IN THE SUPREME COURT FOR THE STATE OF OREGON

MARY LEE NELSON, MICHAEL NELSON, JUDY HUFF, SAMUEL JOHNSON, and CHAD SULLIVAN, electors of Oregon,

Plaintiffs-Relators,

v.

LAVONNE GRIFFIN-VALADE, Secretary of State of Oregon,

Defendant.

SC S _____

MANDAMUS PROCEEDING:

MEMORANDUM IN SUPPORT OF:

PETITION FOR PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS

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I. INTRODUCTION.

Plaintiff-Relators petition the Court to issue a peremptory or alternative writ of mandamus directing the Defendant to exclude Donald John Trump from both the Oregon 2024 primary election ballot and the Oregon 2024 general election ballot. As set forth in more detail below, and as established by the facts set forth in Statement of Facts in Support of: Petition for Peremptory of Alernative Writ of Mandamus (filed this day) [hereinafter "SOF"], Trump is disqualified from the presidency of the United States under Section 3 of the Fourteenth Amendment ("Section 3"). Section 3 does not require federal implementing legislation; Section 3 bars an insurrectionist from the presidency; Section 3 applies to a person who has previously taken an oath as president of the United States; the overwhelming (and largely undisputed) evidence demonstrates that Trump "engaged" in "insurrection" under Section 3; and the political question doctrine does not preclude this Court from adjudicating his eligibility for office.

II. SECTION 3 DOES NOT REQUIRE ADDITIONAL FEDERAL LEGISLATION.

For at least four reasons, this Court may enforce Section 3 without special federal legislation.[1]

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1. The present question is not whether Section 3 can be enforced without *any* underlying cause of action. Rather, the present question is whether, even where (as here) state law supplies a cause of action, some unwritten principle requires *congressional* action before the state may apply its laws to enforce Section 3.

First, state courts do not need congressional permission to enforce the Constitution (including the Fourteenth Amendment), where constitutional obligations can be enforced through state law.

Second, Section 3 is stated as a self-executing prohibition, not a grant of power to legislate. Congress's only exclusive role under Section 3 is *removing* disqualifications. Section 5, which *does* confer congressional power to legislate, does not render Section 3 dependent on congressional legislation any more than it renders Section 1 dependent on congressional legislation.

Third, Reconstruction history demonstrates that Congress, state courts, and ex-Confederate insurrectionists overwhelmingly understood Section 3 applied *without* a federal enforcement statute.

Finally, other state courts relying on state law have applied Section 3 to the January 6, 2021, insurrection without special federal legislation.

A. State courts do not need congressional permission to enforce the Fourteenth Amendment.

1. State courts are obligated to adjudicate federal constitutional questions.

Nothing in the Constitution supports the idea that state judges may apply the Constitution only if Congress says they can. To the contrary, state courts are *obligated* to apply the Constitution. *See* U.S. Const., art. VI, § 2 (the US Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby"). Fifty years before the Fourteenth Amendment, the US Supreme Court established that state courts are competent to adjudicate questions arising under the US Constitution. *See*

Martin v. Hunter's Lessee, 14 US (1 Wheat.) 304, 339-42 (1816) (Story, J.); *see also Robb v. Connolly*, 111 US 624, 637 (1884) (Harlan, J.) (emphasizing that obligation to enforce US Constitution lies "[u]pon the state courts, equally with the courts of the Union").

2. State courts routinely adjudicate Fourteenth Amendment claims without federal statutory authorization.

When plaintiffs in state court civil actions raise federal constitutional claims, courts do not first demand a federal statute authorizing consideration of the claims. *See Testa v. Katt*, 330 US 386, 389 (1947) (holding that, when federal law applies to a cause of action, state courts must apply it). Instead, state courts review the constitutional claims on their merits. *See, e.g.*, *Beaulieu v. Mack*, 788 N.W.2d 892, 893, 897 (Minn. 2010) (considering plaintiff's Fourteenth Amendment equal protection claim raised under Minn. Stat. § 204B.44).

State courts began adjudicating Fourteenth Amendment claims—including claims using the amendment as a "sword," i.e., seeking affirmative relief—almost immediately after the amendment's passage, without special authorization from Congress. *See, e.g.*, *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136 (Cal. 1872) (deciding affirmative claim for relief under Section 1's privileges and immunities clause).

Today, state courts routinely enforce provisions of the Fourteenth Amendment in civil actions without citing any federal statute "authorizing" such enforcement. The Oregon examples are very numerous. Most recently,

see ***State v. A.R H.***, 371 Or 82, 102, 530 P3d 897 (2023); ***State v. Martin***, 370 Or 653, 655, 522 P3d 841 (2022).

B. Nothing in the Fourteenth Amendment's text suggests Section 3 requires federal legislation.

1. Section 3 states a direct prohibition, not an authorization.

Section 3 states the disqualification as a direct prohibition: "*No person shall be* a Senator or Representative in Congress, or elector of President and Vice-President, *or hold* any office" if they previously took an oath as a covered official and then engaged in insurrection or rebellion. The prohibition "lays down a rule by saying what shall be. It does not *grant a power* to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself." William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (revised Sept. 19, 2023), at 17-18 (emphasis in original).[2] It parallels other qualifications in the Constitution that, indisputably, require no special implementing legislation. *See* U.S. Const. art. I, § 2, cl. 2 ("*No Person shall be* a Representative" who does not meet age, citizenship, and residency requirements), § 3, cl. 3 ("*No Person shall be* a Senator" who does not meet age, citizenship, and residency requirements), art. II, § 2, cl. 5 ("*No Person * * * shall be* eligible to the Office of President" who does not meet age, citizenship, and residency requirements), amend. XII ("*no person*

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2. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751

constitutionally ineligible to the office of President *shall be* eligible to that of Vice-President").

Likewise, Section 3's prohibitory language resembles the language of Section 1, which is indisputably self-executing. No federal legislation is needed to enforce the Due Process Clause or Equal Protection Clause in state court. *See* U.S. Const. amend. XIV, § 1 ("*No State shall make or enforce any law* which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive* any person of life, liberty, or property, without due process of law; *nor deny* to any person within its jurisdiction the equal protection of the laws.") (emphases added).

In fact, a major purpose of the Fourteenth Amendment was to constitutionalize these protections precisely so that they did *not* depend on the whims of Congress. *See*, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. at 1095 (Rep. Hotchkiss) (arguing for constitutional protection of civil rights because "We may pass laws here to-day, and the next Congress may wipe them out"). That is why Section 1 is self-executing. *See City of Boerne v. Flores,* 521 US 507, 522-24 (1997) ("Section 1 of the new draft Amendment imposed self-executing limits on the States * * *"). As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."); *Civil Rights Cases*, 109 US at 20 ("[Thirteenth] amendment, *as well as the Fourteenth*, is undoubtedly self-executing without any ancillary legislation"). If "No *State* shall" is self-executing, then so is "No *person* shall."

Likewise, Congress did not leave Section 3 to the whims of "the next Congress" which could pass or repeal legislation by bare majority; to the contrary, Section 3 applies until *two-thirds* of each chamber grants amnesty.

In contrast, constitutional provisions that require effectuating federal legislation explicitly state that Congress *may* enact legislation. For example, Article I authorizes Congress "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States." U.S. Const. art. I, § 8. This neither prohibits counterfeiting, nor establishes a punishment; it authorizes Congress to "provide for" such punishment. Such authorizing language typically uses formulations such as Congress "may" "by Law" do something, *e.g.*, U.S. Const. art. I, § 2, cl. 3; *id.* § 4, cl.1-2, or that Congress "shall have power" to do something, *e.g.*, *id.* art. I, § 8; art. III, § 3, cl. 2; art. IV, § 3, cl. 2. Similarly, the Treason Clause *defines* treason, and authorizes Congress "to declare the Punishment of Treason," but it does not itself impose any consequences for treason. *Id.* art. III, § 3. And the Impeachment Clause defines impeachable offenses, *id.* art. II, § 4 ("The President * * * shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors"), but the Constitution leaves to the House to decide whether to impeach, *id.* art. I, § 2, cl. 5 ("The House * * * shall have the sole Power of Impeachment"), and the Senate to decide whether to convict, *id.* art. II, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."). Unlike those provisions, Section 3 enacts its own disqualification—"No person shall be * *

* or hold," the office—and, like other provisions of the Fourteenth Amendment, sets no prerequisites for congressional action before a state may independently implement it. To the contrary, the only exclusive role Section 3 confers upon Congress is the right to *waive* disqualification—which Congress has not done for Trump.

2. Section 5's authorization of congressional legislation does not make Section 3 unenforceable without similar legislation.

Under Section 5, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. This provision authorizes federal legislation but does not require it. Indeed, as the Supreme Court recognized soon after the enactment of the Fourteenth Amendment—and in the specific context of a dispute about the scope of Congress's enforcement power under Section 5— "the Fourteenth [Amendment], is undoubtedly self-executing without any ancillary legislation." *Civil Rights Cases*, 109 US 3, 20 (1883).

Section 5 applies to the entire Fourteenth Amendment, including Section 1's Due Process and Equal Protection Clauses. If Section 5 meant states could not adjudicate questions under Section 3 without congressional legislation, then it would *also* mean states could not adjudicate Due Process or Equal Protection Clause questions without congressional legislation. Yet courts in every state routinely adjudicate such questions without specific congressional authorization. Just as Section 1 is enforceable outside of 42 USC § 1983, so too Section 3 is enforceable in state court even without federal legislation.

C. History confirms that states may enforce Section 3 without special federal legislation.

Nothing in Section 3's original public meaning—in congressional debates, state ratification debates, or public discussion surrounding ratification—supports the argument that congressional action is required for enforcement. To the contrary, the crucial period between 1868, when the amendment was ratified, and 1870, when the first federal enforcement legislation was passed, confirms that virtually everyone involved understood that Section 3 applied without special federal legislation.[3]

1. Congress confirmed that Section 3 applies automatically.

Both Congress and ex-Confederates understood Section 3 to apply between ratification of the Fourteenth Amendment in July 1868 and passage of the first federal statute enforcing Section 3 in May 1870.[4] If Section 3 were not self-executing, then during this 22-month period, Section 3 should have had no effect. But neither Congress nor ex-Confederates treated it that way.

Rather, during that 22-month period, Congress enacted multiple private bills granting Confederate insurrectionists amnesty from Section 3.[5] If

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3. For more on why Section 3 is self-executing, *see* Baude & Paulsen, *supra*, at 17-49.

4. *See* Act of May 31, 1870, ch. 114, § 14, 16 Stat. 140, 143 (repealed 1948).

5. *See, e.g.*, *An Act to relieve certain Persons therein named from legal and political Disabilities imposed by the fourteenth Amendment of the*

(continued...)

Section 3 truly could not be enforced without federal enforcement legislation, it would have made no sense for Congress to pass amnesty bills long *before* enacting any enforcement legislation. Yet two-thirds of both houses of Congress repeatedly passed amnesties during that period.

These amnesty bills—passed by Congress months or years before any congressional statute authorizing federal Section 3 enforcement—show that Congress understood that Section 3's disqualification could be enforced directly by *states*. *See infra* Part III.C.3 (discussing history of state enforcement). Congress granted amnesty to specific individuals *precisely* because states could enforce Section 3 without federal legislation.

The ex-Confederate public also understood this. Private amnesty bills required an affirmative request by the disqualified individuals. *See* 2 James G. Blaine, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 512 (1886). The many thousands who sought amnesty before May 1870 understood that they could be excluded from office by state law and state

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5.(...continued)
Constitution of the United States, and for other Purposes, 16 Stat. 632 (Apr. 1, 1870); *An Act to relieve certain Persons therein from the legal and political disabilities imposed by the fourteenth amendment of the Constitution of the United States, and for other Purposes*, 16 Stat. 614-30 (Mar. 7, 1870); *An Act to remove political Disabilities of certain Persons therein named*, 16 Stat. 613 (Dec. 18, 1869); *An Act to relieve certain Persons therein named from the legal and political Disabilities imposed by the fourteenth Amendment of the Constitution of the United States, and for other Purposes*, 16 Stat. 607-13 (Dec. 14, 1869); *An Act to relieve Certain Persons of All Political Disabilities imposed by the Fourteenth Article of the Amendments to the Constitution of the United States*, 15 Stat. 436 (1868).

courts; two-thirds of both houses of Congress agreed. If these individuals could only be excluded through legislation that did not exist, they would have had nothing to gain—and much to lose—by putting their fates in the hands of congressional votes requiring a two-thirds supermajority.

