section 3 of the Fourteenth Amendment, passed after the Civil War, excludes from federal or state office those who engaged in insurrection against the Constitution after previously taking an oath to support it. Because the district court found that Trump engaged in insurrection after taking the Presidential oath of office, it should have concluded that he is disqualified from office and ordered the Secretary of State to exclude him from the Colorado presidential primary ballot.

Instead, the district court ordered the Secretary to place Trump on the ballot. The court held that Section 3's disqualification rule does not apply to insurrectionist former Presidents, nor to any insurrectionists running for President—in effect, that this office alone is above the law. To reach this result, the district court had to find, counterintuitively, that the President is not an "officer of the United States," that the Presidency is not an "office under the United States," and that the Presidential oath to "preserve, protect, and defend" the Constitution is not an oath to support the Constitution.

This holding was reversible error. The Constitution itself, historical context, and common sense, all make clear that the Fourteenth Amendment's disqualification clause extends to the President and the Presidency.

The Constitution explicitly tells us, over and over, that the Presidency is an "office." The natural meaning of "officer of the United States" is anyone who holds a federal "office." And the natural reading of "oath to support the Constitution" includes the stronger Presidential oath

to "preserve, protect, and defend the Constitution." The historical record when the Fourteenth Amendment was ratified also reveals an overwhelming consensus that Section 3 disqualified rebels like Jefferson Davis from the Presidency, and that the President was an "officer of the United States."

As for common sense, there would be no reason to allow Presidents who lead an insurrection to serve again while preventing low-level government workers who act as foot soldiers from doing so. And it would defy logic to prohibit insurrectionists from holding every federal or state office except for the highest and most powerful in the land. Section 3 does not say that. The Framers did not intend that. Trump is disqualified from holding office again.

This is an expedited proceeding, and all appeals must be resolved before the Secretary certifies the ballot on January 5, 2024. Given the tight timeline, Petitioners filed this opening brief concurrently with their application for review under C.R.S. § 1-1-113.

STATEMENT OF THE FACTS AND CASE

A. Statement of the Case

On September 6, 2023, Petitioners Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian filed suit against the Colorado Secretary of State and Trump in Denver District Court. The Petition challenged the listing of Trump as a candidate on the 2024 Republican presidential primary election ballot. Petitioners asserted that Trump is disqualified from public office under Section 3 of the Fourteenth Amendment because he engaged in insurrection against the Constitution after taking an oath to support the same and hence is ineligible to appear on Colorado's ballots. Section 3 of the Fourteenth Amendment provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the

> enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. Const. amend. XIV § 3.

Petitioners' Count I asserted a claim against the Secretary of State under C.R.S. §§ 1-1-113 and 1-4-1204 alleging that placing Trump on the presidential primary ballot would constitute an impermissible "wrongful act" under the Election Code. Petitioners also originally asserted a claim for declaratory relief against both the Secretary and Trump, but voluntarily dismissed that claim. District Court Op. ¶ 5 (attached here as Exhibit A). Trump intervened to defend against Count I, as did the Colorado Republican State Central Committee. *Id.* ¶¶ 3, 7.

After resolving various pre-trial, evidentiary, and dispositive motions, *id.* ¶¶ 14-17, the district court held a five-day evidentiary hearing from October 30 through November 3, 2023, with closing arguments on November 15, 2023. Petitioners presented evidence that Trump engaged in insurrection against the Constitution by, among other things, repeatedly praising political violence by his supporters, creating a false expectation that the 2020 Presidential election was stolen by

fraud, calling his supporters to Washington, D.C. on January 6, 2021, and, then, inciting a violent and lawless attack on the Capitol to obstruct the constitutionally mandated counting of electoral votes in a desperate and illegal attempt to stay in power despite losing the 2020 election. Trump denied that he engaged in insurrection. He also argued that he is exempt from Section 3 because it does not apply to the Presidency—either to individuals who engage in insurrection as President or to insurrectionists who want to be President.

The district court issued its decision on November 17, 2023. The district court held that it had jurisdiction to decide Petitioners' ballot access challenge under C.R.S. §§ 1-1-113 and 1-4-1204 of the Election Code. District Court Op. ¶¶ 222-224. Based on a thorough review of the evidence and assessments of witness credibility, the district court found that the January 6, 2021, attack on the United States Capitol was an insurrection against the Constitution and that Trump engaged in that insurrection. *Id*. ¶¶ 20-93, 225-298.

Not only did the district court rule in favor of Petitioners on every factual issue necessary to disqualify Trump from the ballot, but it also found for Petitioners on every legal issue necessary to grant the Petition save for one. *See id.* n. 12 (noting that the court made "findings of fact and conclusions of law on all remaining issues" so "the Colorado Supreme Court" could "resolve this matter fully and finally without the delay of returning it to this Court"). For instance, the Court held that the Petition stated a claim under Colorado law, that Section 3 may be enforced through state ballot access laws, that the Petition does not raise a non-justiciable political question, and that the First Amendment does not shield Trump's incitement. *Id.* ¶¶ 12-13 & n.2, 210-224, 264-298.

The district court nevertheless concluded Trump was not disqualified under Section 3 of the Fourteenth Amendment for two related reasons. First, because it does not apply to individuals—like Trump—who had taken only the presidential oath of office before engaging in insurrection and, second, because it does not prevent even oath-breaking insurrectionists from becoming President. The district

court reasoned that the terms "President" and "Presidency" are not specifically mentioned in Section 3, that the President is not an "officer of the United States" as that term is used in Section 3, that the Presidency is not an "office under the United States" as that term is used in Section 3, and that the President's oath to "preserve, protect, and defend the Constitution" is not an oath to "support" the Constitution as required by Section 3. *Id.* ¶¶ 299-315.

Petitioners timely appeal this portion of the district court's decision under C.R.S. § 1-1-113(3).

