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 JACK COBEN IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

My father, JACK COBEN is a United States citizen residing in the Commonwealth of Pennsylvania. Mr. Coben was born on January 11, 1924. He has lived, worked and voted as a responsible citizen his entire life. He served his country in the United States Navy, he was honorably discharged and then for a number of years, he worked for the Navy as a civilian employee. He and his wife, Anna, raised four boys who have lived productive lives, and they too have appreciated and enjoyed the privileges available to every American citizen. Mr. Coben has been a student of politics his entire life, enjoying the good debate afforded each of us to identify and vote for people running for office that match our respective core values and at times to oppose others who do not. Mr. Coben continues to marvel at the democratic process and privileges Americans enjoy in deciding who is elected to hold political offices. Our political system depends upon the election of citizens who hold common, core beliefs in democracy. As Amicus, Mr. Coben asks this Honorable Court to consider his perspective on how this democratic-republican constitutional system should answer the important question: "when is a citizen disqualified from holding the office of the President of the United States"? The answer is important to Mr.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from the Amicus Curiae and his counsel, made any monetary contribution toward the preparation or submission of this brief.

Coben, his children, grand-children and great-grand-children, as well as every other American alive today or who will be born tomorrow.

SUMMARY OF THE ARGUMENT

In 2019, Congressman John Lewis spoke from the floor of the House of Representatives:

> When you see something that is not right, not just, not fair, you have a moral obligation to say something. To do something. Our children and their children will ask us, 'What did you do? What did you say?' . . . [W]e have a mission and a mandate to be on the right side of history.

This Amicus Curiae brief was prepared, and it is submitted to hopefully assist this Honorable Court by providing legal commentary on an issue of paramount importance to the great democracy our citizens depend upon and sometimes take for granted. History and the current political affairs of the United States oblige your Amicus to say something. Your Amicus files this Brief as a citizen of the United States who has an unassailable love for his country and its legal system of justice.

The questions presented by this appeal are as convoluted as the history of these United States. While it is popular these days to argue the resolution of current legal issues by claiming an understanding of the "original" intent of the enumerated Constitutional rights and privileges identified in the 18th and 19th centuries, the truth is that sometimes the literal

meaning of the words, phrases and subjects recounted in this great document are impossible to know. And we respectfully proffer that no one should think that she or he has a lock on the meaning of any of these enumerated rights and privileges. Yet, what we hope is obvious is that every American should acknowledge the innate value of our legal construct and the importance of the basic principles of democracy and the constitutional creation of a Republic for which we must all stand. Our principles of democracy depend upon our court system acknowledging, approving and enforcing them. It is this perspective that allows your Amicus to detail the resolution we urge the Court to adopt in deciding the current controversy.

The publicly available evidence and the evidence presented to the Court below convincingly established that former President Donald Trump initiated and conspired with others to prevent Congress from certifying the results of the general election of Joseph Biden as the 46th President of the United States. The evidence proved that Trump did so by his conduct and his words, urging people to march on the Capitol and stop the certification. Trump further ignored the actions of these insurrectionists after they stormed the Capitol and took over the House of Representatives. *See*, https://www.americanoversight.org/timeline-jan6. Clearly, this conduct constituted the initiation or conspiratorial support of insurrection or rebellion, which is defined as "an act of violent or open resistance to an established government". *See* MERRIAM-WEBSTER DICTIONARY. Faced with this evidence, the Court below found that Mr. Trump was disqualified to run for the office of President in the State of Colorado. While your Amicus agrees with the factual findings obtained

below, as well as the self-effectuating purpose of Article 14, Section 3, and its application when a former officer of the United States participates in insurrection or rebellion—as happened here—the decision that this person cannot *run for office* is not supported by the text of Section 3, thereby requiring reversal of the decision below on this limited basis.

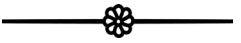
Section 3 states:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or *hold any office*, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability. [Emphasis added]

The core purpose of Article 14, Section 3 was to disqualify a person from holding an office of the United States or a State when (1) the person previously took an oath to support the Constitution; (2) the prior oath was as an officer of the United States, a member of Congress or State government; and, (3) the person engaged in insurrection or rebellion (or aided an enemy of the U.S.).