2. Reconstruction-era state constitutions confirm that Section 3 requires no special federal legislation.

Three contemporaneous state constitutions ratified by ex-Confederate states provide further evidence. These state constitutions confirm that disqualification is imposed by Section 3 itself and does not require further congressional action. For example, the Florida Constitution of 1868 provides:

> Any person debarred from holding office in the State of Florida by the third section of the proposed amendment to the Constitution of the United States, which is as follows: [quoting section 3] is hereby debarred from holding office in this state; *Provided*, That whenever such disability from holding office be removed from any person by the Congress of the United States, the removal of such disability shall also apply to this State.

Fla. Const. of 1868, art. XVI, § 1; *accord* S.C. Const. of 1868, art. VIII, § 2 (similar); Tex. Const. of 1869, art. VI, § 1.

Again, Congress did not pass enforcement legislation until May 1870. These pre-1870 state constitutions necessarily recognized that disqualification was imposed by the Constitution itself.

3. Reconstruction-era state courts used state law in civil cases to enforce Section 3 without special federal legislation.

The practice of multiple state courts during the Reconstruction era demonstrates that they enforced Section 3 without federal legislation, as well.

See Worthy v. Barrett, 63 N.C. 199, 200 (1869) (holding that a sheriff-elect could not take office because he served under the Confederacy). The *Worthy* court said nothing about needing a federal statute to enforce Section 3. Instead, the court quoted from a *state* statute providing that "no person prohibited from holding office by Section 3 of the Amendment to the Constitution of the United States, known as Article XIV, shall qualify under this act or hold office in this State." *See id.* (citation omitted); *see also In re Tate*, 63 N.C. 308, 308-09 (1869) (disqualifying another official and citing *Worthy* as controlling authority).

The Louisiana Supreme Court also adjudicated the Section 3 eligibility of state officials without any federal legislation. *See State v. Lewis,* 22 La. Ann. 33 (La. 1870) (affirming lower court ruling that official was disqualified under section 3); *State ex rel. Downes v. Towne*, 21 La. Ann. 490, 492 (1869) (finding insufficient evidence "to establish conclusively" that official was disqualified, but never suggesting it needed congressional legislation to decide disqualification).

D. The only case demanding federal legislation to enforce Section 3 is erroneous or, at minimum, does not apply to functional state governments.

The only ostensible basis for the view that state courts cannot enforce Section 3 without specific congressional action is an 1869 decision—since described by scholars as "indefensible" and "bonkers,"—Baude & Paulsen, *supra*, at 43—in the then-unreconstructed state of Virginia. *See Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815). Caesar Griffin, a Black

man, was convicted in Virginia court. *Id.* at 22. He brought a federal habeas petition challenging his conviction, arguing the Virginia judge presiding over his trial was disqualified under Section 3. *Id.* at 22-23. Chief Justice Salmon P Chase, acting as a Circuit Justice, presided over a two-judge federal court hearing Griffin's challenge. *See id.* at 22. Chase rejected the petition on the purported basis that Section 3 was not self-executing and required federal legislation for enforcement. *Id.* at 26.

This decision—which is not binding outside federal courts in Virginia—is erroneous, contradictory, and unpersuasive. At minimum, it does not apply where, as in Oregon, a functional state government exists.

1. Griffin's Case provides no coherent principle to apply to other Section 3 cases.

Griffin's Case is "confused and confusing," *Cawthorn v. Amalfi*, 35 F4th 245, 278 n.16 (4th Cir 2022) (Richardson, J., concurring in the judgment); *see also* Baude & Paulsen, *supra*, at 43. During Reconstruction, it was apparently ignored by other states' courts, *e.g.*, *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 633 (La. 1869) (four months after *Griffin*, in response to disqualified individual claiming that Section 3 was not self-executing, responding that "we are far from assenting to" that proposition, and ruling him disqualified); *State v. Lewis,* 22 La. Ann. 33 (La. 1870) (decided after *Griffin*, and adjudicating a Section 3 claim on the merits); *Downes*, 21 La. Ann. at 492 (same), and Congress—presumably understanding that Section 3

was not just enforceable but was actually being enforced—continued passing amnesty bills after the decision, *see supra* n. 10.[6]

Chief Justice Chase acknowledged that the "literal construction"—what today would be called plain meaning—of Section 3 would disqualify the Virginia judge. *Griffin*, 11 F. Cas. at 24. However, that would mean that not only Griffin, but presumably other prisoners sentenced by ex-Confederate judges, would go free. Noting that the judge's counsel "seemed to be embarrassed by the difficulties" supposedly presented by that plain meaning, Chase expounded upon the "great inconvenience" of applying it, sympathizing with the various "calamities which have already fallen upon the people of these [ex-Confederate] states." *Id.* at 24-25.[7] To avoid this outcome, he adopted two alternative holdings: (1) a constitutional interpretation of Section 3, and (2) a statutory interpretation (the "de facto officer" doctrine) that habeas was not available simply because a prisoner was sentenced by a judge later found disqualified.

First, Chase construed the amendment narrowly and opined that Section 3 requires federal legislation to take effect. *See id.* at 25. This contradicted a

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6. In further repudiation, the Union-appointed provisional governor of Virginia pardoned Griffin three weeks after the decision. *See* Rockingham Reg., May 20, 1869, at 2 col. 3.

7. Judge Underwood, in the unpublished district court opinion in *Griffin's Case* that Chief Justice Chase reversed on appeal as circuit justice, wrote, "Whatever inconvenience may result from the maintenance of the Constitution and the laws, I think the experience of the last few years shows that much greater inconvenience comes from attempting their overthrow." Baude & Paulsen, *supra*, at 40 n.144 (citation omitted).

different Virginia circuit case that Chief Justice Chase himself had just decided. In the treason prosecution of Jefferson Davis, Chase concluded that Section 3 *was* self-enforcing and that *no* Act of Congress was required for its implementation.[8] *See Case of Davis*, 7 F. Cas. 63, 90, 102 (C.C.D. Va. 1867) (No. 3,621a); *Cawthorn*, 35 F4th at 278 n.16 ("These contradictory holdings * * * draw both cases into question and make it hard to trust Chase's interpretation."); *see also* Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 Const. Comment. 87, 100-108 (2021)

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8. Chief Justice Chase suggested Davis's lawyers should argue that Section 3 disqualification was the *exclusive* sanction for ex-Confederates. *See Cawthorn*, 35 F4th at 278 n.16; C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P Chase in the Trial of Jefferson Davis*, 42 Akron. L. Rev. 1165, 1196 (2009); *see also* Cynthia Nicoletti, *Secession On Trial: The Treason Prosecution of Jefferson Davis* 294-296 (2017) (suggesting that this questionable intervention stemmed from Chase's personal and political qualms about the Davis case).

   Davis moved to quash his indictment. However, since no federal legislation had yet been passed to implement Section 3, Davis necessarily also argued that Section 3 was self-enforcing. *See* 7 F. Cas. at 90-91. After a presidential pardon relieved Davis of criminal liability, Chief Justice Chase "instructed the reporter to record him as having been of opinion . . . that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States." *Id.* Thus, Chase necessarily adopted Davis's argument that Section 3 is self-enforcing.

   Just as Chase's interpretation in *Case of Davis* may have reflected his personal qualms about the Davis prosecution, his interpretation in *Griffin* may have reflected his personal opposition to Section 3 as "too harsh on former Confederate officials." *See Cawthorn*, 35 F4th at 278 n.16 (*quoting Connally, supra*, at 1196). The racial dynamic of rulings favoring two ex-Confederates, but not the Black petitioner Griffin, may also be relevant.

(providing a detailed analysis of *Davis* and *Griffin's Case*). *Griffin's Case* did not attempt to reconcile these conflicting points of view.[9]

Griffin's Case never explained why *state* law could not be the basis for Section 3 enforcement. It noted that "[t]o accomplish this ascertainment [of who is disqualified] and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." 11 F. Cas. at 26. But *Griffin's Case* did not consider *state* court proceedings, and never explained why *state* courts could not provide such "proceedings, evidence, decisions, and enforcements of decisions, more or less formal"—like this action under Oregon law. Instead, Chase proceeded, without explanation, to conclude that "these can only be provided for by congress." *Id.* Even if that is true in federal court, it does not explain why a state court would need federal legislation to enforce the Fourteenth Amendment.

Chief Justice Chase relied on Section 5, which authorizes congressional legislation. *See* 11 F. Cas. at 26. But authorizing Congress to enact legislation does not deprive states of their inherent authority and obligation to

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9. Chief Justice Chase's divergent rulings in these two cases cannot be reconciled by a post hoc distinction (never offered by Chase himself) that Davis raised Section 3 as a *defense* to a criminal prosecution, whereas Griffin raised Section 3 as an *affirmative* argument in a habeas petition. The fact that this clever explanation did not occur to any of the hundreds of ex-Confederates who petitioned Congress for amnesty before 1870 despite the lack of congressional enforcement legislation, nor the two-thirds of both chambers of Congress that repeatedly granted such amnesty, indicates that the rest of the country did not recognize such a distinction.

enforce the US Constitution. *See supra* Part III.B.2. Chase stated that the exclusive role for Congress in removing disqualifications "gives to [C]ongress absolute control over the whole operation of the amendment." *Griffin's Case*, 11 F. Cas. at 26. But that does not follow. Rather, Section 3's grant of exclusive authority to Congress to *remove* the disqualification, coupled with the absence of such language regarding the *disqualification itself*, reinforces the conclusion that Section 3's disqualification requirement, like other requirements of the Fourteenth Amendment and the Constitution generally, may (and must) be enforced by state courts with or without congressional action.

2. *Griffin's Case* is not reliable.

Chief Justice Chase publicly opposed Reconstruction. On June 3, 1868, Chase wrote that if he were president, he would "proclaim a general amnesty to every body of all political offences committed during the late rebellion." C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P Chase in the Trial of Jefferson Davis*, 42 Akron L. Rev. 1165, 1195 (2009) (citation omitted). That same day, a major newspaper published an extraordinary interview stating Chase's opposition to Section 3:

> There is no constitutional authority to hold [southern states] in subjugation, and if there were it would be alike unwise and unjust. [Chase] favors * * * removing the political disabilities of every man in the nation. * * * Furthermore he regards this as absolutely necessary, as the provisions of that amendment exclude thousands from office, both under the government and the States, and this will lead to complications which should be avoided.

N.Y. Herald, June 3, 1868, at 3 col. 3.[10] When Congress did not pass a general amnesty soon enough for Chase's liking,[11] the "complications" he cited in June 1868 became the "difficulties" and "inconvenience" he cited in *Griffin*. 11 F. Cas. at 24.

3. *Griffin's Case* should be limited to its unusual context: a state without a fully functional government.

In 1869, Virginia was an unreconstructed state under military occupation. *Cf.* Act of Jan. 26, 1870, ch. 10, 16 Stat. 62-63 (readmitting Virginia to the Union). Its provisional government operated under the control of a Union Army General as part of military reconstruction. *See, e.g.*, First Military Reconstruction Act, ch. 153, 14 Stat. 428-430 (1867). Indeed, *Griffin's Case* quoted from a Joint Resolution of Congress that referred to "the provisional government[] of Virginia." 11 F. Cas. at 26-27 (citation omitted). Since Virginia was under federal control when *Griffin's Case* was decided, the Court's conclusion that "proceedings, evidence, decisions, and enforcements of decisions, more or less formal * * * can only be provided for by [C]ongress," 11 F. Cas. at 26, is arguably defensible if limited to that context. Provisional state governments operating under federal military occupation lacked the powers of ordinary state governments. Put differently, Virginia

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10. Chase's exact words were paraphrased by the interviewer and publisher. *See id.*

11. In 1868, the Republican and Democratic national platforms called for broad amnesty—nonsensical if Section 3 was not in effect. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comm. 87, 112 & n.131 (2021).

was treated more like a federal territory, with limited autonomy accorded by Congress.