B. Statement of Relevant Facts

Petitioners and Trump each presented expert testimony on the historical meaning of Section 3 of the Fourteenth Amendment. Petitioners' expert was Gerard Magliocca, a law professor specializing in constitutional history at the Indiana University Robert H. McKinney School of Law. District Court Op. ¶ 44; Ex. D, 11/1/23 Tr. 10:3-5, 18-21. He has authored extensive, peer-reviewed scholarship on the Fourteenth Amendment, including an article on Section 3 before its recent spike in

scholarly interest. Ex. D at 11:3-20, 12:24-13:6. His work has been cited by courts and the Congressional Research Service, and he has testified as an expert in a prior Section 3 case. *Id*. at 12:3-19, 13:7-22. The district court admitted Magliocca as "an expert in the history of Section 3 of the Fourteenth Amendment." *Id*. at 20:22-24.

Trump's expert was Robert Delahunty, a retired constitutional law professor. District Court Op. ¶ 53; Ex. F, 11/3/23 Tr. at 11:22-24, 15:22-16:11. Delahunty has published no peer-reviewed literature on Section 3 and admitted he was "not claiming to be an expert in the history of Section 3 of the Fourteenth Amendment." Ex. F at 121:6-19, 114:7-11. The district court admitted Delahunty only as an expert "in constitutional law and the application of historical documents to 19th-century statutes and constitutional provisions." District Court Op. ¶ 53.

1. Evidence on whether the Presidency is an "office . . . under the United States"

Magliocca testified that "during Reconstruction, the Presidency was considered an office under the United States for purposes of Section 3." Ex. D, 11/1/23 Tr. at 51:10-19. He described "the consensus at the time

that Jefferson Davis was ineligible to be President because of Section 3," including Congress's decision to deny amnesty to leaders like Davis in the General Amnesty Act of 1872. *Id.* at 61:1-62:6. He recounted an exchange between Senators Reverdy Johnson and Lot Morrill during the debate over Section 3 which clarified that the phrase "hold any office, civil or military, under the United States" includes the presidency. *Id.* at 59:17-60:19. Magliocca testified that "it would have been odd to say that people who had broken their oath to the Constitution by engaging in insurrection were ineligible to every office in the land except the highest one." *Id.* at 62:7-15.

Delahunty, by contrast, took "no position" on whether the Presidency is an "office under the United States," but acknowledged that "maybe the preponderance" of scholars agreed with Magliocca's view. Ex. F, 11/3/23 Tr. at 240:13-25. On cross-examination, Delahunty admitted that he too "would be inclined" to think the Presidency is an "office under the United States" given the Constitution repeatedly refers to the "office of the Presidency." *Id.* at 241:1-11.

2. Evidence on whether the President is an "officer of the United States"

Magliocca testified that "during Reconstruction, the President was considered an officer of the United States for purposes of Section 3." Ex. D, 11/1/23 Tr. at 51:20-52:3. He based his opinion on a review of "congressional debates and reports," "presidential documents," "opinions of the United States Attorney General," "judicial decisions," and "contemporary newspapers." *Id.* at 52:4-11.

He cited a legal opinion from Attorney General Henry Stanbery, observing that term "officer of the United States" in Section 3 was "to be used in its most general sense and without any qualification, and that the oath was central to determining whether someone was an officer or not." *Id.* at 53:16-23. A second opinion specifically referred to the President as an "executive officer." *Id.* at 57:22-59:16. Statements by various presidents at the time, as well as by members of the 39th Congress that passed the Fourteenth Amendment, repeatedly referred to the President as the "chief executive officer of the United States." *Id.* at 56:16-59:16.

Delahunty did not disagree with Magliocca's testimony about any of these historical sources, nor did he dispute that people commonly referred to the President as an officer of the United States when the Fourteenth Amendment was adopted. Ex. F, 11/3/23 Tr. at 255:24-264:8. He acknowledged that Stanbery's second opinion defined "officers of the United States" as *any* person who held "any office, civil or military, under the United States" and took the required oath. *Id.* at 256:22-257:13. Delahunty nevertheless relied on cases interpreting the Appointments Clause (referring to the President appointing "other Officers") to claim that "officer of the United States" is a constitutional "term of art" that excludes the President. *Id.* at 101:11-105:10, 250:13-251:4.

3. Evidence on whether the Presidential oath is an oath to support the Constitution

Magliocca testified that the Presidential oath to "preserve, protect, and defend the Constitution" is an oath "to support the Constitution" for purposes of Section 3. Ex. D, 11/1/23 Tr. at 55:23-56:2. He pointed to a contemporaneous grand jury charge issued by a federal circuit judge in 1870 in a Section 3 case, which instructed that an "oath to support the

Constitution" need not use those specific words but merely had to convey substantially the same meaning. *Id.* at 54:14-56:2.

Delahunty admitted that "as a practical matter" the Presidential oath includes an obligation to support the Constitution, and that contemporary dictionaries defined "defend" as "to support." Ex. F, 11/3/23 Tr. at 246:18-248:6, 248:7-249:7. He nevertheless relied on linguistic difference alone to conclude that Section 3 disqualifies only people who took an oath including the word "support" and does not disqualify people who took the more demanding Presidential oath. *Id.* at 105:11-107:16. He provided no rationale or historical evidence for this interpretation.

SUMMARY OF THE ARGUMENT

The district court found that the violence against the United States Capitol on January 6, 2021, was an insurrection against the Constitution, and that Trump engaged in that insurrection through intentional incitement to violence. Because Section 3 of the Fourteenth Amendment applies to Presidents and the Presidency, that factual finding means Trump is disqualified from being President again.

First, Section 3 prohibits disqualified individuals from holding "any office . . . under the United States." The Constitution repeatedly refers to the Presidency as an "office." That alone is dispositive, because the President's "office" is clearly "under" the United States rather than under a state or foreign government. In addition, the historical evidence makes clear that both the framers and the public understood Section 3 to disqualify Confederate leaders like Jefferson Davis from being President of the United States.

Second, Section 3's disqualification covers anyone who engaged in insurrection against the Constitution after taking an oath to "support" the Constitution as an "officer of the United States." This includes the President and the Presidential oath. For purposes of Section 3, an "officer of the United States" is simply one who holds a federal office, which the President undoubtedly does. At the time of the Fourteenth Amendment's framing, it was also widely known—by Presidents, Congress, the Supreme Court, the Attorney General, and the public—that the President was an "officer of the United States." And the Presidential oath

to "preserve, protect, and defend" the Constitution is clearly an oath to support the Constitution.

