No. 23-719

In The
Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF *AMICUS CURIAE* DAVID E. WEISBERG IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

David E. Weisberg, *amicus curiae*, is a citizen of and attorney in the United States, and his interest is in seeing this important case correctly decided.[1] Since the beginning of the public controversy over whether Section 3 prohibits Petitioner from again serving as president, *amicus* has publicly stated his opinion, based on the argument advanced in this brief, that there is no such prohibition. *See,* Weisberg, David, "Baude and Paulsen Are Mistaken: Section 3 Has Never Barred Anyone from Serving as President" (August 23, 2023), available at SSRN; Weisberg, David E., "Robert E. Lee Could Have Been President," The Wall Street Journal, (September 8, 2023). *Amicus* contends that the decision of the Supreme Court of Colorado, *Anderson v. Griswold*, 2023 WL 877011[2], is incorrect.

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[1] *Amicus* affirms that no counsel for a party authored this brief, in whole or in part, and that no person or entity, other than *amicus*, made any monetary contribution toward the preparation or submission of this brief.

[2] Hereinafter referred to as *Anderson*.

SUMMARY OF ARGUMENT

There are only five federal offices that are elective in nature: president, vice president, senator, representative, and elector of president and vice president. Section 3 of the Fourteenth Amendment provides that "[n]o person" who is disqualified as a disloyal person "shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States[.]" President and vice president are not included in the list of federal offices specifically barred to disqualified persons, nor are those two offices explicitly referred to anywhere in Section 3.

Amicus submits that the omission of "President or Vice-President" from the list of specifically barred federal offices was a deliberate, well-founded choice, and that those two offices are not encompassed in the phrase "any officer, civil or military, under the United States[.]" The reason for the deliberate omission of those two offices follows.

No one disputes that Section 3 was adopted in the aftermath of the Civil War because there was a fear that former federal and state officeholders, who had violated their previous oaths by supporting the Confederacy, might yet again return to powerful political positions as the formerly Confederate States regained their proper places in the Union. Because that was the reason for adopting Section 3, there was

a deliberate, well-founded decision to include senator, representative and elector in the class of federal offices barred to disqualified persons, and to exclude the presidency and vice presidency from that class.

The crucial point is that the three specifically barred federal offices—senator, representative, and federal elector—all entail elections held in *a single State*. There was understandable concern in 1868 that unreconstructed rebel voters in formerly Confederate States might elect disloyal persons to be senator, representative, or elector in the federal government, or to important offices in state government—all offices involving elections confined to a single State.

But, at the *national* level, the population of States that had remained in the Union, taken together with the population of emancipated persons, vastly outnumbered the population of formerly Confederate States. It was simply mathematically impossible that, in a national election, unreconstructed rebel voters would be able to pick a president.[3]

No reasonable legislator with sound democratic instincts would wish to limit the voters' free choice in a nation-wide presidential election, if there were no

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[3] In addition, as is discussed below, Section 3 explicitly disqualifies disloyal persons from serving as federal electors of president and vice president.

good reason to do so. Although there was a credible reason to restrict the electorate's choice in elections held in individual States, there would have been no such reason to restrict the national electorate's free choice of president and vice president. That is why the offices of president and vice president are not among the federal offices barred by Section 3, and why Section 3 has never barred anyone from serving as president.

ARGUMENT

The presidency and vice presidency were deliberately omitted from the list of barred offices because in 1868 there was no danger that voters or federal electors with unreconstructed rebel sentiments could pick winners in a nation-wide election, while there clearly was such a danger in elections confined to States that had previously seceded.

In its discussion of whether the presidency is a barred office under Section 3, the majority in *Anderson* commits two grave errors. First, it makes the textual mistake of failing to properly appreciate the significance of the absence of the presidency and the vice presidency from the list of federal offices explicitly barred to disqualified persons. *Amicus* will

leave to others the task of exposing the textual errors in the majority opinion.

The second error in the *Anderson* majority opinion is its failure to consider or even notice the compelling reason why legislators in 1868 made what *amicus* contends was a deliberate decision to exclude the presidency and vice presidency from the class of federal offices barred to disqualified persons. That deliberate decision left voters—in 1868 and today—with a free choice for president, which, after all, is what one would expect in a truly democratic republic.

The presidency and vice presidency were deliberately omitted from the list of barred offices because in 1868 there was no danger that either voters or electors with unreconstructed Confederate sentiments could pick winners in a national election, while there was clearly such a danger in elections confined to States that had joined the Confederacy.

One does not need to be a professional, life-long Civil War historian to recognize an indisputable fact: Section 3 was adopted because, in 1868, there was concern and even fear that, as formerly Confederate States reestablished proper relations within the Union, unreconstructed rebels who had violated their oaths to the United States might again occupy powerful political offices in the federal government and in state governments. That concern is manifest

in every jot and tittle of Section 3, and it clearly was the reason for its adoption.