Moreover, Virginia ratified the Fourteenth Amendment in October 1869, *after* Chief Justice Chase decided *Griffin's Case*. It is unsurprising that Virginia courts did not enforce a constitutional amendment *that Virginia itself* was at the time refusing to recognize.

4. The only precedential effect of *Griffin's Case* is limited to the "de facto officer" doctrine.

In the alternative, Chase rested his decision on an alternative holding that garnered the unanimous support of the U.S. Supreme Court. As he explained, while the case was pending he consulted with the US Supreme Court justices, who "unanimously concur[red] in the opinion that a person convicted by a judge de facto acting under color of office, though not de jure * * * can not be properly discharged upon habeas corpus." *Griffin's Case*, 11 F. Cas. at 27; *see also* Baude & Paulsen, *supra*, at 45-49. In other words, the full US Supreme Court agreed with him that habeas does not lie when the sentencing judge, though disqualified by Section 3, acts under color of office.

That apparently unanimous ruling of the US Supreme Court not only controls but obviates the remainder of *Griffin's Case*, and is (if anything) the relevant precedent. In modern terms, *Griffin's Case* was affirmed on other grounds. The record does not reflect whether Chase first presented his theory that Section 3 requires implementing legislation to the full Court before resorting to the de facto officer doctrine, which sufficed to resolve the case.

But the Court dismissed an appeal of a case that *did* implement Section 3 without federal legislation. *See Worthy v. Comm'rs*, 76 US 11 (1869). And the Court *did* later cite *Griffin* favorably—but *only* for the de facto officer ruling. *See Ex parte Ward*, 173 US 452, 454–56 (1899) (quoting the de facto officer portion).

5. *Griffin's Case* was widely criticized.

The decision was widely criticized. For example, the New York Sun (a paper widely quoted, as in its famous "Yes, Virginia, there is a Santa Claus" editorial) wrote:

> Chief Justice CHASE decided in effect that the fourteenth amendment was a mere dead letter, entirely dependent on Congressional legislation to give it any efficacy, and not to be enforced where its enforcement would occasion inconvenience.
>
> *We consider that decision of Chief Justice CHASE not only entirely erroneous in point of law, but the most immoral in its character and the most atrocious in its consequence ever pronounced by an American Judge.*

N.Y. Sun, May 21, 1869, at 1 col. 1 (emphasis in original).

Those newspapers that praised the decision focused on its outcome (preventing the release of prisoners), *not* the interpretation of Section 3 as non-self-executing. *See, e.g.*, N.Y. Tribune, May 11, 1869, at 4 col. 2 (praising decision for avoiding "a general jail delivery" and noting that "the ineligibility of certain judges * * * does not go to the extent of *invalidating their official actions*, prior to their removal from office"). One editorial approved the outcome but excoriated Chase for "bas[ing] his decision on the worst possible grounds," noting that its "sweeping" basis would apply to the

entire Thirteenth and Fourteenth Amendments, and so a future Congress "has only to repeal all laws for the enforcement of the amendment, and it is absolutely null." Milwaukee Sentinel, May 17, 1869, at 1 col. 1.

E. Recent decisions regarding the January 2021 insurrection recognize Section 3 enforcement without special federal legislation.

Since January 6, 2021, three different state courts have applied Section 3 to the January 2021 insurrection. In 2022, a New Mexico state court applied Section 3 under the state *quo warranto* statute, and removed a county commissioner from office for engaging in insurrection. *See New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619 (N.M. 1st Jud. Dist., Sept. 6, 2022), *appeal dismissed*, No. S-1-SC-39571 (N.M. Nov. 15, 2022), *cert. filed* May 18, 2023. No special federal legislation was needed. Similarly, Georgia adjudicated a Section 3 ballot challenge against Representative Marjorie Taylor Greene. *See Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Ofc. of State Admin. Hrgs. May 6, 2022).[12] While the administrative law judge overseeing the state proceeding found there was insufficient evidence to establish that Greene personally engaged in insurrection, he followed *Worthy* and adjudicated the Section 3 question on the merits. Neither the administrative law judge, nor the state courts on appellate review, *see Rowan v. Raffensperger*, No. 2022-CV-364778 (Ga. Fulton Cty. Sup. Ct. July 25, 2022), nor the federal court that rejected Greene's efforts to enjoin the state proceeding, *see Greene*, 599 FSupp3d

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12. https://freespeechforpeople.org/wpcontent/uploads/2022/05/2222582.pdf

1283, *remanded as moot*, 52 F4th 907 (11th Cir 2022), questioned the state's authority to adjudicate and enforce Section 3. *See, e.g.*, *Greene*, 599 FSupp3d at 1319 ("Plaintiff has pointed to no authority holding that a state is barred from evaluating whether a candidate meets the constitutional requirements for office or enforcing such requirements").[13]

Most recently, the Colorado District Court rejected Trump's argument that Section 3 is not self-executing. *Anderson v Griswold*, Docket No. 2023-CV-32577, 2023 WL 8006216, at *3) (Colo. Dist. Ct. November 17, 2023) (Exhibit 6, pp. 5-6).

III. THE PRESIDENCY OF THE UNITED STATES IS A BARRED "OFFICE * * * UNDER THE UNITED STATES" UNDER SECTION 3.

A. The presidency is an "office" under the Constitution.

1. The Constitution repeatedly describes the presidency as an "office."

The 1787 Constitution and antebellum (1803) Twelfth Amendment repeatedly (over two dozen times) label the presidency an "office." *See, e.g.*, U.S. Const. art. II, § 1, cl. 1 ("[The President] shall hold his *Office* during the Term of four years."), art. II, § 1, cl. 8 ("Before he enter on the Execution of his *Office*, he shall take the following Oath or Affirmation:—'I do solemnly

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13. In one Arizona decision, the state supreme court noted that the county trial judge had dismissed a Section 3 challenge on multiple grounds, including an ostensible requirement for congressional legislation, but the state supreme court affirmed on a technical question of Arizona election law and expressly declined to decide or endorse the county judge's constitutional theory. *See Hansen v. Finchem*, No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz. May 9, 2022).

swear (or affirm) that I will faithfully execute the *Office* of President of the United States * * *.'"). The antebellum Constitution repeatedly uses that term in *eligibility* provisions. *Id.* art. II, § 1, cl. 5 ("No person * * * shall be eligible to the *Office* of the President; neither shall any Person be eligible to that *Office*"), art. II, § 1, cl. 6 ("In Case of the Removal of the President from *Office*, or of his * * * Inability to discharge the Powers and Duties of the said *Office*."); *see also id.* amend. XII ("no person constitutionally ineligible to the *office* of President").[14]

Likewise, the ratifying public understood the presidency as an "office." *See, e.g.*, Federalist No. 39 (Madison) (referring to presidency as an "office" three times); Federalist No. 66 (Hamilton) (referring to presidency as the "first office"); Federalist No. 68 (Hamilton) (referring to presidency as an "office" five times); Federalist No. 69 (Hamilton) (twice); Federalist No. 72 (Hamilton) (five times); Saikrishna Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 Duke J. Const. L. & Pub. Pol'y 143, 147-48 (2009) (collecting other citations).

2. A contrary reading is absurd.

Several provisions of the 1787 Constitution would be absurd, if the presidency were not an office "under the United States." If it were not, then "the President could simultaneously hold a seat in Congress, sit in the Electoral College, and be subject to a religious test." *District of Columbia v.*

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14. This brief adds emphases to constitutional text *passim*, highlighting terms such as "office" and "officer."

Trump, 315 FSupp3d 875, 884 (D. Md. 2018), *rev'd on other grounds*, 928 F3d 360 (4th Cir 2019);[15] Prakash, *supra*, at 148-51 (2009).

Specifically:

> Presidents could be impeached and convicted, but not removed. *See* U.S. Const. art. I, § 3, cl. 7 ("Judgment in cases of impeachment shall not extend further than to removal from *office* * * * .").

> Even if removed, they could not be disqualified from returning to power. *See id.* ("and disqualification to hold and enjoy any *office* of honor, trust or profit *under the United States*").

> The president could simultaneously serve in Congress. *See* U.S. Const. art. I, § 6, cl. 2 ("[N]o Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office."); John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L. Rev. 141, 146 (1995) ("The Presidency is surely an 'Office under the United States'; one could hardly interpret the Incompatibility Clause to allow a Representative or Senator to retain a seat in the Congress after being elected and inaugurated as President.").

> The president could serve as a presidential elector—for himself—even though every other major federal officeholder is barred. *See* U.S. Const. art. II, § 1, cl. 2 ("no Senator or Representative, or Person holding an *Office* of Trust or Profit *under the United States*, shall be appointed an Elector.").

> The presidency could be subject to a religious test. *See* U.S. Const. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any *Office* or public Trust *under the United States*.").

Thus, the presidency is an "office * * * under the United States."

Trump, 315 FSupp3d at 881-86 (analyzing and rejecting view, advanced by Professor Seth Barrett Tillman as amicus curiae, to the contrary); *see also*

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15. *Rev'd en banc*, 958 F3d 274 (4th Cir 2020), *vacated as moot*, 141 SCt 1262 (2021).

Trump v. Mazars USA, LLP, 39 F4th 774, 792 (D.C. Cir 2022) (noting that the Foreign Emoluments Clause, which applies to anyone "holding any Office of Profit or Trust under" the United States, "bars federal officials (including the President) from accepting gifts or other payments from foreign governments"); *see also* H. Rep. No. 302, 23d Cong., 1st Sess. at 2 (1834) (noting that President Jefferson had reached same conclusion).

B. Congressional debate specifically clarified that the presidency is a barred "office * * * under the United States" under Section 3.

The history and purpose of Section 3 confirm that insurrectionists are barred from the presidency. In fact, this question was explicitly asked and answered during congressional debate, in which Senator Johnson expressed concern that "this amendment does not go far enough." He expressed concern that the specific enumeration of certain offices and not others "meant that section 3 would *not* apply to the presidency:

> I do not see but that any one of those gentlemen [ex-Confederates] may be elected President or Vice President of the United States, and why did you omit to exclude them? I do not understand them to be excluded from the privilege of holding the two highest offices in the gift of the nation.

Cong. Globe, 39th Cong., 1st Sess. 2899 (1866).

But Senator Morrill interrupted him:

> Let me call the Senator's attention to the words "or hold any office, civil or military, under the United States."

Id. In other words, the phrase "office * * * under the United States" already addressed Senator Johnson's concern, because it prevented insurrectionists from holding the "two highest offices" in the land. Senator Johnson then

acknowledged there was "no doubt" he had been wrong, and that he had been "misled by noticing the specific exclusion in the case of Senators and Representatives." *Id.*

This legislative history conclusively establishes Congress's understanding and intent, and the presumptive understanding of the ratifying public, that insurrectionists are barred from the presidency.

C. The generation that ratified and implemented the Fourteenth Amendment understood the presidency as an "office * * * under the United States" for purposes of Section 3.

During the ratification period, the public specifically discussed the scenario of Jefferson Davis or Robert E. Lee rising to the presidency. *See, e.g.*, *Democratic Duplicity*, Indianapolis Daily J., July 12, 1866, at 2 col. 1 (three days after congressional enactment, explaining that Section 3's opponents believed "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"); *Rebels and Federal Officers*, Gallipolis J. (Gallipolis, Ohio), Feb. 21, 1867, at 2 col. 1 (criticizing President Johnson's alternate Fourteenth Amendment proposal, which lacked an equivalent to Section 3, and noting that "Reconstruction upon this basis would render Jefferson Davis eligible to the Presidency of the United States").