More fundamentally, excluding the President and the Presidency from Section 3 would make no sense. Section 3's purpose was to prevent oath-breaking insurrectionists who "have heretofore held high official positions," from taking office again and subverting the Constitution from within. Ex. I, Cong. Globe, 39th Cong., 1st Sess. 3036 (1866) (statement of Sen. Henderson). There would be no reason to prohibit insurrectionists from serving as mere presidential electors, and from holding every other office in the land, while allowing them to hold most the powerful and hence most dangerous office. Nor would there be any reason to allow insurrectionist former Presidents to hold office again, while excluding former low-level state officers.

PRESERVATION AND STANDARD OF REVIEW

Petitioners argued consistently below that Section 3 of the Fourteenth Amendment prohibits those who engage in insurrection against the Constitution after taking the Presidential oath from serving

as President again. *See, e.g.*, Ex. G, 11/15/23 Tr. 40:9-43:15 (closing argument); Ex. H, Petitioners' Proposed Findings of Fact and Conclusions of Law at 52-57 (COL ¶¶ 27-45). Interpreting the Constitution is a matter of law reviewed *de novo* by this Court. *People v. Higgins*, 2016 CO 68, ¶ 7.

ARGUMENT

I. Oath-Breaking Insurrectionists May Not Assume the Office of the Presidency

Section 3 prohibits a disqualified individual from holding "any office, civil or military, under the United States." Text and history establish beyond doubt that this broad language includes the office of the Presidency.[1]

[1] Leading Fourteenth Amendment scholars have established this point. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 104–12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751; John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming 2023) at 6–22, https://papers.ssrn.com/sol3/papers.cfm?abstract_%20id=4440157; Mark A. Graber, *Section*

A. The Constitution's Text Establishes that the Presidency is an Office

We know that the Presidency is an "office . . . under the United States" because the Constitution repeatedly says so. The Constitution refers to the Presidency as an "Office" 25 times. *See* U.S. Const. art. II, § 1 ("[The President] shall hold his Office during the Term of four Years . . . No Person except a natural born Citizen . . . shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."); *see also id*. art. I, § 3 ("the Office of President of the United States"); art. II, § 4; amends. XII, XXII, XXV; *see also* The Federalist Nos. 39, 66, and 68 (Hamilton and Madison repeatedly referring to the President as holding an "office"). Given Section 3's focus on constitutional oaths, it is particularly notable that the Constitution requires the President to swear, prior to "the Execution

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Three of the Fourteenth Amendment: Our Questions, Their Answers, 17–24 (Univ. of Md. Legal Studies Research Paper No. 2023-16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591133.

of his Office," to "faithfully execute the Office of President of the United States[.]" U.S. Const. art. II, § 1.

Section 3 thus applies to the Presidency. It prohibits disqualified individuals from holding "*any* office, civil or military, under the United States," using deliberately broad language that permits no exceptions. U.S. Const. amend. XIV § 3 (emphasis added); *see United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (citation omitted)). Nor can there be doubt that the President's "office" is "under the United States." Section 3 uses "under the United States" only to distinguish federal offices from offices "under any State." U.S. Const. amend. XIV § 3.

Other constitutional provisions using the phrase "office under the United States" make clear that the phrase covers the Presidency. If the Presidency is not an "office . . . under" the United States, then a President could:

1. simultaneously serve as both President and as a member of Congress, U.S. Const. art. I, § 6;

2. accept emoluments or even titles of nobility from a foreign sovereign, U.S. Const. art. I, § 9;

3. hold office as President (but no other federal office) despite previously being impeached and removed from office, U.S. Const. art. I, § 3;

4. serve as a presidential elector in his own re-election, U.S. Const. art. II, § 1; and

5. face a "religious Test" as a "Qualification" to his office, U.S. Const. art. VI.

These outcomes would have been unthinkable to the Constitution's framers. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 355 (1819) (rejecting reading of the Constitution that would have resulted in "so gross an absurdity [it could not] be imputed to the framers of the constitution").

Instead of addressing the textual proof that the Presidency is an "office," the district court relied on the fact that Section 3 does not specifically mention the Presidency. District Court Op. ¶¶ 301-303. But there would have been no reason to specifically enumerate the Presidency, because it so clearly falls within the general language of "any office." *See N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 302 (2017) ("The

expressio unius canon applies only when 'circumstances support[ ] a sensible inference that the term left out must have been meant to be excluded.'"). For the same reason, it is unsurprising that Section 3 does not specifically mention Supreme Court justices; they, too, are covered because they hold "offices." *See* U.S. Const. art. III (referring to federal judges as "hold[ing] their Offices" and to "their Continuance in Office").

That stands in sharp contrast to "Senator[s] or Representative[s] in Congress" and "Electors for President or Vice President." The Framers needed to enumerate those positions precisely because they were *not* obviously "offices." Electors do not hold "office"—they are selected for a discrete purpose and a single vote, after which their duty is discharged. *See* U.S. Const. art. II § 1; *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (electors "are no more officers or agents of the United States than are . . . the people of the States when acting as electors of representatives in congress."). Similarly, the Constitution nowhere refers to Senators or Representatives as holding "office," and in fact implies they do not. *See* U.S. Const. art. II, § 1 ("no Senator or Representative, *or Person holding*

an Office . . . under the United States, shall be appointed an elector" (emphasis added)).

The district court also reasoned that Section 3 presents the disqualified offices "in descending order" of importance, and that it was therefore unlikely the Presidency fell in the "any office" language at the end of the list. District Court Op. ¶ 301. That is not correct. The order simply appears to track the structure of the original Constitution: it begins with Congress (Art. I), then discusses presidential Electors (Art. II), and finally anyone who holds "any office" under the United States (Art. II and III) or under any State (Art. IV). Certainly, presidential electors are not more important than Supreme Court justices, who like the President fall under the catch-all "any office."