> **A**. In the national electorate, voters with Unionist sentiments far outnumbered those with Confederate sentiments, so it was impossible for the latter to pick winners in an election for president and vice president.

In 1868 and today, elections for president and vice president were and are national in scope. Federal electors are of course elected in individual States, but the president and vice president are elected only after the votes of electors from every State are all tallied together. In contrast, the three federal offices specifically barred in Section 3—senator, representative, and presidential elector—all entail elections limited to individual States; they do not involve national elections. That is the case, *amicus* submits, simply because in 1868 there was a reasonable, understandable concern among those drafting and voting for the adoption of Section 3 that unreconstructed rebel voters might constitute majorities in individual States that had formerly been in the Confederacy. In a national election, however, it was a mathematical certainty that the national electorate would not be so constituted. The national electorate could never have a majority of unreconstructed rebel voters.

In the 1860 census, the aggregated populations of the 22 States that would remain in the Union

approximated 23 million people, while the future 11 Confederate States had populations of 9 million people, which included 3.5 million enslaved persons.[4] If one assumes that emancipated, formerly enslaved persons would have Union sentiments, that means that in the late 1860's the national citizenry, and presumably the qualified voters in that citizenry, would favor Union sentiments over Confederate sentiments by a ratio of almost 5 to 1 (26.5 divided by 5.5 equals 4.818). These aggregated numbers do include both children and women, and women were unable to vote in 1868, as of course were children. But there is no reason to believe that the sentiments of qualified voters would have varied significantly from the sentiments of the population as a whole.

There was therefore an enormous population imbalance that favored States with presumably pro-Union voters over State that might have unreconstructed rebel voters. So, if Robert E. Lee had run for president in 1868, he could not have been elected only by the voters in States that had previously joined the Confederacy. Even with distortions from the electoral college, someone like Lee could win only if he received a large majority of

[4] NCpedia.org https://www.ncpedia.org/anchor/north-and-south-1861. *See also*, United States Census Bureau https://www.census.gov/library/publications/1864/dec/1860a.html

his votes from voters in States outside the defunct Confederacy. But in those States that had remained in the Union, the electorate would have been overwhelming Unionist, not Confederate, in sentiment. And every voter, North and South, would have been fully aware of General Lee's role in the Civil War.

Unlike the case of elections in individual States, there would have been no reason in 1868 to deny voters an entirely free choice for president and vice president, because Union-favoring voters would vastly outnumber Confederate-favoring voters. There was no credible risk that, in a national election, unreconstructed rebel voters could pick the winners. In an election in any one State, and especially in a State that had purported to secede, there was a great risk that rebel voters might pick the winners. And that is why, on its very face, Section 3 prohibited disqualified persons from serving in the specific federal offices of senator, representative, or elector—all of which involve elections in a single State—but never barred anyone from serving as president or vice president.

B. As an additional safeguard, Section 3 explicitly barred any disqualified person from serving specifically as "elector of President and Vice-President".

The very substantial population imbalance in favor of States that had remained in the Union, taken together with the population of emancipated persons,

was not the only safeguard against unreconstructed rebels picking presidents. Section 3 specifically and explicitly barred the federal office of "elector of President and Vice-President" to disqualified persons. This bar provided still more assurance—belt *and* suspenders, as it were—that formerly disloyal persons would not have a decisive voice in choosing a future president or vice president. Even if a majority of voters in individual States that had been in the Confederacy continued to be unreconstructed rebels, the persons who could properly serve as federal electors for those States would either not have been disloyal, or would have had their disability removed by a two-thirds vote of each House of Congress. Thus, the overwhelmingly pro-Union sentiments of the national electorate, when joined with the bar against disloyal persons serving in the electoral college, made it inconceivable that unreconstructed rebel voters could pick a president.

CONCLUSION

If it had been understood by those who drafted and adopted Section 3 that the presidency and vice presidency would be barred offices, every reasonable and thoughtful person, without exception, would expect Section 3 to begin with these words:

> No person shall be *President or Vice-President*, *or* a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, … etc.

In *Anderson*, the majority of the Supreme Court of Colorado decided that, notwithstanding the omission of those crucial five words and one comma, the two most important offices in the federal government are implicitly relegated to the vague, unspecific reference, "any office, civil or military, under the United States[.]"[5]

Having made that decision, the majority in *Anderson* deprived themselves of even the possibility of considering whether the omission of those five words might have been a deliberate, well-founded decision. They effectively blinded themselves to the obvious reason why those words were deliberately omitted: because in 1868 it would have been impossible for unreconstructed rebel voters to pick the winner in a nation-wide election for president. The majority erroneously decided that Section 3 bars Petitioner from being president. In truth, that provision has never barred anyone from serving in that office.

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[5] Thus, we are asked to believe that not one, but two bulky elephants have been hidden in what must be an extremely cramped mousehole. *See*, *Whitman* v. *American Trucking Associations*, 531 US 457, 468 (2001).

Respectfully submitted,

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