No. 23-719

IN THE
Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,
v.
NORMA ANDERSON, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Colorado

Brief of the Public Interest Legal Foundation and Hans A. von Spakovsky as *Amici Curiae* in Support of Petitioner

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INTERESTS OF *AMICI CURIAE*[1]

The Public Interest Legal Foundation, Inc. ("Foundation") is a non-partisan, public interest 501(c)(3) organization whose mission includes working to protect the fundamental right of citizens to vote and preserving election integrity across the country. The Foundation has sought to advance the public's interest by protecting the federalist arrangement in the Constitution regarding elections. Hans A. von Spakovsky submits this brief in his personal capacity. Mr. von Spakovsky is a member of the board of the Foundation but is also a former Commissioner on the Federal Election Commission, which enforces federal campaign finance law, and the former Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice, where he coordinated the enforcement of federal voting rights laws. He has also served as a local county election official in both Georgia and Virginia.

SUMMARY OF ARGUMENT

This case presents the opportunity for this Court to weigh in on the application of Section 3 of the Fourteenth Amendment to former President Donald Trump. *Amici curiae* contend that previous actions of Congress, in both 1872 and 1898, call into question the continued viability of Section 3. Even if Section 3 has continued effect, it is not applicable to former President Trump because of his position, the lack of a constitutionally valid finding of insurrection or

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

rebellion, and the absence of any implementing legislation by Congress providing for enforcement. These questions are vitally important as states should not add qualifications for the Presidency beyond what the U.S. Constitution set forth.

ARGUMENT

I. The Continued Legal Viability of Section 3 Is Suspect.

As an initial matter, the legal viability of Section 3, the foundation for the challenge below, is suspect. In its entirety, Section 3 reads as follows:

> 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.

The second sentence of Section 3 expressly states that "Congress may by a vote of two-thirds of each House, remove such disability." U.S. CONST. amend. XIV, § 3.

Congress did just that in the Amnesty Act of May 22, 1872, ch. 193, 17 Stat. 142 (1872).

> Four years after the Fourteenth Amendment's ratification, Congress exercised its power under Section 3 and passed the Amnesty Act of 1872 with the required two-thirds vote in each House. The Act provided
>
> [t]hat all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval services of the United States, heads of departments, and foreign ministers of the United States.

Hans von Spakovsky, *Efforts by Courts or State Officials to Bar Members of Congress from Running for Re-Election or Being Seated Are Unconstitutional* (April 6, 2022), THE HERITAGE FOUNDATION, https://www.heritage.org/courts/report/efforts-courts-or-state-officials-bar-members-congress-running-re-election-or-being.

Congress acted again in 1898, "'as a gesture of national unity during the Spanish American War.'" *Id.* (citation omitted). Accordingly, Congress passed another act providing "that 'the disability imposed by section 3 of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed.' There was no language preserving any of the disqualifications for future cases." *Id.*

(citing Amnesty Act of June 6, 1898, ch. 389, 30 Stat. 432 (1898)).

Amici note that, in 2022, the Fourth Circuit Court of Appeals held that "the 1872 Amnesty Act removed the Fourteenth Amendment's eligibility bar only for those whose constitutionally wrongful acts occurred before its enactment." *Cawthorn v. Amalfi*, 35 F.4th 245, 248 (4th Cir. 2022). But the district court had the correct view of the Amnesty Act containing no language limiting its application to only those individuals who engaged in insurrection or rebellion prior to 1872. *See Cawthorn v. Circosta*, 590 F. Supp. 3d 873, 890 (E.D.N.C. 2022). The Fourth Circuit cannot properly interpret the actions of Congress in the passage of two Amnesty Acts or their text as only looking backwards in defining who is absolved and yet looking forward and capturing future actions as insurrections subject to Section 3 disqualification.

The House of Representatives wrestled with the application of the Amnesty Acts to Section 3 in 1919 in the context of whether to seat a congressman, Victor Berger, who was unjustly prosecuted in violation of his First Amendment rights for his public opposition to World War I, although this Court overturned his conviction under the Espionage Act due to the bias of the trial judge. *Berger v U.S.*, 255 U.S. 22, 28-29 (1921) (noting that the trial judge said that "One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty."). There, rather than considering the scope of the Amnesty Acts and the specific applicable language of Section 3, the congressional committee mistakenly concluded that the Amnesty Acts were

ineffective and it could use Section 3 against Berger because Congress "'has no power whatever to repeal a provision of the Constitution by mere statute, and that no portion of the Constitution can be repealed except in the manner prescribed by the Constitution itself.'" Hans von Spakovsky, *Efforts by Courts or State Officials to Bar Members of Congress from Running for Re-Election or Being Seated Are Unconstitutional* (April 6, 2022), THE HERITAGE FOUNDATION (citation omitted). Under normal circumstances, the committee would have been correct. Yet the congressional committee ignored the second sentence of Section 3, a unique provision not found in any other amendment, that expressly grants Congress the power to act, just as it did in 1872 and 1898, to repeal and void Section 3. "The Amnesty Act [of 1872] is not ambiguous; its plain language removes "all political disabilities imposed" by Section 3 with only certain exceptions." *Id*. And those remaining exceptions were eliminated in 1898 in the second Amnesty Act.