In short, the Constitution repeatedly declares the Presidency to be an "Office" in unambiguous terms that brook no dissent. *See, e.g., D.C. v. Trump*, 315 F. Supp. 3d 875, 883 (D. Md. 2018) (for purposes of the foreign emoluments clause, "the only logical conclusion" from Constitution's text "is that the President holds an 'Office of Profit or Trust

under the United States'" (cleaned up)), *vacated as moot*, 141 S. Ct. 1262 (2021); *see also Trump v. Mazars USA, LLP*, 39 F.4th 774, 792 (D.C. Cir. 2022) (noting that the foreign emolument clause applies to all federal offices "including the President"). Where the text is so clear, the Court need look no further.

B. Historical Evidence Confirms the Presidency Is an "Office under the United States"

1. Framing debates

The congressional debates over Section 3 likewise reveal a clear intent to cover the office of the Presidency. In the Senate debate, Senator Reverdy Johnson of Maryland asked why former rebels "may be elected President and Vice-President of the United States, and why did you omit to exclude them?" Senator Lot Morrill of Maine responded: "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'" Senator Johnson replied: "Perhaps I am wrong as to the exclusion from the presidency; *no doubt I am*." Ex. I, Cong. Globe, 39th Cong., 1st Sess. 2899 (1866) (emphasis added). In other words, Congress questioned whether the Presidency was an "office . . .

under the United States" and determined the answer was "yes." Nobody in the debates later suggested that this reading was wrong. Ex. D, 11/1/23 Tr. 60:22-25.

In reaching a contrary conclusion, the district court relied on an early draft of Section 3 that expressly referred to the office of President. District Court Op. ¶ 303. But "[i]t is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." *Dist. of Columbia v. Heller*, 554 U.S. 570, 590 (2008). At any rate, this history further confirms Section 3 applies to the Presidency.

The earlier draft provided that those who had engaged in rebellion would be ineligible to hold:

> "[T]he 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[.]"

See Ex. I, Cong. Globe, 39th Cong., 1st Sess. 919 (1866). There are a few notable features of this draft. First, it confirms the Presidency was

understood to be an "office." Second, it highlights Congress's desire to exclude rebels from the Presidency. Third, the draft catch-all "any office" clause was considerably *narrower* than the final version of Section 3, applying only to offices requiring Presidential appointment and Senate confirmation. This general language would not cover the Presidency, and so that office needed to be specifically enumerated.

There is no evidence that by later *broadening* this catch-all to include "any office . . . under the United States," Congress actually intended to *exclude* the Presidency. *See* Ex. D, 11/1/23 Tr. at 68:12-69:12. The most reasonable inference is that they dropped the specific reference to the Presidency once the broadened catch-all made it redundant.

2. Amnesty debates

Contemporaneous debates also reveal "a consensus at the time" that Section 3 disqualified confederate leaders like Jefferson Davis from the Presidency unless Congress removed that disability by a two-thirds vote. Ex. D, 11/1/23 Tr. 61:1-62:6. During the ratification debates, supporters defended the proposed amendment precisely because it would

exclude Davis from the Presidency. Ex. J, *Rebels and Federal Officers*, GALLIPOLIS J. (Gallipolis, Ohio), Feb. 21, 1867, at 2 (rejecting Section 3 would "render Jefferson Davis eligible to the Presidency of the United States," and "[t]here is something revolting in the very thought"); Ex. K, Milwaukee Daily Sentinel, *Shall We Have a Southern Ireland?* (July 3, 1867) (defending proposed Section 3 as modest because "[e]ven Jefferson Davis, unless by some miracle of justice he should first expiate his atrocious crimes upon the gallows, may be rendered eligible to the Presidency by a two-thirds vote of Congress").

As Reconstruction wore on, Congress began considering whether to enact blanket legislation removing Section 3 disabilities from former Confederates. Both supporters and proponents acknowledged that blanket amnesty would remove Davis's existing disqualification to be President. Vlahoplus, *supra*, at 7-10 (collecting sources). Opponents of amnesty thought this result was "preposterous" and cited it as a reason to vote against amnesty legislation. Ex. D, 11/1/23 Tr. 61:23-62:6. Those who backed amnesty likewise acknowledged that it would "make even

Jeff Davis eligible again to the Presidency." Ex. L, The Pulaski Citizen, *The New Reconstruction Bill*, Apr. 13, 1871, at 4.

When Congress passed general amnesty legislation in May of 1872, it excluded those who had previously held certain high offices, including Davis. Ex. D, 11/1/23 Tr. 25:1-19; *see* Act of May 22, 1872, ch. 193, 17 Stat. 142. John Bingham, one of the principal drafters of the Fourteenth Amendment, declared that if amnesty had gone any further, "Jefferson Davis [would be] made eligible to be the Democratic candidate for President"—an absurd proposition that elicited laughter in the audience. Ex. M, Tiffin Tribune, *Speech of Hon. John A. Bingham*, July 18, 1872. And in 1876, a blanket proposal for amnesty to all confederates failed, with a principal objection being that Davis would "be declared eligible and worthy to fill any office up to the Presidency of the United States." Ex. N, 4 Cong. Rec. 325 (1876) (statement of Rep. Blaine). Opponents of blanket amnesty made these points repeatedly. *See* Vlahoplus, *supra* at 7-10.

The district court suggested that Section 3 would have obstructed a Davis presidency not by making him ineligible, but indirectly by preventing rebels from serving as presidential electors. District Court Op. ¶ 303-305 & n.18. But the historical record reveals a consensus that Davis was disqualified—not merely that it should be harder for him to win. Also, Section 3 only covers those who had previously sworn an oath to support the Constitution, and a hypothetical Davis presidential campaign would have had no difficulty finding former rebels who had never previously held public office and could therefore serve as electors.

The history thus confirms what the Constitution's text already says: the Presidency is an "office under . . . the United States" from which oath-breaking insurrectionists are disqualified.