Article 14, Section 3 disqualifies a person from *holding office*. That is plain and simple. Because its

scope is obvious, any effort to regulate conduct beyond that premise cannot be governed by this constitutional provision. And therefore, the conclusion below was in error. The decision below that Section 3 must apply to a person *running for office* because otherwise it would permit any person unqualified by other Constitutional constraints (e.g., age requirement) to run for office cannot overcome the text of Section 3. Any ancillary concerns raised below can and should be addressed by State-imposed supplemental requirements to run for an office.



ARGUMENT

To many Americans in 2020, the electorate chose between an enlightened statesman and one whose interests clashed with the common good. After the election, many who supported the failed election of former President Trump gathered in Washington on January 6, 2020; evidence revealed that these insurrectionists had fallen into mutual animosity for those in Congress and "their unfriendly passions" led to violent conflicts and an attack on our Republic.

While the Congress completed its task, certifying the election of the 46th President of the United States, rancor has continued in many forms for the past three years. Many continue to claim that Mr. Trump won the election. Others claim that our Republic has been captured by enemies of Democracy. Yet, over time, these claims have found no evidentiary support. Instead, we now look forward to the election of President in 2024. And, in that regard, this Court has now been

called upon to answer a perplexing legal issue that has never before been raised. The Court must decide whether the language and scope of Art. 14, Section 3 was written and intended to disqualify Mr. Trump under the facts presented to the Court below. Can the former President of the United States, who has evidenced and supported those who pursued insurrection and the disruption of our Republican government be disqualified from running for President? Our Constitutional history provides the answer to the question.

It is important to acknowledge what is and what is not meant in this context by constitutional "intentionalism". It has never been that judges should only apply a constitutional provision to circumstances understood by the authors of our Constitution—because we cannot possibly speculate how those authors would decide cases arising centuries later. Instead, the intent of the text of any constitutional provision is garnered by identifying the "core value" or premise the authors intended to protect or address. *See*, Bork, R., *The Constitution, Original Intent, and Economic Rights,* 23 San Diego L. Rev. 823-826 (1986).

A. Self-Executing Force of Section 3

Unlike most Articles and sections of the Constitution, Section 3 of Article 14 does not establish or confirm any rights or privileges, but rather it eliminates a right bestowed upon every American. *See*, *Amnesty and Section Three of The Fourteenth Amendment*, *supra*. 36 Const. Comment. at 99 and 104. Disqualification under Section 3 is self-executing upon proof of insurrection or rebellion by a person who previously took an oath to uphold and defend the Constitution. *Id*. Some will argue (as did the dissent below) that Section 3 is not self-executing, and it

requires "intermediate proceedings" before depriving a person of the constitutional privilege to hold office. *Anderson*, *supra*. 2023 CO at 57-59 (Dissent). While one can resort to—as did the Dissenting Opinion below—a few oblique decisions of Chief Justice Chase in the late 1890s as proof of the court's view that Section 3 is not self-effectuating, to do so is to ignore the precise impetus for this provision.[2] Recall that Section 3 was written when the former Vice President of the Confederacy and other confederate officers appeared at the 39th Congress and expected to be sworn in after having been elected to the U.S. Senate and House of Representatives. Their presence prompted creation of Section 3 and without any "intermediate proceeding", its passage excluded these former enemies of the U.S. from holding the seat to which they were elected. The proof of the intent of Section 3 is thus self-evident. While it is certainly paradoxical to allow for the deprivation of a constitutional privilege (e.g., to hold office) without due process, the Constitutional promulgation of a remedy for insurrection or rebellion was unquestionably established and should be literally applied.[3]

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[2] One author has studied the contradictory views espoused by Justice Chase in two reported cases and concluded that the inconsistency in finding Section 3 self-executing in one case and not in another is not determinative of the true intent of this Amendment. *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment 87, 105-108 (2021).