After ratification, newspapers around the country raised the concern that amnesty proposals debated at the time might render Jefferson Davis eligible for the presidency. *See* John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. __ (forthcoming 2024), at 7-10

(collecting sources).[16] The idea that amnesty could make Davis eligible for the presidency was expressed by both amnesty *opponents*, who viewed this specter with horror, *see* Terre Haute Wkly. Express, Apr. 19, 1871, at 4, col.1 (warning that if amnesty were granted, "JEFF DAVIS would be elligible [sic] to the Presidency"); *Columbus Letter: An Unexpected Opposition*, Cincinnati Comm'l, Jan. 9, 1871, at 3 col. 3 (questioning whether nation should "make Jeff. Davis and John C. Breckinridge eligible to the Presidency of the United States"), and amnesty *supporters*, who welcomed Davis's return to presidential eligibility, *see The Administration, Congress and the Southern States—The New Reconstruction Bill*, N.Y. Herald (N.Y., N.Y.), Mar. 29, 1871, at 6[17] (proposing "such an amnesty as will make even Jeff Davis eligible again to the Presidency").

In 1872, after a broad amnesty bill finally passed, the Chicago Tribune noted that the act made many ex-Confederates "as eligible to the Presidency * * * as General Logan or General Butler." *The Philadelphia Platform*, Chicago Trib., June 8, 1872, at 4. Similarly, in 1876, the central debate over a (failed) universal amnesty bill concerned whether it would, or would not, render Davis eligible for the presidency. *See* Vlahoplus, *supra*, at 9 (citing multiple newspaper reports and editorials describing the debate as whether

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16. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157

17. Reproduced in *Northern View*, Fairfield Herald (Winnsboro, S.C.), Apr. 12, 1871, at 1.

amnesty bill should extend so far as to make Davis eligible for the presidency).

If Davis were already eligible for the presidency because the presidency was *not* an "office * * * under the United States" under Section 3, then these debates would have been pointless.

D. The spirit and purpose of Section 3 reveals an intent to include the presidency as "an office * * * under the United States."

Section 3's purpose is to protect the republic from those who, having sworn to support its Constitution, turned against it. *See* Cong. Globe, 39th Cong., 1st Sess. 2918 (Sen. Willey) (Section 3 is "not * * * penal in its character, it is precautionary. It looks not to the past, but it has reference, as I understand it, wholly to the future. It is a measure of self-defense."); *United States v. Powell,* 27 F. Cas. 605 (C.C.D.N.C. 1871) ("those who had been once trusted to support the power of the United States, and proved false to the trust reposed, ought not, as a class, to be entrusted with power again until congress saw fit to relieve them from disability").

Given this broad purpose, it is absurd to suggest that insurrectionists are considered so dangerous to the republic that they must be excluded from minor offices, such as county commissioner, *White*, 2022 WL 4295619, at **16-17; county sheriff, *Powell*, 27 F. Cas. at 605; *Worthy*, 63 N.C. at 201-03; district solicitor, *In re Tate*, 63 N.C. at 308; or even as an *elector* for the president, *see* amend. XIV, § 3—yet are for some reason still eligible for the nation's most powerful office. Nothing in the amendment's text or history

suggests that the Framers and the ratifying public acted with such bizarre effect. *See* Myles Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill of Rts. J. 153, 163 (2021) ("[I]nstead of questioning whether the drafters intended to include the President, it is proper to question whether the public would have thought the President was immune from this provision.").

Indeed, such a bizarre interpretation would contradict a broader constitutional design. Elsewhere, throughout the Constitution, presidential qualifications are the *most* stringent, whether for age (25 for House; 30 for Senate; 35 for president), United States residency ("when elected" for House and Senate; fourteen years for president), or citizenship (seven years for House; nine years for Senate; from birth for president). *Compare* U.S. Const. art. I, § 2, cl. 1 *with id.* art. I, § 2, cl. 3 *and id.* art. II, § 1, cl. 5. Reading the presidency out of section 3 would lead to the incongruous result of rendering the qualifications for president far *less* stringent than those of minor local, state, or federal officials.[18]

Finally, the fact that Section 3 specifically enumerates various barred positions (including presidential electors) that are *not* offices under the United States does not indicate that the presidency is not covered—rather, it confirms that he is. As noted above, the Constitution refers to the presidency as an "office" over two dozen times. So, too, Article III refers to "Judges, both of

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18. For more on why the presidency is a barred office under Section 3, *see* Vlahoplus, *supra*, at 6-13, 22-27; Baude & Paulsen, *supra*, at 104-112.

the supreme and inferior Courts" as holding "Office." U.S. Const. art. III, § 1. Thus, the presidency (and federal judgeships) are included by default in the phrase "office . . . under the United States."

In contrast, the Constitution does *not* refer to members of Congress as holding "office," and its only reference to congressional "officers" are those chosen to hold office *within* the legislative body, such as Speaker. *See, e.g., id.* art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers"). And the Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office," which would be self-contradictory if the position of Representative or Senator were itself an "Office under the United States." *Id.* art. I, § 6, cl. 2. Thus, members of Congress—unlike the president—do not hold "office under the United States." *See* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?,* 48 Stan. L. Rev. 113, 136 (1995) (explaining why Senators and Representatives are not "officers of the United States"). The same is true for electors—they *cannot* hold federal office. *See* Art. II, § 1, cl. 2 ("no . . . Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector").

Thus, it was *specifically necessary* to enumerate members of Congress and presidential electors in Section 3's barred-positions list precisely because they do *not* hold "Office under the United States." But since the presidency (and federal judgeships) *are* constitutional "offices," there was no need to

enumerate them separately—they are covered by the phrase "office . . . under the United States."

IV. THE PRESIDENT OF THE UNITED STATES IS A COVERED "OFFICER OF THE UNITED STATES" UNDER SECTION 3.

A. The plain meaning of "officer of the United States" includes the president.

The simplest meaning of "officer" is one who holds an office. *See* N. Bailey, *An Universal Etymological English Dictionary* (20th ed. 1763) ("one who is in an Office"); *see also United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, C.J., riding circuit) ("An office is defined to be a public charge or employment, and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States.") (quotation marks omitted). This plain meaning must be the starting point:

> The Constitution repeatedly designates the Presidency as an "Office," which surely suggests that its occupant is, by definition, an "officer." An interpretation of the Constitution in which the holder of an "office" is not an "officer" seems, at best, strained.

Motions Sys. Corp. v. Bush, 437 F3d 1356, 1371–72 (Fed. Cir 2006) (*en banc*) (Gajarsa, J., concurring in part and concurring in the judgment) (citations omitted). Even today, this plain meaning is widely used by the Supreme Court and the executive branch alike. *See, e.g.*, *Nixon v. Fitzgerald,* 457 US 731, 750 (1982) (referring to president as "the chief constitutional officer of the United States"); *Cheney v. US District Court for the District of Columbia*, 541 US 913, 916 (2004) (Scalia, J.) (referring to "the President

and other officers of the Executive"); *Motions Sys. Corp.*, 437 F3d at 1368 (cataloguing multiple presidential executive orders in which the president refers to himself as an "officer"); Office of Legal Counsel, US Dep't of Justice, *A Sitting President's Amenability to Indictment and Criminal Prosecution* (Oct. 16, 2000), at 222, 226, 230 (distinguishing "*other* civil officers" from the president) (emphasis added)[19]; Exec. Order No. 11435 (January 21, 1968) (referring to actions "of the President or of any other officer of the United States").

The phrase is not a technical "term of art." *See* Jennifer L. Mascott, *Who are "Officers of the United States*"?, 70 Stan. L. Rev. 443, 471 (2018) (explaining why the phrase is not an "indivisible term of art"). Rather, "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." *District of Columbia v. Heller*, 554 US 570, 576 (2008) (quotation omitted); *Whitman v. Nat'l Bank of Oxford*, 176 US 559, 563 (1900) ("The simplest and most obvious interpretation of a Constitution * * * is the most likely to be that meant by the people in its adoption."). Furthermore, technical legal terms of art are defined in law dictionaries. No contemporaneous law dictionary provided a technical definition for "officer of the United States."

Rather, the constitutional text, drafting history, and Founding-era debates demonstrate that "Officers of the United States' is a descriptive phrase

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19. https://www.justice.gov/d9/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf

indicating that the officers are federal, and not state or private, actors." *Id.* at 471-83; *cf.* Cong. Globe, 39th Cong., 1st Sess. 3939 (1866) (noting that "'officers of' and 'officers under' the United States are * * * 'indiscriminately used in the Constitution.'") (citation omitted).

B. Donald J. Trump has argued in court that he was an "officer of the United States" during his term in office.

In multiple lawsuits, Trump has argued that he was an "officer of the United States" under the federal officer removal statute. Under 28 USC § 1442(a)(1), "any officer * * * of the United States" may remove a state court case to federal court if the action concerns "any act under color of such office." *Id.* While Trump's removal efforts have met with mixed success, the courts have agreed with him that the president is an officer of the United States. *See K&D LLC v. Trump Old Post Office LLC*, 951 F3d 503, 505 (D.C. Cir 2020) (affirming district court's denial of motion to remand); *New York v. Trump*, No. 23-cv-03773-AKH, 2023 WL 4614689, *5 (S.D.N.Y. July 19, 2023) (agreeing with Trump that president is an "officer of the United States" but remanding because acts at issue were not under color of office).

In New York, Trump argued that he *is* a former "officer of the United States." *See* Memo. in Opp. to Mot. to Remand, ECF No. 34, *People v. Trump*, No. 23-cv-3773 (S.D.N.Y. filed June 15, 2023) ("Trump Opp."), at 2-9.[20] He correctly argued that the claim that the president is not an officer of the United States has "never been accepted by any court." *Id.* at 2-3. He

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20. https://bit.ly/TrumpRemandOpp

distinguished Appointments Clause cases such as *Free Enterprise Fund v. Public Co. Acct. Oversight Bd.*, 561 US 477 (2010), explaining the "Supreme Court was not deciding that meaning of 'officer of the United States' as used in every clause in the Constitution," but rather was only describing the meaning of "other officers of the United States" in that clause, and "*Free Enterprise Fund* says nothing about the meaning of 'officer of the United States' in other contexts." Trump Opp. at 4.[21]

The court remanded because the acts at issue were not under color of office but agreed with Trump that the president *is* an "officer of the United States." *New York v. Trump*, No. 23-cv-03773-AKH, 2023 WL 4614689, *5 (S.D.N.Y. July 19, 2023).

C. The original public meaning of "officer of the United States" included the president.

By the 1860s—the relevant period for ascertaining the original public meaning of the Fourteenth Amendment—"officer of the United States" was widely understood to include the president. This 1860s-era usage defines the original public meaning of the Fourteenth Amendment. *See McDonald v. City of Chicago*, 561 US 742, 813 (2010) ("the objective of this inquiry is to discern what 'ordinary citizens' *at the time of ratification* would have understood" the words to mean) (cleaned up); *Minnesota v. Dickerson*, 508 US 366, 379 (1993) (Scalia, J., concurring) ("I take it to be a fundamental

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21. Trump also correctly distinguished *United States v. Mouat*, 124 US 303, 307 (1888), which held a naval paymaster's clerk was not an officer of the United States. Trump Opp. at 2-3 n.1.

principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them *at the time of their ratification*.") (all emphases added).

Someone who takes a constitutionally required oath to "preserve, protect and defend" the Constitution before he can "enter on the Execution of his Office," U.S. Const., art. II, § 1, is, in plain language, an "officer of the United States." Presidents, members of Congress, Supreme Court justices, and the general public referred to the president this way. Thus, the original public understanding of Section 3 in the 1860s applied to an insurrectionist ex-president.

Consistent with the plain language and the original understanding at the time the Constitution was enacted, well before the Civil War, both common usage and judicial opinions described the president as an "officer of the United States." As early as 1789, congressional debate referred to the president as "the *supreme Executive officer* of the United States." 1 Annals of Congress 487–88 (Joseph Gales ed., 1789) (Rep. Boudinot); *cf.* Federalist No. 69 (Hamilton) ("The President of the United States would be an officer elected by the people"). Chief Justice Branch wrote in 1837 while riding circuit that "[t]he president himself * * * is but an officer of the United States." *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 752 (C.C.D.D.C. 1837), *affirmed*, 37 US 524 (1838).