II. Section 3 Covers Insurrectionist Former Presidents

Section 3 disqualifies all who engage in insurrection after "having previously taken an oath . . . as an officer of the United States . . . to support the Constitution of the United States[.]" This applies to Trump,

because his Presidential oath included a duty to support the Constitution and because the President is an "officer of the United States."

A. The President Takes an Oath to "Support the Constitution"

The Constitution contains two oath of office provisions. Article VI obligates all members of Congress and State legislatures, and "all executive and judicial officers, both of the United States and of the several States," to swear an oath to "support this Constitution." U.S. Const. art. VI. For most officers, the Constitution does not dictate the exact wording that this oath must take. However, the President must meet this general obligation through a specific and more demanding oath set out in Article II: he must "to the best of my Ability, preserve, protect and defend the Constitution of the United States." U.S. Const. art. II § 1.

By swearing the stronger Article II Presidential oath, Trump necessarily also undertook a duty to "support" the Constitution. By definition, one who "defends" something "supports" it. Ex. O, Samuel Johnson, A Dictionary of the English Language (5th ed. 1773) ("defend": "to stand in defense of; to protect; to support"); Ex. V, Webster's American

Dictionary of the English Language (1857) ("defend": "to support or maintain"); Ex. F, 11/3/23 Tr. at 246:18-248:6 (Trump's expert admitting that "as a practical matter" the obligation to "defend" the Constitution includes the obligation to "support" it). Nineteenth century Presidents repeatedly gave speeches acknowledging that their Presidential oaths imposed a duty "to support" the Constitution. *See* Ex. P-S, James D. Richardson, A Compilation of the Messages and Papers of the Presidents, 1789-1897, Vol. 1 at 232, 467 (Adams, Madison); Vol. 2 at 625 (Jackson); Vol. 8 at 381 (Cleveland).

The linguistic difference between an oath "to support" and an oath to "preserve, protect, and defend" is irrelevant here. If anything, that a former President broke an even more demanding oath would provide more reason why Section 3 *should and does* apply to him.

The historical evidence confirms the common sense intuition that particular words of the oath do not matter to Section 3. A federal judge at the time charged a grand jury that Section 3 is not limited to those whose oaths used the "precise words of the amendment: 'to support the

Constitution of the United States." Ex. T, The Public Ledger, Dec. 2, 1870, at 3 (newspaper reprinting federal grand jury charge). Although "there ha[ve] been slight differences in the forms of these oaths," Section 3 applies to any oath that "substantially, though not literally" imposes an obligation to support the Constitution. *Id.* The President's oath does just that.

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

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

As laid out in detail above, both text and history establish that the Presidency is an "Office" under the United States. *See supra* §§ I.A, I.B. That conclusion also resolves the related question whether former President Trump was an "officer of" the United States for purposes of Section 3. A public "officer" is simply one who holds a public "office." *See, e.g.*, Ex. U, N. Bailey, An Universal Etymological English Dictionary (20th ed. 1763) ("one who is in an Office"); Ex. V, Webster's American Dictionary of the English Language (1857) ("[a] person commissioned or authorized to perform any public duty").

The structure of Section 3 confirms this understanding. Section 3 has a near-total symmetry between the *persons* disqualified by Section 3 and the *positions* from which those persons are excluded.[2] For example, Section 3 covers the position of "Senator or Representative in Congress" and individuals who broke an oath taken as a "member of Congress."[3] Similarly, it covers the position "any office, civil or military, under the United States" and individuals who broke an oath taken as an "officer of the United States." The best understanding of this symmetry is that "officers" are synonymous with those who hold "offices." *See* Vlahoplus, *supra*, at 22-27 (describing the "essential harmony" of the "office" and "officer" terms); *see also* U.S. Const., art. II, § 4 (impeachment of "Officers" results in their removal "from Office").

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[2] The one clear exception is presidential electors, which are included in the list of barred offices but not in the list of covered persons. *See* Baude & Paulsen, *supra*, at 106-107.

[3] The express inclusion of legislative officials in Section 3 is not surprising; unlike the President, there was uncertainty in the 1860s about whether members of Congress held "office" or were "officers" Ex. I, Cong. Globe, 39th Cong., 1st Sess. at 3939 (debating this issue at length).

Judicial decisions at the time confirmed that "officer" in Section 3 meant anyone who holds an office and swears the required oath. In applying Section 3 to disqualify a county sheriff, the North Carolina Supreme Court drew "the distinction between an officer and a mere placeman . . . by making his oath the test. Every officer is required to take not only an oath of office, but an oath to support the Constitution . . . of the United States. . . . [T]he oath to support the Constitution is the test." *Worthy v. Barrett*, 63 N.C. 199, 202, 204 (1869). Similarly, the Florida Supreme Court in an opinion construing Section 3 as incorporated through the Florida Constitution defined "[a]n officer of the State" as "a person in a public charge or employment, commissioned or authorized to perform any public duty, under an oath to support the Constitution and Government, and to perform the duty faithfully." *In the Matter of the Executive Communication of the 14th October, 1868*, 12 Fla. 651, 651–62 (1868).

Because the President holds the office of the Presidency and swears an oath to support the Constitution, he is an "officer" under the plain language of Section 3.

2. Attorney General opinions

In interpreting Section 3, Attorney General Stanbery's opinions likewise made clear that "officer of the United States" includes *anyone* who holds an "office" requiring an oath to the Constitution, including the President.

In his first opinion, Stanbery wrote that the term "'officer of the United States' within the meaning of [Section 3] . . . is used *in its most general sense, and without any qualification*, as legislative, executive, or judicial," including "military as well as civil officers of the United States who had taken the prescribed oath." 12 U.S. Op. Att'y. Gen. 141, 158 (1867) (emphasis added). He explained why Section 3's application to federal officers was all-inclusive: "[T]he violation of the official oath" relates to "fealty to the United States, which is broken by rebellion against the United States[.]" *Id.* Thus, "the reason is apparent for

including all officers of the United States, and for making the disenfranchisement more general and comprehensive as to them." *Id.* (emphasis added). In other words, no former federal official who broke their oath could be trusted to hold federal office again.