[3] While courts must analyze legislation and governmental action through a constitutional lens, one cannot apply a similar lens to the Constitution itself. "The words of the constitution are to be taken in their natural and obvious sense . . . " *Martin v. Hunter's Lessee*, 14 U.S. 304, 325 (1816). Where the intention of these words is clear, there is no room for construction and no excuse

Because this provision removes a natural born right, it must be viewed cautiously and with deference to its literal intent. The Constitution, including its Amendments, was written and must be interpreted based upon the normal and ordinary meaning of its words and phrases. *District of Columbia v. Heller*, 554 U.S. 570, 576-577 (2008).

B. History of Section 3

Between October 1787 and May 1788, James Madison, Alexander Hamilton, and John Jay wrote 85 essays which were published to assist New Yorkers in deciding to ratify the United States Constitution. These essays, known collectively as The Federalist Papers, have been used by historians and legal scholars to help understand the scope of our Constitutional Republic and the rights and privileges of all Americans. Mr. Madison wrote the FEDERALIST NO. 10, which included grave concerns regarding our political system. He observed that

> . . . [t]he latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. . . . A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; So strong is this propensity of mankind to fall into mutual

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for interpolation or addition. *United States v. Sprague*, 282 U.S. 716, 731 (1931). While this Court has the authority to carry into effect the powers expressly given by the constitution, it cannot extend to exercise power inconsistent with the words, "genius, spirit and tenor of the constitution." *Martin*, 14 U.S. at 316.

> animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.
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> * * *
>
> It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.

When the Constitution was signed and ratified it expressly acknowledged a host of inalienable rights and privileges reserved to each American, and in many ways, it detailed how this Republic would function by dividing authority between the federal government and State governments. It spelled out what qualifications a person must have to hold political office and obtain judicial appointments and it explained the power of one branch of government to question and remove members of another branch of government—via an impeachment process—under specific circumstances or conditions. In its original form, the Constitution simply provided qualifications to hold political office and a method to remove a person from political office via impeachment. It did not address the issue now before the Court: when is a person disqualified from holding office.

The Fourteenth Amendment and its several sections were written and added to our Constitution shortly after the Civil War. At its core this Amendment confers citizenship upon every person born or naturalized in the United States, it guarantees equal

protection under the law to every such person, and it disqualifies persons from holding office upon a showing that the person previously took an oath to protect our Democracy but then by their misconduct demonstrated deplorable disdain (by way of conduct characterized as insurrection or rebellion) for the United States. Specifically, Section 3 states:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States[4], or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

When this Amendment was written, the country was then attempting to heal and prevent a repeat of the insurrectional audacity of rebellious confederates who had torn our country apart over one of the most vile, immoral institutions humans have allowed: slavery. In 1865, when the 39th Congress convened, newly elected Senators and Representatives appeared to be sworn in. Among them were the former Vice President

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[4] In FEDERALIST NO. 69, Alexander Hamilton confirmed that the " . . . President of the United States would be an officer elected by the people . . . ."

of the Confederacy, as well as former Senators, Congressmen and military officers of the Confederacy. *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment 87, 91 (2021). Infuriated by the presence of these "unrepentant rebels", the Senate drafted Section 3 and a Joint Committee of Congress ultimately approved its terms. *Amnesty*, *supra.* 36 Const. Comment at 91-92. It was reported that the need for this disqualifying provision was the election in the South of "'notorious and unpardoned rebels . . . who made no secret of their hostility to the government and the people of the United States'". *Id.* (citing to the Joint Comm. On Reconstruction, 39th Cong. Report of the Joint Committee on Reconstruction, at x (1st Sess. 1866)). *See also*, *Amnesty*, *supra.* 36 Const. Comment at 110 (discussing the enforcement of Section 3 by Congress in refusing to seat a Senator from North Carolina.)

C. The Purpose of Section 3

Those who have violated their oath to uphold our Constitution can be disqualified from holding any public office under the United States or any state. *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM & MARY BILL RTS. J. 153 (2021).