By the 1860s, this usage was firmly entrenched. *See* Vlahoplus, *supra*, at 18-20. On the eve of the Civil War, President Buchanan called himself

"the chief executive officer under the Constitution of the United States." *Id.* at 18 (citation omitted). That usage was repeated with respect to President Lincoln. *See* Cong. Globe, 37th Cong., 2d Sess. 431 (1862) (Sen. Davis) (referring to President Lincoln as "the chief executive officer of the United States"). In a series of widely reprinted official proclamations that reorganized the governments of former confederate states in 1865, President Andrew Johnson referred to himself as the "chief civil executive officer of the United States."[22]

This usage continued throughout the Thirty-Ninth Congress, which enacted the Fourteenth Amendment, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 335 (Sen. Guthrie) (1866), 775 (Rep. Conkling) (quoting Att'y Gen. Speed), 915 (Sen. Wilson), 2551 (Sen. Howard) (quoting President Johnson), and during its two-year ratification period, *see, e.g.*, *Mississippi v. Johnson*, 71 US 475, 480 (1866) (counsel labeling the president the "chief executive officer of the United States"); Cong. Globe, 39th Cong. 2d Sess. 335 (1867) (Sen. Wade) (calling president "the executive officer of the United States"); Cong. Globe, 40th Cong. 2d Sess. 513 (1868) (Rep. Bingham) ("executive officer of the United States"). Given the repeated and consistent description of the

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22. Andrew Johnson, Proclamation No. 135 (May 29, 1865); Proclamation No. 136 (June 13, 1865); Proclamation No. 138 (June 17, 1865); Proclamation No. 139 (June 17, 1865); Proclamation No. 140 (June 21, 1865); Proclamation No. 143 (June 30, 1865); Proclamation No. 144 (July 13, 1865), *all reprinted in* 8 *A Compilation of the Messages and Papers of the President*, 3510–14, 3516–23, 3524–29 (James D. Richardson ed., 1897).

president as the (chief) (executive) "officer of the United States," the original public meaning of the phrase in Section 3 necessarily included the president.

Indeed, an insurrectionist ex-president was hardly inconceivable in 1866. Former President John Tyler (1841-45) joined the Confederacy, although he died in 1862. If he had survived the war and sought public office, the idea that his disqualification would turn on whether he had happened to also serve as a *less powerful* covered official—as it happens, Tyler had also served in the House—bears no relation to any defensible understanding of Section 3.

D. The generation that ratified the Fourteenth Amendment understood the president to be an "officer of the United States."

Those charged with interpreting and applying the term "officer" in Section 3—often in the context of the phrase "officer of any State"—repeatedly interpreted it in a commonsense manner that does not distinguish elected from appointed office. Rather, they understood an "officer" (state or federal) as one who, by dint of office, must take an oath to support the Constitution. *See Worthy*, 63 N.C. at 204 ("The oath to support the Constitution is the test. The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress.").

Under this analysis, an "officer" under Section 3 is one who is "required to take an oath to support the Constitution," in contrast to a "placeman" who is "simply required to take an oath to perform the particular duty required of him." *Id.* at 202-03 (enumerating state officers who satisfy this test, including

apex elected officials such as governor, as well as minor officials such as "Inspectors of flour, Tobacco, &c." and "Stray Valuers"). *See also Powell*, 27 F. Cas. at 605-06 (holding elected constable was an "officer in the state" because he held "executive office"); *see also The Reconstruction Acts* (May 24, 1867), 12 US Op. Att'y Gen. 141, 158 (1867) (defining covered officials as those "[h]olding the designated office, State or federal, accompanied by an official oath to support the Constitution of the United States"); *In re Exec. Comm. of 14th October, 1868*, 12 Fla. 651, 651–52 (1868) (interpreting Section 3 as incorporated into Florida Constitution, and defining an "officer" simply as "a person commissioned or authorized to perform any public duty").

Just one month after sending the Fourteenth Amendment to the states for ratification, Congress explained its own interpretive methodology, rejecting constitutional distinctions between "officer of" and "office under" the United States. *See* Vlahoplus, *supra*, at 24-26. As the report explained, "[i]t is irresistibly evident that no argument can be based on the different sense of the words 'of' and 'under.'" Cong. Globe, 39th Cong., 1st Sess. 3939 (1868) (concluding that terms "of" and "under" the United States "are made by the Constitution equivalent and interchangeable."). *Id.* The committee dismissed efforts to distinguish these terms as "mere verbal criticism" and emphasized that "[n]o method of attaining the Constitution is more unsafe than this one of 'sticking' in sharp verbal criticism." *Id.*

E. The framers and general public did not understand Section 3 to be constrained by technical taxonomies.

Any reading of Section 3 that allows an insurrectionist president to return to power simply because he happened not to have any prior public service would make a mockery of the protective purpose and parallel structure of Section 3. Structurally, for federal positions, Section 3 pairs covered officials with barred offices:

Covered officials	Barred positions
"members of Congress"	"Senator or Representative in Congress"
"officer of the United States"	"any office, civil or military, under the United States"

See Baude & Paulsen, *supra*, at 106-07. The simplest understanding is that—with the exception of presidential electors, who only appear in the "barred positions" list—these lists match. *See* Vlahoplus, *supra*, at 22-27 (describing the "essential harmony" of the "office" and "officer" terms).

It strains credulity to suggest that the Framers of the Fourteenth Amendment relied on nonsensical textualism that would somehow seek to distinguish "member[] of Congress" from "Senator or Representative in Congress" because they used different words. The same logic applies to the table's second row: "officer of the United States" in the covered-officials clause corresponds to "any office, civil or military, under the United States" in the barred-positions clause.

Some commentators have developed elaborate schema to try to distinguish officers of "the Government of the United States," U.S. Const. art. I, § 8, which indisputably includes the president, from officers of "the United States," which they claim does not. *See* Seth Barrett Tillman & Josh

Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S. Tex. L. Rev. 309 (2021) (introducing a planned ten-part series of law review articles that is apparently necessary to understand and explain their taxonomy). This bizarre argument flies in the face of the plain meaning of the words used, their dictionary definitions, and hundreds of years of common usage by Congress, the president, and the Supreme Court, and the public generally. Absolutely no evidence suggests that the Framers of the Fourteenth Amendment, or the ratifying public, understood the meaning of terms in the amendment to be constrained by byzantine technical taxonomies. *See* Baude & Paulsen, supra, at 105 ("a reading that renders the document a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one"); *cf.* Cong. Globe, 39th Cong., 1st Sess. 1089 (1866) (Rep. Bingham) (asked to define "due process of law," replying "the courts have settled that long ago, and the gentleman can go and read their decisions").

Rather, the Framers understood the terms with their common meanings and for the intended purpose of protecting the republic. If "[t]he oath to support the Constitution is the test," *Worthy*, 63 N.C. at 204, then the president's oath—the only one explicitly specified in the Constitution itself—must qualify at least as much as those of "Inspectors of flour, Tobacco, &c." or "Stray Valuers." *See Worthy*, 63 N.C. at 203.

The theory that a deputy assistant undersecretary, newly commissioned second lieutenant, or Inspector of Flour who engages in insurrection is forever

excluded from public office unless and until Congress grants him amnesty, but a *president* is not, [23] is completely untethered from the amendment's purpose to protect the republic from oath-breaking insurrectionists.[24]

Finally, the fact that Section 3 specifically enumerates various covered officials who are not officers of the United States does not indicate that the president is not covered; rather, it confirms that he is. As discussed supra, members of Congress *cannot* hold "office under the United States." U.S. Const. art. I, 6, cl. 2. They are therefore not "officers of the United States."

Thus, it was *specifically* necessary to enumerate members of Congress in Section 3's covered-officials clause precisely because they are *not* officers of the United States. But since the president (and federal judges) *are* officers of the United States, there was no need to enumerate them separately.

F. The presidential oath is an oath to support the Constitution.

The presidential oath to "preserve, protect and defend" the Constitution is an oath to "support" the Constitution under Section 3. See U.S. Const., art. II, 1, cl. 8. It is not materially distinct from the oath described in art. VI, cl. 3. Article VI requires all state and federal legislators and "all executive and judicial Officers both of the United States and of the several States" to "be bound by Oath or affirmation to support this Constitution," but it does not provide the specific language to be used in swearing the oath. Instead, Article

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23. Unless, of course, he previously served as Inspector of Flour.

24. For more on why the president is a covered official under Section 3, *see* Vlahoplus, *supra*, at 13-27; Baude & Paulsen, *supra*, at 104-112.

II prescribes the specific language to be used by the president in his oath to support the Constitution, while the Constitution leaves it up to Congress and the states to provide oath language for all other officers. In enacting such language at the federal level, Congress has specifically recognized that the president indeed holds an office under the United States. See Act of July 2, 1862, ch. 128, 12 Stat. 502 ("every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military or naval departments of the public service, *excepting the President of the United States*, shall . . . take and subscribe the following oath or affirmation"). In other words, the presidential oath is simply a specific instantiation of the Article VI oath requirement.

Furthermore, the distinct wording ("preserve, protect and defend") of the presidential oath is not material. As a leading commentator explained:

> The President's oath is but an amplification of [the oath described in Article VI]; it enters into more detail, but does not add another compulsive clause. The solemn promise in particulars to "preserve, protect and defend the Constitution," does not imply more than the equally solemn promise "to support" it.

John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* (8th ed. 1885).[25]

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25. To the extent that "preserve, protect and defend" the Constitution, could be read to imply more than "to support" the Constitution, it certainly could not be read to imply less. Preserving, protecting, and defending the Constitution includes, at an absolute minimum, supporting the Constitution and anyone who has taken an oath to "preserve, protect, and defend" the Constitution has necessarily taken an oath to "support" the Constitution.

Indeed, the definition of "defend" includes "support," and vice versa. *See* WEBSTER'S DICTIONARY (1828) (defining "defend" to include "to support," and defining "support" to include "to defend"); Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) (defining "[d]efend" as "[t]o stand in defence of; to protect; to support"). And Section 3 refers to "an" oath to support the Constitution, not a particular specificaly worded oath.

In the 1860s, Congress twice revised art. VI oaths, using these verbs interchangeably. *See* Act of July 2, 1862, ch. 128, 12 Stat. 502 ("support and defend"); Act of Aug. 6, 1861, ch. 64, 12 Stat. 326-27 ("support, protect, and defend"). Likewise, many states—mandated by art. VI to require officials to *support* the Constitution—then or now have specified an oath to "preserve, protect, and defend" the Constitution. *See, e.g.*, Ga. Const. of 1868, art. IV, § 1, cl. 5 ("preserve, protect, and defend"); S.C. Const. of 1895, art. III, § 26 ("preserve, protect, and defend"). This long history of interchangeable usage demonstrates the verb phrases' equivalence.

In 1870, a federal court enforcing Section 3 explained why the precise wording of an oath was irrelevant:

> The oath which shall have been taken need not be in the precise words of the amendment: "To support the Constitution of the United States." That instrument, Art. 6, Sec. 3, provides that all officers, executive and judicial, both of the States and United States, shall be sworn to support the Constitution of the latter. Under this provision there has [sic] been slight differences in the forms of these oaths, but all are conceded to comply with it when substantially, though not literally, they include an obligation to the Federal power.

Memphis Pub. Ledger, Dec. 2, 1870, at 3 col. 4. So too here.

V. THE FACTS ESTABLISH THAT TRUMP ENGAGED IN INSURRECTION.

A. January 6 was an "insurrection" under Section 3.

1. Legal Standard.

Nineteenth-century definitions of "insurrection" varied in exact wording but converge on key elements. *See* Baude & Paulsen, *supra*, at 63-93 (canvassing dictionary definitions, public and political usage, judicial decisions, and other sources); *id.* at 64 (summarizing all these definitions as "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect"); Webster's Dictionary (1830) ("combined resistance to * * * lawful authority * * *, with intent to the denial thereof"); 1 John Bouvier, *Bouvier's Law Dictionary*, 817 (15th ed., 1883) (defining "insurrection" as "rebellion"), 2 Bouvier, *A Law Dictionary*, 510 (defining "rebellion" as "The taking up arms traitorously against the government. *The forcible opposition and resistance to the laws and process lawfully issued.*") (emphasis added); *see also The Prize Cases (The Amy Warwick*), 2 Black (67 U.S.) 635, 666 (1862) ("Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government."); *Allegheny Cty. v. Gibson*, 90 Pa. 397, 417 (1879) ("A rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state; a rebellion; a revolt"); President Lincoln, *Instructions for the Gov't of Armies of the United States in the Field*, Gen. Orders No. 100 (Apr. 24, 1863), art. 149 ("Insurrection is the

rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.").