Stanbery's second opinion was even more direct in equating "officer" and "office." He declared that "Officers of the United States" includes, "without limitation," any "person who has at any time prior to the rebellion *held any office*, civil or military, *under the United States*, and has taken an official oath to support the Constitution of the United States." 12 U.S. Op. Att'y Gen. 182, 203 (1867) (emphasis added). Consistent with this broad and common sense view, Stanbery declared the President to be an "executive officer." *Id.* at 196.[4]

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[4] The district court reasoned that calling the President an "executive officer" cuts against Petitioners because Section 3 expressly covers "executive or judicial officer[s]" of the states but covers only "officers" of the United States. District Court Op. ¶ 309. That is wrong, and is inconsistent with other parts of the district court's opinion. As the district court pointed out elsewhere, "executive or judicial officers of any State"

Stanbery's opinions provide exceptionally persuasive evidence of the historical understanding. They came in 1867—after Congress sent the Fourteenth Amendment to the States, but before the requisite three-fourths of States had ratified it. 11/1/23 Tr. at 38:13-49:16. At that time, the Union was organizing constitutional conventions in former confederate states that would vote on new state constitutions and on ratification of the Fourteenth Amendment. 12 U.S. Op. Att'y. Gen. at 141-42. The Reconstruction Acts provided that no person could vote for delegates to those conventions if they would be disqualified by the proposed Section 3. *Id.* Stanbery's opinions interpreting the Reconstruction Acts (and by incorporation Section 3) therefore directly impacted public debates on that Constitutional provision. And they were legally binding: Andrew Johnson's cabinet approved Stanbery's opinions and directed the Union Army to follow them. 11/1/23 Tr. at 38:13-49:15.

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in Section 3 was meant to capture a narrower group of officials than "officers of the United States." *Id.* ¶ 307. "Officers of the United States" necessarily includes "executive officers" of the United States, further confirming the President is covered.

Short of a U.S. Supreme Court opinion directly on point, contemporaneous opinions from the U.S. Attorney General adopted by the Cabinet and implemented by the U.S. military at the President's command are about the best historical evidence one can get.

The district court acknowledged the opinions' importance but incorrectly concluded that they cut the other way, standing for the proposition that the President is not an officer of the United States. District Court Op. ¶¶ 306-309. The district court relied primarily on the fact that, in both opinions, Stanbery states that "officer of the United States" includes both "military" and "civil" officers who had taken the prescribed oath. The district court reasoned that "refer[ring] to the President of the United States as a mere 'civil officer' is counterintuitive." *Id.* ¶ 306 (quoting 12 U.S. Op. Att'y Gen. at 158); *see also id.* ¶ 308 (quoting 12 U.S. Op. Att'y Gen. at 203). But there is nothing counterintuitive about saying the President—who is both the Commander-in-Chief of the military and the leader of the executive

branch—is either a military or a civil officer (or both). There is no other type of officer the President could be.

The district court also relied on Stanbery's opinion to hold that any doubt about the operation of Section 3 should be construed against its application. District Court Op. ¶ 314. But Stanbery was specifically concerned about the scope of state officials captured by the phrase "executive or judicial officer of any State." 12 U.S. Op. Att'y Gen. at 155 ("I have said, that in addition to the class of officers who clearly come within the terms of the act, as *judicial* and *executive* officers of the State . . . there remain a vast body of officers whose *status* is in some way to be defined."). He had no such qualms about "officer of the United States," which uses the "term officer . . . in its most general sense, and without any qualification." *Id*. at 158. The President is not some fringe, low-level state officer who the Framers of the Fourteenth Amendment may have had good reason for exempting and for whom the language of Section 3 is not clear. The President either is or is not included; there is no "maybe" that could warrant resort to a rule of lenity.

Moreover, the Reconstruction Acts were retroactively applicable statutes that disenfranchised those who had rebelled from *voting* in state conventions. In that context, Stanbery concluded that the law was "retrospective, penal, and punitive," and therefore should be construed cautiously. 12 U.S. Op. Att'y Gen. at 159-60. By contrast, Section 3 here is not applied retroactively, and it merely "fix[es] a qualification for office"; it is not a "punishment mean[t] to take away life, liberty, or property." Cong. Globe, 39th Cong., 1st Sess. 3036 (1866) (Sen. Henderson).

3. Other historical evidence

Other historical evidence likewise confirms what the text already makes plain. By the time the Fourteenth Amendment was ratified, the phrase "officer of the United States" was widely understood to include the President. *See* Vlahoplus, *supra*, at 13–22; Graber, *supra*, at 13–21.

This usage extends back to the founding, when George Washington was described as "the first executive officer of the United States." Vlahoplus, *supra*, at 17; *see also* The Federalist No. 69 (Hamilton) ("The

President of the United States would be an officer elected by the people[.]"). But it was firmly established in the nineteenth century. Presidents were regularly called the "chief executive officer of the United States," including Jefferson, Jackson, Van Buren, Harrison, Polk, Taylor, Fillmore, Buchanan, Lincoln, Johnson, Grant, and Garfield. Vlahoplus, *supra*, at 17-20.

These were not isolated or meaningless references—they were consistent, came in contexts laden with significance, and often were close in time to the ratification of Section 3. Ex. D, 11/1/23 Tr. 56:3-59:16. For instance, President Andrew Johnson issued many presidential proclamations (equivalent to executive orders today) that invoked his status as "chief executive officer of the United States" as a basis for his power to adopt reconstruction measures. *Id.* at 56:3-57:13; Ex. W, Richardson, *supra*, at 312–31. During Andrew Johnson's impeachment in 1868 (the year the Fourteenth Amendment was ratified), members of Congress repeatedly referred to him the same way—again, in a context where the President's status as an "officer" actually mattered. Ex. D,

11/1/23 Tr. 69:21-71:21; Ex. X, Cong. Globe, 40th Cong., 2d Sess. 236 (1868) (Rep. Evarts); *id,* at 513 (Rep. Bingham).