In the alternative, if the Amnesty Act does not apply prospectively, then Section 3's disqualification cannot extend beyond the behavior in the "insurrection or rebellion" upon which it was based, namely only the American Civil War. Nor does Section 3 define "insurrection or rebellion." Therefore, if the Amnesty Act applies only retrospectively, it is because the "insurrection or rebellion" had already occurred. Otherwise, what constitutes an insurrection or rebellion is a straight political question outside of any court's jurisdiction. And it should be noted that the misuse of Section 3 to violate the First Amendment rights of Victor Berger to voice his

unpopular opposition to the U.S. entry into World War I is analogous to events unfolding today in the misuse of Section 3 to violate the First Amendment right of an individual to express his opinion – even if misguided, wrong or even preposterous – about the outcome of an election.

II. Section 3 Does Not Apply to Former President Donald Trump.

Further, Section 3 of the Fourteenth Amendment does not apply to former President Donald Trump. The text of the amendment ends the inquiry. The first condition precedent to Section 3 applying to President Trump is that he previously served as a member of Congress, a state government official, or as an "officer of the United States." U.S. CONST. amend. XIV, § 3. It is a matter of public record that President Trump has never served in Congress or been a judicial, executive, or legislative official in any state government.

President Trump has also never been an "officer of the United States." The Colorado district court correctly concluded the phrase "'officers of the United States' did not include the President of the United States." App. 282a (¶ 313). The Colorado Supreme Court reversed, relying upon "the normal and ordinary usage of the term," as well as its interpretation that "Section Three's drafters and their contemporaries understood" at the time. App. 70a (¶ 145). But such findings contrast with this Court's precedent.

In 1888, this Court held in *U.S. v. Mouat*, 124 U.S. 303, 307 (1888), that an "officer of the United States" is only those individuals who are appointed to positions within the federal government under Article

II of the Constitution. This definition does not extend to those who are elected.

This Court emphasized that view again more recently in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 497-498 (2010), when Chief Justice John Roberts wrote that "the people do not vote for 'Officers of the United States.'" Under this precedent, a cabinet official like Attorney General Merrick Garland is an "officer of the United States" since he was appointed by a president and confirmed by the Senate. However, as the elected heads of the Executive Branch, neither President Joseph Biden nor former President Trump is a current or former "officer of the United States."

Thus, regardless of whether an insurrection occurred on January 6, 2021, and regardless of whether President Trump in any way participated, Section 3 does not apply to President Trump and cannot be used to disqualify him from being a candidate on the ballot, getting elected, or assuming the office of the presidency if he wins the election.

Moreover, even if a former president was considered an "officer of the United States," Section 3 still would not apply because once this precondition is met, Section 3 only bars individuals from being a member of Congress, holding "any office civil or military, under the United States, or under any State," or being an "elector of President and Vice President." U.S. CONST. amend. XIV, § 3. While this language explicitly bars an individual from being an elector, it does not bar an individual from being president. As explained by Professors Josh Blackman and Seth Tillman,

> At the time the Fourteenth Amendment was ratified, there were zero former living U.S. Presidents and Vice Presidents who supported the Confederacy, and who would not otherwise fit within the express language used in Section 3's jurisdictional element. Thus, the Framers of the Fourteenth Amendment—whose focus was on past wrongdoing during the Civil War—had no pressing reason to draft Section 3's jurisdictional element to cover presidents.

Josh Blackman & Seth Barrett Tillman, *Is the President an 'officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment?*, 15 N.Y.U. J.L. & Liberty 1, 46 (2021).

III. No State Court Has the Constitutional Authority to Overrule the Judgment of the Senate that Acquitted President Trump of "Incitement of Insurrection."

Importantly, the lower court's finding of an insurrection or rebellion contradicts the decisions of the Senate. On January 11, 2021, the U.S. House of Representatives introduced articles of impeachment against President Trump that included the charge of "incitement of insurrection." Art. I, H. Res. 24, 117th Cong., 1st Session. The Senate, which has the sole power to remove a president under Section 3 of Art. I of the Constitution, acquitted President Trump of that charge on February 13, 2021.