The term as used in Section 3 is informed by previous insurrections against the United States, such as the Whiskey, Shays', and Fries Insurrections. Cong. Globe, 39th Cong. 1st Sess. 2534 (1866) (Rep. Eckley) (during debates over clause, arguing that "[b]y following the precedents of our past history will we find the path of safety," then discussing approvingly the expulsions and investigations of representatives who supported the "small in comparison" Whiskey Rebellion); *see also The Reconstruction Acts,* 12 US Op. Atty. Gen. at 160 (opining that, in similarly-worded statute, "[t]he language here comprehends not only the late rebellion, but every past rebellion or insurrection which has happened in the United States").[26] These violent uprisings against federal authority (which were *less significant* than January 6) were described as insurrections. *See* Robert Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789–1878* (U.S. Army Ctr. of Mil. Hist. 1996) (recounting antebellum insurrections that involved loosely organized, lightly-armed groups and few deaths). None of these pre-1861

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26. Section 3's phrase "insurrection or rebellion against *the same*" is best read as an "insurrection or rebellion against [the Constitution of the United States]" (i.e., to block exercise of core constitutional functions of the federal government) but can also be read as an insurrection or rebellion against "the United States." The January 6 insurrection satsifies both readings, so the distinction does not matter here.

insurrections approached the scale of the Civil War. *See* Coakley, *supra*, at 6, 35-66, 74 (describing Shays, Whiskey, and Fries insurrections). For example, the Whiskey Insurrection initially boasted thousands, but virtually all fled before federal forces arrived, and it was "almost bloodless." *See id.* at 35-66. It was specifically cited during debate over Section 3 as an example of a previous insurrection. *See* Cong. Globe, 39th Cong. 1st Sess. 2534 (1866) (Rep. Eckley).

To qualify as an insurrection, the uprising must be "so formidable as for the time being to defy the authority of the United States." *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894) (emphasis added). However, no minimum threshold of violence or level of armament is required. *See id.* at 830 ("It is not necessary that there should be bloodshed"); *Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) ("military weapons (as guns and swords * * *) are not necessary to make such insurrection * * * because numbers may supply the want of military weapons, and other instruments may effect the intended mischief."). Even a failed attack with no chance of success can qualify as an insurrection. *See In re Charge to Grand Jury*, 62 F. at 830 ("It is not necessary that its dimensions should be so portentous as to insure probable success.").[27]

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27. Modern jurisprudence agrees. *See Home Ins. Co. of N.Y. v. Davila*, 212 F2d 731, 736 (1st Cir 1954) (an insurrection “is no less an insurrection because the chances of success are forlorn.”).

2. The January 6 insurrection met the legal standard.

The January 6 insurrection satisfies all these criteria. As set forth in more detail in the Statement of Facts ("SOF"), it sought to block Congress from executing the law. Further, it was unquestionably an "insurrection against" the Constitution of the United States, within the meaning of Section 3, in that it sought to prevent Congress from fulfilling its core constitutional duty to certify the results of a presidential election and thereby prevent the peaceful transfer of power.

It succeeded, temporarily. Its success may have been short-lived, but even a failed attack with no chance of success can qualify as an insurrection. *See Charge to Grand Jury*, 62 F. at 830. In fact, the January 6 insurrection claims something that *no past insurrection* achieved: its violent seizure of the Capitol, in fact, obstructed and delayed an essential constitutional procedure. *See* SOF ¶ 199. Even the Confederates never attacked the heart of the nation's capital, prevented a peaceful and orderly presidential transition of power, or took the US Capitol.

It was violent. Five people died and 150 law enforcement officers were injured, some severely. SOF ¶ 242. The violence was so significant that civil authorities were unable to resist the attack; military and other federal agencies had to be called in. SOF ¶ 234.

Congress, then-President Trump's own Department of Justice, federal courts, and even Trump's defense lawyer have all categorized January 6 as an "insurrection." SOF ¶ 243-51.

Most recently, a Colorado court, after a five-day bench trial in which Trump was a party, concluded that the events of January 6, 2021 constituted an insurrection under Section 3 of the Fourteenth Amendment. *See Anderson v Griswold*, Docket No. 2023-CV-32577, 2023 WL 8006216 at *31-33 (Colo.Dist.Ct. November 17, 2023) (Exhibit 6, pp. 66-71).

B. Donald Trump engaged in the January 6 insurrection.

So far, nine federal judges have ascribed responsibility for the January 6 Insurrection to Donald Trump. SOF ¶¶ 255-57. In a published opinion, one federal judge in the District of Columbia stated:

> For months, the President led his supporters to believe the election was stolen. When some of his supporters threatened state election officials, he refused to condemn them. Rallies in Washington, D.C., in November and December 2020 had turned violent, yet he invited his supporters to Washington, D.C., on the day of the Certification. They came by the thousands. And, following a 75-minute speech in which he blamed corrupt and weak politicians for the election loss, he called on them to march on the very place where Certification was taking place.
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> * * *
>
> President Trump's January 6 Rally Speech was akin to telling an excited mob that corn-dealers starve the poor in front of the corn-dealer's home. He invited his supporters to Washington, D.C., after telling them for months that corrupt and spineless politicians were to blame for stealing an election *from them*; retold that narrative when thousands of them assembled on the Ellipse; and directed them to march on the Capitol building—the metaphorical corn-dealer's house—where those very politicians were at work to certify an election that he had lost. The Speech plausibly was, as [John Stuart] Mill put it, a "positive instigation of a mischievous act."[28]

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28. *Thompson*, 590 FSupp3d at 104, 118.

At least eight other federal judges—in published opinions and in sentencing decisions—have explicitly assigned responsibility for the January 6 insurrection to Trump. For example:

1. "Based on the evidence, the Court finds it more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021."[29]
2. "The fact remains that [the defendant] and others were called to Washington, D.C. by an elected official; he was prompted to walk to the Capitol by an elected official. . . [the defendant was] told lies, fed falsehoods, and told that our election was stolen when it clearly was not."[30]
3. "The steady drumbeat that inspired defendant to take up arms has not faded away. . . not to mention, the near-daily fulminations of the former President."[31]
4. "Defendant's promise to take action in the future cannot be dismissed as an unlikely occurrence given that his singular source of information, . . . ("Trump's the only big shot I trust

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29. *Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1193 (C.D. Cal. 2022).

30. Tr. of Sentencing at 55, *United States v. Lolos*, No. 1:21-cr-00243 (D.D.C. Nov. 19, 2021).

31. Mem. Op. at 24, *United States v. Meredith, Jr.*, No. 1:21-cr-00159, ECF No. 41 (D.D.C. May 26, 2021).

right now"), continues to propagate the lie that inspired the attack on a near daily basis."[32]

5. "At the end of the day the fact is that the defendant came to the Capitol because he placed his trust in someone [Donald Trump] who repaid that trust by lying to him."[33]
6. "And as for the incendiary statements at the rally detailed in the sentencing memo, which absolutely, quite clearly and deliberately, stoked the flames of fear and discontent and explicitly encouraged those at the rally to go to the Capitol and fight for one reason and one reason only, to make sure the certification did not happen, those may be a reason for what happened, they may have inspired what happened, but they are not an excuse or justification."[34]
7. "[B]ut we know, looking at it now, that they were supporting the president who would not accept that he was defeated in an election."[35]

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32. *United States v. Dresch*, No. 1:21-cr-00071, 2021 WL 2453166, *8 (D.D.C. May 27, 2021).

33. Tr. of Plea and Sentence at 30, *United States v. Dresch*, No. 1:21-cr-00071 (D.D.C. Aug. 4, 2021).

34. Tr. of Sentencing at 22, *United States v. Peterson*, No. 1:21-cr-00309, ECF No. 32 (D.D.C Dec. 1, 2021).

35. *United States v. Tanios*, No. 1:21-mj-00027, ECF No. 30 at 107 (N.D.W. Va. Mar. 22, 2021).

8. "And you say that you headed to the Capitol Building not with any intent to obstruct and impede congressional proceedings; but because the then-President, Trump, told protesters at the "stop the steal" rally -- and I quote: After this, we're going to walk down; and I will be there with you. We're going to walk down. We're going to walk down. I know that everyone here will soon be marching over to the Capitol Building to peacefully and patriotically make your voices heard. And you say that you wanted to show your support for and join then-President Trump as he said he would be marching to the Capitol; but, of course, didn't."[36]
9. "[A]t the "Stop the Steal" rally, then-President Trump eponymously exhorted his supporters to, in fact, stop the steal by marching to the Capitol. . . [h]aving followed then-President Trump's instructions, which were in line with [the defendant's] stated desires, the Court therefore finds that Defendant intended her presence to be disruptive to Congressional business."[37]

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36. Tr. of Sentencing at 36, *United States v. Gruppo*, No. 1:21-cr-00391 (D.D.C. Oct. 29, 2021).

37. Findings of Fact and Conclusions of Law at 15, *United States v. MacAndrew*, No. 1:21-cr-00730, ECF No. 59 (D.D.C. Jan. 17, 2023). https://storage.courtlistener.com/recap/gov.uscourts.dcd.238421/gov.uscourts.dcd.238421.59.0_2.pdf .

10. Moreover, four sentencing cases of January 6 defendants included statements by a judge that, "The events of January 6th involved the rather unprecedented confluence of events spurred by then President Trump. . ."[38]~~~And most recently, a Colorado district court found, under Section 3, that Trump "engaged" in insurrection. *Anderson*, 2023 WL 8006216, at *31-43.

And most recently, a Colorado district court found, under Section 3, that Trump "engaged" in insurrection. *Anderson,* 2023 WL 8006216, at *31-43.

C. Applying the legal standard.

Under the established *Worthy-Powell* standard, to "engage" in insurrection or rebellion under Section 3 means to provide voluntary assistance, either by service or contribution (except charitable contributions). *See United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (defining "engage" as "a voluntary effort to assist the Insurrection * * * and to bring it to a successful [from insurrectionists' perspective] termination"); *Worthy v. Barrett*, 63 N.C. 199, 203 (1869) (defining "engage" as "[v]oluntarily aiding the rebellion by personal service or by contributions, other than charitable, of anything that was useful or necessary"), *appeal dismissed sub nom. Worthy v*

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38. Tr. of Sentencing at 38, *United States v. Prado*, No. 1:21-cr-00403 (D.D.C. Feb. 7, 2022); Tr. of Sentencing at 28, *United States v. Barnard, et al.*, No. 1:21-cr-00235 (D.D.C. Feb 4, 2022); Tr. of Sentencing at 68, *United States v. Stepakoff*, No. 1:21-cr-00096 (D.D.C. Jan. 20, 2022); Tr. of Sentencing at 28, *United States v. Williams*, No. 1:21-cr-00388 (D.D.C. Feb. 7, 2022).

Comm'rs, 76 US (9 Wall) 611 (1869); *see also The Reconstruction Acts*, 12 US Op. Att'y Gen. at 161-62 (opining that, in similarly-worded statute, "engage" includes "persons who * * * have done *any overt act* for the purpose of promoting the rebellion").

All three modern courts that have construed "engage" under Section 3 applied the same *Worthy-Powell* standard. *See Anderson*, 2023 WL 8006216 at *72-75; *New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, *19-20 (N.M. 1st Jud. Dist., Sept. 6, 2022), *appeal dismissed*, No. S-1-SC-39571 (N.M. Nov. 15, 2022), *cert. filed*, May 18, 2023; *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Ofc. of State Admin. Hrgs. May 6, 2022), slip op. at 13-14[39] *aff'd sub nom. Rowan v. Raffensperger*, No. 2022-CV-364778 (Ga. Fulton Cty. Sup. Ct. July 25, 2022). No court has ever used a different standard under Section 3.