Members of the 39th Congress who enacted the Fourteenth Amendment also repeatedly referred to the President as an officer. *See* Graber, *supra*, at 17–24; Ex. I, Cong. Globe, 39th Cong., 1st Sess. 132 (1866) (Rep. Spalding) ("this high officer of the Government"); *id.* at 1800 (Sen. Wade) ("[t]he President is a mere executive officer."); Ex. Y, Cong. Globe, 39th Cong., 2d Sess. 1505 (1867) (Sen. Dixon) ("officer of the Government"). They especially often called the President the "chief executive officer of the United States." *See, e.g.,* Ex. I, Cong. Globe, 39th Cong., 1st Sess. 335 (1866) (Rep. Guthrie); *id.* at 775 (Rep. Conkling (quoting Attorney General James Speed)); *id.* at 915 (Sen. Saulsbury); *id.* at 1318 (Rep. Holmes (quoting President Johnson)); *id.* at 2914 (Sen. Dolittle).

4. Judicial decisions

No court has squarely held that the President qualifies as an "officer of the United States" under Section 3 of the Fourteenth

Amendment. The issue has never come up because we have never before had an insurrectionist President. But for nearly 200 years, judicial decisions have consistently referred to the President as an "officer."

The year the Fourteenth Amendment was ratified, the Supreme Court said: "We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 676–77 (1868). This was a constant refrain from the Supreme Court in the nineteenth century. *Menard's Heirs v. Massey*, 49 U.S. (8 How.) 293, 309 (1850) ("the President or some other officer"); *Embry v. United States*, 100 U.S. (10 Otto) 680, 685 (1879) ("[n]o officer except the President"); *United States v. McDonald*, 128 U.S. 471, 473 (1888) (quoting *Embry*); *United States v. Am. Bell Tel.*, 128 U.S. 315, 363 (1888) ("the president or . . . any other officer of the government"). Lower courts likewise referred to the President as an officer. *See, e.g., United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 752 (C.C.D.D.C. 1837) ("The president himself … is but an officer of the

United States[.]), *aff'd*, 37 U.S. (12 Pet.) 524 (1838); *Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (calling the President "that high officer").

More recent Supreme Court decisions specifically addressing constitutional issues related to the President have made the same point. In *U.S. Term Limits, Inc. v. Thornton*, the Supreme Court held that various clauses of the original Constitution "reflect the idea that the Constitution treats both the President and Members of Congress as federal officers." 514 U.S. 779, 804–05 n.17 (1995). And in *Nixon v. Fitzgerald*, the Court discussed the President's "unique position in the constitutional scheme," whose vesting of executive power "establishes the President as the chief constitutional officer of the executive branch." 457 U.S. 731, 749–50 (1982); *see also Clinton v. Jones*, 520 U.S. 681, 699 n. 29 (1997) (quoting *Fitzgerald*); *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992) (referring to the President as a "constitutional officer"); *Cheney v. U.S. District Court for the District of Columbia*, 541 U.S. 913, 916 (2004) (mem. op. by Scalia, J.) (referring to "the President and other

officers of the Executive") *In re Sealed Case*, 121 F.3d 729, 748 (D.C.Cir.1997) (the President is "the chief constitutional officer").[5]

Trump relies on several cases to suggest that "officers of the United States" must be appointed rather than elected. *See, e.g.*, *Free Enterprise Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010). These cases are irrelevant here because they interpret the President's power to appoint "*other* Officers of the United States" under the Appointments Clause. Of course officers who are appointed by the President are not elected. Because 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. Trump recently acknowledged as much in a New York case where he argued both that the President *is* an "officer of the United States" and that the Appointments Clause and related decisions have no bearing on that

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[5] Even the district court in this case referred to the President as the "Chief Executive Officer of the Executive Branch." District Court Op. ¶ 123.

question. *See* Ex. Z, President Donald J. Trump's Mem. of Law. in Opp. to Mot. to Remand, *New York v. Trump*, 1:23-cv-3773-AKH, ECF No. 34, at 2–9 (S.D.N.Y., filed June 15, 2023); 11/3/23 Tr. 252:8-255:16.

While the Appointments Clause cases do not bear directly on whether the President is an officer of the United States for purposes of Section 3, they do establish a useful general test: to be an officer of the United States, an "individual must occupy a 'continuing' position established by law," and must "exercis[e] significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). The President satisfies both requirements. The Constitution establishes the Presidency as a "continuing position" and vests that office with the executive power of the United States. *See* U.S. Const. art. II.

5. Other constitutional provisions

While the district court believed "that there are persuasive arguments on both sides," it nevertheless held that the President was not an "officer of the United States." *See* Dist. Ct. Op. ¶ 311-313. In reaching this conclusion, the district court asserted that provisions in the original

Constitution using the phrase "officer of the United States" suggest the President is not an "officer" in Section 3. *See* Dist. Ct. Op. ¶ 311-313. This conclusion is wrong on several levels.

First, none of the cited provisions of the original Constitution attempt to define "officer of the United States," much less say that the President is not one:

Appointments Clause: This clause says only that the President "shall appoint" ambassadors, Supreme Court Justices, "and all other Officers of the United States[.]" U.S. Const. art. II, § 2. The President does not appoint himself, and so is clearly not an "other" officer of the United States. That does not remotely imply he is not "an" officer. Rather, the use of "other" implies that the President *is* an officer.

Article VI: Article VI requires "all executive and judicial Officers . . . of the United States" to swear an oath "to support" the Constitution. But the President does exactly that—he simply does so by means of a more demanding oath spelled out word-for-word in Article II. *See supra*

§ II.A. There is nothing in Article VI suggesting the President is not included in "all executive . . . Officers . . . of the United States."

Impeachment Clause: The clause provides that "[t]he President, Vice President, and all civil Officers of the United States" may be impeached. U.S. Const. art. II, § 4. The key word here is "civil": because the President is both the chief executive officer and the Commander-in-Chief, he is both a military and civil officer. U.S. Const. art. II, § 2. Because military officers are not subject to impeachment, to avoid confusion, the Impeachment Clause needed to specifically identify the President. And for the Vice President, because they also serve as President of the Senate, adding them to this list ensures that this legislative role does not prevent their impeachment.