Yet, the lower Colorado court "found by clear and convincing evidence that President Trump engaged in insurrection as those terms are used in Section Three." App. 8-9a (¶3). As the dissent below noted,

such a finding was made "without a determination from a proceeding (e.g., a prosecution for an insurrection-related offense) with more rigorous procedures to ensure adequate due process." App. 263a (¶263).

State courts contradicting the judgment of the Senate, the legislative branch specifically authorized by the Constitution to decide these questions, is destabilizing and would lead to electoral chaos. As the State of Michigan Court of Claims recently warned in a similar effort to disqualify President Trump in that state, the large number of such cases proceeding across the country could lead to judicial officers issuing "partial or even totally conflicting opinions on the basis of a significant number of potentially dispositive issues." *LaBrant v. Benson*, Case No. 23-000137 (Mich. Ct. Cl. Nov. 14, 2023), Slip Op. at 18; *aff'd sub nom. Davis v. Wayne Cnty. Election Comm'n*, No. 368615, 2023 Mich. App. LEXIS 9150 (Mich. Ct. App. Dec. 14, 2023), *appeal denied sub nom.*, *LaBrant v. Sec'y of State*, No. 166470, 2023 Mich. LEXIS 2231 (Mich. Dec. 27, 2023). "The number of cases," added the court, "presents the risk of completely opposite and potentially confusing opinions and outcomes, which will certainly 'expose the political life of the country to months, or perhaps years, of chaos.'" *Id.* (citation omitted). Judicial restraint should be exercised in this incendiary circumstance.

Worse, no prosecutor has even filed charges against President Trump for insurrection or rebellion. The United States has not charged President Trump under 18 U.S.C. § 2383, which makes it a federal crime to engage in "any rebellion or insurrection against the" United States. Even though the House

January 6 committee "recommended the DOJ charge Trump with inciting or assisting an insurrection[,]" the grand jury indictment of President Trump that has been filed in federal court in the District of Columbia noticeably "does not include charges of insurrection…." Michael Macagnone, *Trump indictment covers similar ground as House Jan. 6 panel* (Aug. 1, 2023), ROLL CALL, https://rollcall.com/2023/08/01/trump-indictment-covers-similar-ground-as-house-jan-6-panel/.

No court of law has convicted President Trump of the criminal act of participating in an insurrection or rebellion. The Senate acquitted President Trump of the House's charge of incitement of insurrection, which is "the only official finding by a federal or state institution on the question of whether Trump committed insurrection." John Yoo and Robert Delahunty, *Why Twisting the 14th Amendment to Get Trump Won't Hold Up in Court* (Aug. 25, 2023), THE FEDERALIST, https://thefederalist.com/2023/08/25/why-twisting-the-14th-amendment-clause-to-get-trump-wont-hold-up-in-court/.

IV. Section 3 Is Not Self-Executing and No Court Has the Authority to Enforce Section 3 Because Congress Has Not Passed a Federal Law Providing for Enforcement.

In 1869, only one year after the Fourteenth Amendment was ratified, Chief Justice Chase held that Section 3 was not self-executing. In *Griffin's Case*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869), Chief Justice Chase wrote that "[l]egislation by congress is necessary to give effect to the prohibition" in Section

3. No such enforcement legislation has ever been promulgated by Congress apart from those acts detailed, *supra*.

In upholding the dismissal in 2022 of a similar type of lawsuit attempting to remove certain members of Congress for their supposed participation in an "insurrection" on January 6, 2021, the Arizona Supreme Court noted the findings of the lower court that "Congress has not created a civil practice right of action to enforce" Section 3 and the federal criminal statute "does not authorize the challenge by a private citizen." *Hansen v. Finchem*, No. CV-22-0099-AP/EL, 2022 Ariz. LEXIS 168, at *2 (Ariz. May 9, 2022). The court decided that it was "unnecessary to decide if the Amnesty Act of 1872" voided the disqualification provisions of Section 3 because "no private right of action exists under the United States Constitution or Arizona law." *Id*.

V. States Cannot Add Qualification Beyond What the Constitution Sets Forth.

The challengers seek to have this Court determine who is qualified to be President. But it is the Constitution, not state jurists or partisan factions, that set the qualifications for President. Specifically,

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, 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.

U.S. CONST. art. II, § 1. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 790 (1995) (eligibility for office is "fixed and exclusive" in the Constitution). Political question or not, the states may not set qualifications for Presidential candidates.

CONCLUSION

For these reasons, *amici* respectfully request that this Court reverse the decision of the Colorado Supreme Court.

Respectfully submitted,

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