Engagement does not require that an individual personally commit an act of violence. *See Powell*, 27 F. Cas. at 607 (defendant paid to avoid serving in Confederate Army); *Worthy*, 63 N.C. at 203 (defendant simply served as county sheriff); *Rowan*, *supra*, at 13; *White*, 2022 WL 4295619, at *20. Indeed, Jefferson Davis—the president of the Confederacy—never fired a shot.

Engagement can include incitement. "Disloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come under the

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39. https://bit.ly/MTGOSAH

disqualification." *The Reconstruction Acts*, 12 US Op. Att'y Gen. at 205 (opinion of Attorney General Stanbery regarding a similarly-worded statute); *see also Charge to Grand Jury*, 62 F. at 830 ("When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force that the civil authorities are inadequate to put them down, and a considerable military force is needed to accomplish that result, they become insurgents; and *every person who knowingly incites, aids, or abets them, no matter what his motives may be, is likewise an insurgent*.") (emphasis added).[40]

Incitement is not the only category of speech that can satisfy the *Worthy-Powell* standard. Engagement includes both words and actions. Confederate leaders used words to tell subordinates what to do. Although "merely disloyal sentiments or expressions" may not suffice, 12 US Op. Atty. Gen. at 164, "marching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding, would appear to constitute 'engagement' under the *Worthy-Powell* standard." *Rowan*, *supra*, at 14.

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40. The fact that the 1862 Second Confiscation Act criminalized a longer list of verbs is irrelevant. *See* 12 Stat. 589, 590 (1862) (making it a crime to "incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or . . . give aid or comfort thereto"). No historical evidence suggests that Congress's decision to streamline this lengthy statutory verbiage in the later constitutional amendment meant to *exclude* incitement or other forms of engagement. *See M'Culloch v. Maryland*, 17 US 316, 407 (1819) (denying that Constitution must "partake of the prolixity of a legal code").

The First Amendment does not preclude disqualifying someone based on speech. Section 3 is not a mere statute, subject to First Amendment review; it is a coequal provision of the Constitution, and is in fact the later-enacted and more specific provision. *See* Baude & Paulsen, *supra*, at 57-61. By analogy, all Americans have a First Amendment right to refuse to swear an oath to protect the Constitution, but the Constitution itself requires federal and state legislators and officers to take an oath to protect the Constitution before they can serve. *See* U.S. Const. art. VI. First Amendment "compelled speech" analysis, which protects private citizens from compelled oaths, does not apply to legislators who refuse to take an oath, because the more specific provision controls. *See Bond v. Floyd*, 385 US 116, 132 (1966). Likewise, the First Amendment does not protect words that meet Section 3's definition of "engag[ing]" in insurrection.

Finally, engagement does not require previous conviction, or even charging, of any criminal offense. See *Anderson,* 2023 WL 8006216, at *35 n.17:

> "[A]t no point in this proceeding has Trump (or any other party) argued that some type of appropriate criminal conviction is a necessary precondition to disqualification under Section Three. There is nothing in the text of Section Three suggesting that such is required, and the Court has found no case law or historical source suggesting that a conviction is a required element of disqualification.

See, e.g., *Rowan*, *supra*, at 13-14; *White*, 2022 WL 4295619, at *24; *Powell*, 27 F. Cas. at 607 (defendant not charged with any prior crime); *Worthy*, 63 N.C. at 203 (defendant not charged with any crime); *In re Tate*, 63 N.C. 308

(defendant not charged with any crime); Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 Const. Comment. 87, 98-99 (2021) (in special congressional action in 1868 to enforce Section 3 and remove Georgia legislators, none of whom had been charged criminally); Baude & Paulsen, *supra*, at 68, 83-84.[41] Indeed, it appears that the vast majority of ex-Confederates—including Sheriff Worthy, most of the House and Senate candidates-elect that Congress excluded from their seats, and the many tens of thousands who petitioned Congress for amnesty—were never charged with, let alone convicted of, any crimes.

1. Trump's engagement satisfies the *Worthy-Powell* standard.

As set forth in detail in the SOF, Trump summoned a large crowd to Washington, D.C. to "be wild" on January 6, 2021; ensured that his armed and angry supporters were able to bring their weapons; incited them against Vice President Pence, Congress, the certification of electoral votes, and the peaceful transfer of power; instructed them to march on the Capitol for the purpose of preventing, obstructing, disrupting, or delaying the electoral vote count and peaceful transfer of power; encouraged them during their attack; used the attack as an opportunity to further pressure and intimidate the Vice President and Members of Congress; provided material support to the

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41. Rather than require a criminal conviction as a prerequisite to a civil action to disqualify an officeholder, Congress did the reverse and imposed criminal penalties for those who held office in defiance of the Disqualification Clause. *See* Act of May 31, 1870, ch. 114, § 15, 16 Stat. 140, 143.

insurrection by refraining from mobilizing federal law enforcement or National Guard assistance; and otherwise fomented, facilitated, encouraged, and aided the insurrection.

2. Trump engaged through both conduct and speech.

As a matter of law, Trump's words encouraging and supporting the insurrection can and do constitute engaging in insurrection. Further, Trump's engagement consisted of conduct. He directed the fraudulent electors scheme, a key part of January 6 plans. SOF ¶ 60. He helped plan a critical mustering event: the "wild" Ellipse Demonstration. SOF ¶¶ 97, 106. His campaign and joint fundraising committees paid $3.5 million to its organizers. *Id.*; *see The Reconstruction Acts*, 12 US Op. Atty. Gen. 182, 205 (June 12, 1867) ("voluntary contributions to the rebel cause, even such indirect contributions as arise from the voluntary loan of money to rebel authorities, * * * will work disqualification"). He planned a march on the Capitol to force Congress to stop the electoral vote certification. SOF ¶ 107; *see Rowan*, *supra*, at 14 ("marching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding"). He ordered officials to remove magnetometers that were preventing armed people from joining the assembly, precisely so that they could bring weapons to the Capitol. SOF ¶¶ 146-50. He told officials to transport him to the Capitol with the armed crowd; when they refused, he attempted to go anyway. SOF ¶¶ 168-70.

Well before January 6, 2021, Trump had already lost every single lawsuit that could have changed the election outcome. *See* SOF ¶¶ 17, 62-63,

90. After all possible legal contests had failed, Trump was not lawfully contesting an election outcome. Instead, he was attempting to overstay his four-year term, in violation of the Constitution. *See* U.S. Const. art. II, § 1 (the president "shall hold his Office during the Term of four Years"); *id.* amend. XX, § 1 ("The terms of the President and Vice President shall end at noon on the 20th day of January * * *; and the terms of their successors shall then begin.").

3. Trump's incitement is not protected by the First Amendment.

Much of Trump's speech constituted incitement—notwithstanding his wink-and-nod parenthetical about "peacefully" marching on the Capitol. Even if First Amendment doctrine limited Section 3 (it does not), two different courts have already found that Trump's speech met the incitement test. In addition to *Anderson v. Colorado*, 2023 WL 8006216 at *37-43 (Exhibit 6, pp. 80-95), the D.C. District Court concluded:

> Having considered the President's January 6 Rally Speech in its entirety and in context, the court concludes that the President's statements that, "[W]e fight. We fight like hell and if you don't fight like hell, you're not going to have a country anymore," and "[W]e're going to try to and give [weak Republicans] the kind of pride and boldness that they need to take back our country," immediately before exhorting rally-goers to "walk down Pennsylvania Avenue," are plausibly words of incitement not protected by the First Amendment. It is plausible that those words were implicitly "directed to inciting or producing imminent lawless action and [were] likely to produce such action."

Thompson v. Trump, 590 FSupp3d 46, 115 (D.D.C. 2022), appeal pending, No. 22-7031 (DC Cir); *see also Anderson*, 2023 WL 8006216, at *43. That

context included an inflammatory video, SOF ¶ 144, and calls by previous speakers for "trial by combat" and to "start taking down names and kicking ass" and sacrifice their "blood" and "lives" and "do what it takes to fight for America" by "carry[ing] the message to Capitol Hill," since 'the fight begins today," SOF ¶ 139. Ultimately, the court concluded, Trump's speech included "an implicit call for imminent violence or lawlessness":

> He called for thousands "to fight like hell" immediately before directing an unpermitted march to the Capitol, where the targets of their ire were at work, knowing that militia groups and others among the crowd were prone to violence. Brandenburg's imminence requirement is stringent, and so finding the President's words here inciting will not lower the already high bar protecting political speech.

Thompson, *supra*, 590 FSupp3d at 117. The court found that Trump's "passing reference to 'peaceful[] and patriotic[]' protest cannot inoculate him against the conclusion that his exhortation, made nearly an hour later, to 'fight like hell' immediately before sending rally-goers to the Capitol, within the context of the larger Speech and circumstances, was not protected expression." *Id.*

It is possible—and for leaders, even likely—to engage in insurrection via speech through order-giving or incitement. "[M]arching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding, would appear to constitute 'engagement' under the *Worthy-Powell* standard." *Rowan I*, p. 14. With regard to incitement, "[d]isloyal sentiments * * * would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come

under the disqualification." 12 US Att'y Gen Op, pp 182, 205; *see also Charge to Grand Jury*, 62 F at 830 ("When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force that the civil authorities are inadequate to put them down, and a considerable military force is needed to accomplish that result, they become insurgents; and every person who knowingly incites,aids, or abets them, no matter what his motives may be, is likewise an insurgent.").

The First Amendment does not preclude disqualification based on speech. First, Section 3 is not a statute subject to First Amendment review. It is a coequal provision of the Constitution—in fact, a later-enacted and more specific provision. *See The Sweep and Force of Section Three*, 172 U Pa L Rev at 57–61. By analogy, although all Americans have a First Amendment right to refuse to swear an oath to protect the Constitution, Article VI of the Constitution requires legislators to take an oath to protect the Constitution. *See* US Const, art VI. They cannot use the First Amendment as a shield to avoid taking this oath; Article VI controls. *See Bond v Floyd*, 385 US 116, 132, 87 SCt 339, 17 LEd2d 235 (1966). Likewise, the First Amendment does not protect Trump from disqualification. Section 3 controls.

Second, even if Section 3 were subject to First Amendment protections, those protections would not extend to speech that qualifies as engagement in insurrection. Section 3 proscribes disqualification from office and does not criminalize speech. If Congress may statutorily prohibit federal employees from taking active part in political campaigns, *see US Civil Serv Comm'n v*

Nat'l Ass'n of Letter Carriers, 413 US 548, 550, 556, 93 SCt 2880, 37 LEd2d 796 (1973), then *the Constitution itself* can disqualify from office individuals who engage in rebellion against the United States or its Constitution. And not all speech is protected by the First Amendment. *Virginia v Black*, 538 US 343, 358–359, 123 SCt 1536, 155 LEd2d 535 (2003). Language that incites and is likely to incite imminent lawless action or furthers a crime is unprotected, *Brandenburg v Ohio*, 395 US 444, 447, 89 SCt 1827, 23 LEd2d 430 (1969), as are criminal plans or conspiracy, *see Giboney v Empire Storage & Ice Co*, 336 US 490, 502, 69 SCt 684, 93 LEd834 (1949). The First Amendment is no bar to Section 3 disqualification, and speech that qualifies as engagement in insurrection is not protected by the First Amendment.

4. Trump's misconduct continued while the insurrection proceeded.

As the insurrection proceeded, Trump actively exacerbated it. At the height of violence, Trump tweeted an attack on Pence, expecting this tweet would exacerbate the violence at the Capitol, which it did. SOF ¶¶ 205-09, 216. This constituted further engagement and/or "aid and comfort."[42]

Trump also refused to mobilize federal authorities or, for hours, give his followers a clear instruction to disperse. Trump had a particular duty to "take

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42. The concept of "domestic" enemies became part of American constitutional thinking by 1862, when Congress enacted the Ironclad Oath to "support and defend the Constitution of the United States, against all enemies, foreign and domestic." 12 Stat. 502 (1862).

Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. But he deliberately stood by while *his armed supporters* stormed the Capitol, when he was the only person who could give lawful[43] orders to mobilize federal authorities to repel the insurrection.