Commissions Clause: The Commissions Clause says that the President "shall Commission all the Officers of the United States." U.S. Const. art. II, § 4. But this clause, situated in a section and a paragraph conveying powers on the President, means only that the President alone (and nobody else) "has the power to commission" officers. Ex. AA, Edward

S. Corwin, The President: Office and Powers 78 (4th ed. 1957). It does not mean, and no authority suggests, that the President is somehow excluded from the class of officers of the United States, any more than a rule that "Plaintiff shall . . . serve on all parties an opening brief" means the plaintiff is not a party. C.R.C.P. 106(a)(4)(VII). In any event, the President requires no commission since he is an "officer elected by the people." The Federalist No. 69 (Hamilton).

None of the references to "officers of the United States" in these unrelated constitutional provisions overcome the natural meaning of the text: because the Constitution says the Presidency is an "office," the person who holds it is an "officer." *See Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1372 (Fed. Cir. 2006) (Gajarsa, J., concurring in part) ("An interpretation of the Constitution in which the holder of an 'office' is not an 'officer' seems, at best, strained").

In any event, these provisions of the original Constitution, adopted 80 years *before* the Fourteenth Amendment, do not control the meaning of Section 3. *See New York State Rifle & Pistol Association, Inc. v. Bruen*,

142 S. Ct. 2111, 2127 (2022) ("Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." (emphasis in original)). Suppose for the sake of argument that, in 1787, the phrase "officer of the United States" had some technical, term-of-art meaning that was somehow narrower than "holder of an office under the United States." If that were so, the overwhelming textual, historical, and judicial evidence cited above would make clear the sands of time buried that technical distinction well before the Fourteenth Amendment's adoption.

Thus, the Court need not decide what the term "officer" means in unrelated provisions of the original Constitution to decide this case. Nor does the Court need to decide whether Alexander Hamilton was somehow wrong about prevailing 1780s usage of "officer" when he called the President an "officer" of the United States. The Federalist No. 69 (Hamilton). The Court need only decide what "officer of the United States" meant in 1868, and in a context that used the term "in its most general sense, and without any qualification." 12 U.S. Op. Att'y. Gen. at

158. Those who adopted Section 3 clearly understood that this unqualified term included the President. *See supra* §§ II.B.1-4.

III. Excluding the Presidency and the President from Section 3 Would Yield Absurd Results

The text and history of the Constitution all emphatically support the conclusion that Section 3 applies to the President and the Presidency. But so too does basic common sense. When interpreting the Constitution's text, courts are "guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Dist. of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (citations omitted); *see also Whitman v. Nat'l Bank of Oxford*, 176 U.S. 559, 563 (1900) ("The simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption" (citations omitted)). Applying straightforward interpretation— rather than hyper-technical lawyering and "secret-code" hermeneutics—reveals the implausibility of the claim that Section 3

excludes the President and the Presidency. *See* Baude and Paulsen, *supra*, at 105, 108–109.

The contrary argument must be that even though the Constitution repeatedly says the President holds a federal "office," that office is somehow not an "office under" the United States (what else could it be under?); or that even though the President holds an "office," he is not an "officer" (and presumably the Presidency is therefore an officer-less office?); or that Section 3 was intended to cover only weaker, and not stronger, oaths to the Constitution (but why on Earth would that be?). These interpretations would have confounded the people who ratified the Fourteenth Amendment.

Nor would such a reading be consistent with the purpose of Section 3. Section 3 is a "measure of self-defense," Ex. I, Cong. Globe, 39th Cong., 1st Sess. 2918–19 (Sen. Willey); it gives "the Constitution a steel-clad armor to shield it and [the people] from the assaults of faithless domestic foes in all time to come." Ex. AB, Speech of Hon. John Hannah, *Cincinnati Commercial*, Aug. 25, 1866, at 22. Those who hold the highest

offices can wreak the most havoc on the Constitution. Supporters of the Fourteenth Amendment would have been aghast at the notion that it prohibited a Confederate leader like Jefferson Davis from serving as a county sheriff, *see Worthy*, 63 N.C. at 204, or as a mere elector for President, *see* amend. XIV § 3, but allowed him to serve as the Commander-in-Chief of the very Union that he had so violently betrayed.

And Section 3 was intended to "strike at those who have heretofore held high official position, and who therefore may be presumed to have acted intelligently." Ex. I, Cong. Globe, 39th Cong., 1st Sess. 3036 (1866) (Sen. Henderson). It would thus be similarly nonsensical to exclude the former Commander-in-Chief who engaged in insurrection from its coverage while at the same time disqualifying former low-level state officials.

Exempting the President and Presidency from Section 3 would also conflict with the broader constitutional design. The qualifications for the Presidency are the most stringent in the Constitution, including for age (25 for the House, 30 for the Senate, and 35 for the President), residency

("when elected" for the House and Senate, and fourteen years for the President), and U.S. citizenship (seven years for the House, nine years for the Senate, and from birth for the President). *Compare* U.S. Const. art. I, § 2, cl. 1, and *id*. art. I, § 2, cl. 3, *with id*. art. II, § 1, cl. 5. Reading the Presidency out of Section 3 would mean that, unlike other qualifications for office, the Constitution imposes a *less stringent* requirement on the Presidency than on virtually every other federal and state officer in the country.

No court should adopt an interpretation of the Constitution that has such absurd results, unless strictly compelled by unambiguous text. Fortunately, in this case, the text and history all comport with the common-sense outcome. Section 3 does not disqualify oath-breaking insurrectionists from nearly all public offices *except* the highest one, nor does it give a unique free pass to insurrectionist Presidents.

CONCLUSION

For these reasons, the Court should reverse the district court's determination that Section 3 does not apply to the President or to the

office of the Presidency. It should therefore order the Secretary to exclude Trump from the Colorado presidential primary ballot, and from any future Colorado ballot for federal office, unless Congress removes Trump's disability by a two-thirds vote.

Date: November 20, 2023 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 20th day of November 2023, a copy of this brief was electronically served via e-mail or via e-filing on all counsel and parties of record.

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