D. Enforcement of Section 3

In the Court below, the Dissent made a strong argument that Section 3 cannot be self-executing and that due process requires proceedings essential to enforcement of this Section. *Anderson*, *supra.*, 2023 CO at ¶ 275. Further, the Dissent argued that neither Colorado nor Congress have provided necessary procedures to judge whether the former President is in fact

disqualified under Section 3. *Anderson, supra.*, 2023 CO at ¶¶ 275-278. These conclusions, respectfully, are based upon the belief that application of constitutional analysis to gauge the propriety of statutory enactments is available to "judge the constitutionality of the Constitution". But that is a *non sequitur*. Traditional analyses of the application of the text and meaning of a constitutional prescript to a statutory enactment or institutional conduct cannot apply to judge the Constitution itself. We cannot look at a privilege, a right, a qualification to hold office or a disqualification to hold office etched in stone in the Constitution and judge its authority in the same fashion. When a constitutional prescript " . . . [b]y its own unaided force and effect" is clear, its meaning is defined by the Constitution itself and that ends the analysis. *See*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968). Thus, there is no need for statutory enactment to enforce Section 3; rather, its prescription is self-executing. If the framers of Section 3 had thought that due process proceedings were needed before this provision could be applied to a rebellious elected official, "nothing would have been simpler that [sic] so to phrase article [3] . . . ." *Sprague*, *supra.* 282 U.S. at 732. In another context, this Court has observed that "[t]he fact that an instrument drawn with such meticulous care and by men who so well understood now to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended." *Id*. To not apply Section 3 as intended is to turn the Constitution on its head.

E. The Operative Topic of Section 3

Accepting the need to identify the core value or premise which Article 14, Section 3 was written to protect, the premise becomes obvious by identifying the elements listed. The elements of this self-effectuating Section disqualify a person from *holding an office of the United States or a State* when (1) the person previously took an oath to support the Constitution; (2) the prior oath was as an officer of the United States, a member of Congress or State government; and, (3) the person engaged in insurrection or rebellion (or aided an enemy of the U.S).

Logic dictates that there must be a link between the stated purpose of Art. 14, Section 3 and the command of this constitutional provision. *Heller*, *supra*. The natural meaning of Section 3 is clear. Section 3 commands that upon proof of insurrection or rebellion, a person shall be disqualified from *holding office*. That is plain and simple. Because the purpose of Section 3 is to disqualify a person from *holding office*, any effort to regulate conduct beyond that premise cannot be governed by this constitutional provision. *See*, *Heller*, *supra*. 554 U.S. 584-585. The phrase "holding office" has one meaning: elected or appointed to an office with duties specified by law. *U.S. v. Saunders*, 120 U.S. 126, 129 (1887). Applying the plain meaning of Section 3, it must be judged that until the person charged with violating his or her prior oath to support the Constitution has been elected to hold office, he cannot be disqualified. The ruling below that Section 3 must apply to a person *running for office* because otherwise it would permit any person unqualified by other Constitutional constraints (e.g., age requirement) to run for office cannot overcome this conclusion; such

ancillary concerns can and should be addressed by State imposed supplemental requirements to run for an office. While there is admittedly logic in finding that the phrase "holding office" and the act of "running for office" should be viewed in a synonymous fashion, in truth they are not the same actions. And, regardless of the state based electoral requirements qualifying a person to appear on a ballot, it is not reasonable to substitute one action for the other in the context of Article 14, Section 3.[5]

CONCLUSION

Putting all the textual elements of Article 14, Section 3 together, it is evident that a former officer of the United States or any State who took an oath to support the U.S. Constitution is disqualified from holding any office when he or she has participated in a rebellion or insurrection or aided and abetted an enemy of the United States. The very text of the Amendment disqualifies any such person from holding office. This Section is literally not dependent upon prosecution or other forms of due process by any

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[5] In a different yet persuasive context, this Court observed that if the framers of the Constitution intended to give Congress power to regulate or control a person's removal from office—set forth in the Constitution as a power of the President [in this instance the issue was whether the President could remove from office an executive officer without Congressional approval] " . . . it would have been included among the specifically enumerated legislative powers" . . . . , and because it was not, the President had the authority to remove this officer. *Myers v. U.S.*, 272 U.S. 52, 128 (1926).

governmental agency before disqualification. It is self-executing. Nevertheless, until this former officer is elected to office, he/she cannot be disqualified pursuant to the words and intent of Section 3 to Article 14. And, for this reason, the decision of the Colorado Supreme Court should be reversed. The day to decide application of Section 3 has not yet arrived.

Respectfully submitted,

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