Trump's 3:13 PM tweet "asking for everyone at the US Capitol to remain peaceful" was ineffectual and he knew it. Insurrectionists had taken the House and Senate chambers; the Vice President and Senate had been in hiding for an hour. SOF ¶ 190-200. Asking a conquering force to "remain peaceful" *after it achieved its objective and was not acting peacefully* is hollow.

But Trump *did* know how to call off the insurrection. His belated 4:17 PM speech included the crucial instruction to "go home." SOF ¶ 228. The insurrectionists immediately understood this; most complied. SOF ¶ 231-33. He could have said that 187 minutes earlier.

Trump summoned his supporters to Washington, D.C. to "be wild"; ensured that his armed and angry supporters could bring their weapons; incited them against Pence, Congress, the certification of electoral votes, and the peaceful transfer of power; ordered them to march on the Capitol; actively aided and encouraged the insurrection to continue; and deliberately refused to take steps to suppress or mitigate it. He knew of, consciously disregarded the risk of, or specifically intended all of this. SOF ¶ 298-99. He engaged in

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43. Pence—who was not in the chain of command—mobilized the National Guard. SOF ¶¶ 223, 235.

insurrection.

The Colorado trial court – the only court in the country to specifically address this issue -- found that Trump "engaged" in the insurrection.

> Consequently, the Court finds that Petitioners have established that Trump engaged in an insurrection on January 6, 2021 through incitement, and that the First Amendment does not protect Trump's speech.

Anderson, 2023 WL 8006216, at *43. This finding of fact is supported by extensive discission at ¶¶ 245-98 of that decision.

Numerous other federal courts have explicitly recognized Trump's key role in facilitating or causing the insurrection.

VI. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR ADJUDICATING PRESIDENTIAL CANDIDATES' QUALIFICATIONS.

The political question doctrine is a "narrow exception." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 US 189, 194-95 (2012). It is a doctrine of "'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker v. Carr*, 369 US 186, 217 (1962). Rather, a court "has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 US at 194 (quoting *Cohens v. Virginia*, 19 US (6 Wheat) 264, 404 (1821)). And the doctrine does not apply simply because a presidential election is involved. *McPherson v. Blacker*, 146 US 1, 23 (1892) ("It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions

connected with the election of a presidential elector are political in their nature * * *. But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising * * *.").

Baker identified six relevant factors, but recent Supreme Court precedent focuses on two: (1) whether the issue is textually committed to another branch of government, or (2) lacks judicially manageable standards for resolution. *See Rucho v. Common Cause*, 588 US ___, 139 SCt 2484, 2494 (2019) (citing only second factor); *Zivotofsky*, 566 US at 195 (citing only first two factors).

A. Appointment of presidential electors is committed to states, not Congress.

The Electors Clause textually commits to the *states* plenary power to appoint presidential electors in the manner they choose. *See* U.S. Const., art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors * * *."). This power is plenary. *Moore v. Harper*, 600 US 1, 37 (2023) ("[I]n choosing Presidential electors, the Clause 'leaves it to the legislature exclusively to define the method of effecting the object.'") (citation omitted); *Chiafalo v. Washington*, 591 US ___, 140 SCt 2316, 2324 (2020) (Electors Clause gives states "far-reaching authority over presidential electors"); *Bush v. Gore*, 531 US 98, 104 (2000) ("the state legislature's power to select the manner for appointing electors is plenary"); *McPherson v. Blacker*, 146 US 1, 35 (1892) (Electors Clause "has

conceded plenary power to the state legislatures in the matter of the appointment of electors").

This plenary power includes conditioning appointment of electors on their candidate's meeting constitutional criteria. *Lindsay v. Bowen*, 750 F3d 1061, 1063 (9th Cir 2014) (state's interest in "protecting the integrity of the election process" allows it to enforce "the lines that the Constitution already draws") (citations and quotation marks omitted); *Hassan v. Colorado*, 495 F App'x 947, 948 (10th Cir 2012) (Gorsuch, J.) ("a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office"); Derek Muller, *Scrutinizing Federal Election Qualifications*, 90 Ind. L.J. 559, 604 (2015) ("[B]ecause the legislature[] may choose the manner by which it selects its electors, it follows that it may restrict the discretion of the election process through an ex ante examination of candidates' qualifications.").

But the Constitution does not expressly commit that power to Congress. To the contrary, while Article I explicitly authorizes and directs Congress to judge qualifications of incoming *Senators and Representatives*, U.S. Const., art. I, § 5, cl. 1 ("Each House shall be the Judge of the * * * Qualifications of its own Members * * *."), neither Article II nor any other constitutional provision explicitly authorizes—let alone directs—Congress to judge presidential candidates' qualifications. The Twelfth Amendment authorizes Congress to *count electoral votes*; it does not explicitly authorize Congress to

judge presidential qualifications. See U.S. Const., amend. XII. Similarly, the Twentieth Amendment provides a contingency procedure "if the President elect shall have failed to qualify," but does not textually commit the question of candidate eligibility to Congress. *Id.*, amend. XX.[44]

Even if Congress holds some unwritten residual authority to judge presidential candidates' qualifications, that implicit authority is certainly not *exclusive*. *See* Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. at 605 ("Unlike the robust history of the power of the legislature to adjudicate the qualifications of its own members and the textual language ensuring that each house of Congress is the 'sole' judge of the qualifications of its members, the power of Congress to examine the qualifications of executive candidates is, at the very best, debatable, and certainly not exclusive.").

B. Leading precedent confirms that states may adjudicate presidential candidates' constitutional eligibility.

In 2012, then-Judge (now Justice) Gorsuch, writing for the Tenth Circuit, upheld the Colorado Secretary of State's exclusion of a constitutionally ineligible candidate. The Tenth Circuit "expressly reaffirm[ed] [that] a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F. App'x at

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44. The same logic applies to Congress's power to set the time for choosing electors. *See* US Const. art. II, § 1, cl. 4.

948. Justice Gorsuch's conclusion cannot be reconciled with Trump's theory that *only Congress* may decide whether a presidential candidate is constitutionally eligible.

In 2014, the Ninth Circuit explicitly rejected the idea that the Constitution commits presidential candidates' qualification determinations exclusively to Congress:

> *[N]othing in the Twentieth Amendment states or implies that Congress has the exclusive authority to pass on the eligibility of candidates for president.* The amendment merely grants Congress the authority to determine how to proceed *if* neither the president elect nor the vice president elect is qualified to hold office, a problem for which there was previously no express solution * * *. Candidates may, of course, become ineligible to serve after they are elected (but before they start. their service) due to illness or other misfortune. Or, a previously unknown ineligibility may be discerned after the election. The Twentieth Amendment addresses such contingencies. *Nothing in its text or history suggests that it precludes state authorities from excluding a candidate with a known ineligibility from the presidential ballot.*

Lindsay, *supra*, 750 F3d at 1065 (emphasis added, except "*if*" in original). Likewise, in 2016, the Pennsylvania Commonwealth Court expressly rejected the political question doctrine's applicability. It concluded, after closely reading Article II and the Twelfth Amendment, that "determination of the eligibility of a person to serve as President has not been textually committed to Congress." *Elliott v. Cruz*, 137 A.3d 646, 650–651 (Pa. Commw. 2016), *aff'd*, 134 A.3d 51 (2016).

For these reasons, a leading scholar of the history of challenges to presidential candidates' constitutional qualifications has concluded that "[u]nless the state's process independently breaches some other constitutional

guarantee—such as an election law that severely restricts a voter's rights but is not narrowly drawn to advance a compelling state interest—then the state's examination of a presidential candidate's qualifications is permissible." Muller, *Scrutinizing Federal Election Qualifications*, 90 Ind. L.J. at 604.

C. Section 3 involves judicially manageable standards.

Interpreting constitutional text and applying that text to (sometimes disputed) facts is precisely what courts do. The meanings of "engage" or "insurrection" are judicially discoverable, just as the meanings of "due process of law" and "equal protection of the laws" are judicially discoverable. In fact, the Fourteenth Amendment's key framer explained during congressional debates *precisely how* to construe these terms. Asked to define "due process of law," Representative John Bingham replied: "[T]he courts have settled that long ago, and the gentleman can go and read their decisions." Cong. Globe, 39th Cong., 1st Sess. 1089 (1866).

The same logic applies to Section 3's language. As discussed *supra*, "insurrection" was interpreted and defined repeatedly by courts, law dictionaries, and other authoritative legal sources before, during, and after Reconstruction, and the judicial interpretation of "engage" under Section 3 has been settled for 150 years. Section 3 is not judicially unmanageable—it has been, and continues to be, judicially managed.

D. Prudential factors do not divest the court's jurisdiction.

None of *Baker*'s final three factors apply here.

1. There is no "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker*, 369 US at 217. The branch of government due respect here is the Oregon Legislature, which has plenary power to appoint presidential electors, and has chosen to empower the Oregon courts to hear challenges to candidate eligibility. The presidential selection process proceeds in steps; at different stages, different branches of government lead. In the first (current) stage, states have plenary authority to appoint electors "in such Manner as the Legislature thereof may direct." U.S. Const., art. II, § 1, cl. 2. Oregon's Legislature has chosen to appoint electors via a process that includes ballot access challenges and mandamus procedures. After the electors have cast their votes, Congress will then take the lead in *counting* votes. *See* U.S. Const., amend. XII. Oregon's use of a judicial process to help ensure that it appoints electors only for constitutionally eligible candidates does not disrespect Congress.

Nor does the fanciful possibility that two-thirds of both houses *might theoretically* grant Trump amnesty prevent Oregon from exercising its plenary power to appoint electors in the manner directed by its legislature. First, that possibility is purely speculative—Trump has not even *requested* congressional amnesty. Speculative or imaginary possibilities do not divest states' Article II power, and this Court does not decide cases based on scenarios that are "hypothetical or speculative." *Foote v. State*, 364 Or 558, 563, 437 P3d 221 (2019). Second, this Court's exercise of its legislatively-conferred authority

to issue mandamus requiring the Secretary to limit the ballot to constitutionally qualified candidates would not preclude Congress from later removing Trump's Section 3 disability. Congress could remove the disability tomorrow, or after this or another court rules Trump ineligible to appear on the ballot, thereby enabling him to appear on the ballot despite his engagement in insurrection.

2. There is no "unusual need for unquestioning adherence to a political decision already made," *Baker*, 369 US at 217, nor could there be at this stage. *After* electors have been appointed, that need might arise. But appointment of electors is almost a year away. No political decision has been made, nor will be made any time soon.

3. There is no "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* If Oregon or another state rules that Trump is disqualified under Section 3, he may appeal that decision to the US Supreme Court, which can render a final decision. And "various departments" does not mean "various state courts." State courts *regularly* rule on questions that could also be decided by courts in other states; no one claims, e.g., that Oregon courts cannot decide a First or Second Amendment question merely because California or Texas courts might rule differently. Rather, state courts interpret and apply the Constitution to their best ability, subject to US Supreme Court review. And that Court can render rapid decisions on contested constitutional election issues. *See, e.g., Bush v.*

Gore, 531 US 98 (2000) (argued December 11, 2000, and decided the next day).

VII. CONCLUSION.

Trump is disqualified from the Oregon presidential primary and general election ballots under Section 3. For the reasons explained above and in the accompanying Petition for Peremptory or Alternative Writ of Mandamus and the accompanying Statement of Facts, this Court should (1) exercise its original mandamus jurisdiction under Article VII, section 2, of the Oregon Constitution and ORS 34.120, and (2) issue a peremptory writ of mandamus requiring the Secretary of State to disqualify Donald J. Trump from both the Oregon 2024 presidential primary election ballot and the Oregon 2024 general election ballot. Alternatively, if this Court does not immediately issue a peremptory writ, this Court should issue an alternative writ of mandamus directing the Secretary of State to show cause why she should not be required

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to disqualify Donald J. Trump from appearing on those ballots.

Dated: December 6, 2023

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 6, 2023, I filed by Efile to the Appellate Court Administrator the foregoing:

MANDAMUS PROCEEDING: MEMORANDUM IN SUPPORT OF: PETITION FOR PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS

I certify that on December 6, 2023, I served that document on the parties listed below by conventional email and US First Class Mail.

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