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 *AMICI CURIAE* DEVIN WATKINS AND CHARLES WATKINS IN SUPPORT OF PETITIONER

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January 17, 2024 *Attorney for Amici Curiae*

QUESTION PRESENTED

Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?

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INTEREST OF *AMICI CURIAE*[1]

The Petitioners are a father and son who see the opinion below of the Colorado Supreme Court as not just wrong, but dangerous. The petitioners seek to be allowed to vote for the person they believe would be the best President and Commander-in-Chief of the country. The opinion below is anathema, to that: it presumes that four Colorado judges are more knowledgeable than Congress and the people about whom should be allowed to seek public office.

Allowing state officials to pick and choose which candidates may be elected to federal office invites the worst kind of poisonous gamesmanship.

SUMMARY OF ARGUMENT

The opinion below contains four legal errors: (1) it incorrectly held that the Office of the President is an "Office of the United States," (2) it incorrectly held the President is an "Officer Under the United States," (3) it failed to consider the definition of "Insurrection" given by Congress at the time the Fourteenth Amendment was ratified, (4) it incorrectly held that Section Three of the Fourteenth Amendment was self-executing.

What is the nature of an "Office of the United States"? That term is defined by the Appointments

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[1] Pursuant to Rule 37.6, *amici* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici*, its members, or its counsel made such a monetary contribution.

Clause; it merely refers to positions created by Congress whose holders are appointed by the President or, for inferior officers, courts of law and heads of departments as set by law. Although that definition includes a numerous executive and judicial positions, it does not apply to legislative officers or the President. The opinion below fails to consider the substantial evidence for this conclusion, such as the way in which the Constitutional Convention's Committee on Style changed the Impeachment Clause to explicitly exclude the President from being considered an "Officer of the United States." It also fails to consider that the Impeachment Clause was determined by Justice Story to "lead to the conclusion, that [the President and the Vice President] were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 791, at 260 (Boston, Hilliard, Gray, & Co. 1833). Furthermore, the analysis of "Officers of the United States" in the Colorado opinion below is in direct conflict with this Court's opinions in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 497-98 (2010) and *United States v. Smith*, 124 U.S. 525 (1888), which both hold that an "Officer of the United States" must be an appointed position.

What is the definition of "Officer Under the United States"? That was understood at the founding to have a parallel meaning to "Office under the King" in English common law—to refer to any appointed position. Thus, appointed legislative officers are

included, but not Congressmen or the President. The opinion below failed to mention the extensive relevant common law history of the nearly identical term. Although the opinion below considered the Incompatibility Clause, it omitted the fact that this clause recognizes that every elected Member of Congress both holds an office and yet cannot be an "Officer Under the United States": this demonstrates a fatal flaw of the opinion below. Furthermore, it does not mention the list of all Officers Under the United States, created by Alexander Hamilton in 1793 at the request of Congress, from which the President, Vice President, and members of Congress are absent.

What is the meaning of "insurrection"? In implementing its authority "To provide for calling forth the Militia . . . suppress Insurrections", Art. I § 8, cl. 15, Congress defined "insurrection" as a civil disruption in which it was "impracticable . . . to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State." Militia Act of 1861, enacted July 29, 1861, ch. 25, §1, 12 Stat. 281. The opinion below fails to even mention how Congress defined the word "insurrection" at the time the Fourteenth Amendment was ratified. The fact that the laws of the United States were enforced against the January 6 protesters, through the ordinary course of judicial proceedings, demonstrates that the January 6 protest was not an insurrection.

Is Section Three of the Fourteenth Amendment self-executing? The opinion below rejects *In re Griffin*, 11 F.Cas. 7 (1869), an opinion of the Chief Justice of the United States the year after the Fourteenth

Amendment was ratified. Chief Justice Chase provided a persuasive argument about the dangers of the legal chaos that would ensue if Section Three were self-executing. Nonetheless, the opinion below doesn't try to claim that Section Three is entirely self-executing, just partially self-executing—maneuver that allows Colorado to create the cause of action, without specifying where Colorado got this authority.

In short, the opinion below omits any discussion of the context or circumstances that illuminate the core meaning of the relevant constitutional terms. Furthermore, it reaches conclusions contrary to the opinions of this Court, such as *Free Enterprise Fund*, which correctly explain the appointment requirement. For that reason, the opinion below should be reversed.

ARGUMENT

I. THE PRESIDENT IS NOT AN "OFFICER OF THE UNITED STATES" NOR DOES HE HOLD AN "OFFICE UNDER THE UNITED STATES"

The lower court opinion assigns great significance to the fact that the Constitution refers to the President as an officer. That opinion then infers that the President must be an "Officer of the United States" and that he holds an "Office under the United States" as referred to in Section Three of the Fourteenth Amendment. This conclusion is inconsistent with the original meaning of those terms.

The Constitution uses four different phrases to refer to types of officers:

(1) "Officers of the United States," used in the Appointments Clause (Art. II § 2 cl. 2), the

Commissions Clause (Art. II § 3), the Impeachment Clause (Art. II § 4), and the Oath or Affirmation Clause (Art. VI cl. 3);

(2) "Office under the United States," used in the Incompatibility Clause (Art. I § 6 cl. 2), the Impeachment Disqualification Clause (Art. I § 3 cl. 7), the Foreign Emoluments Clause (Art. I § 9 cl. 8), the Elector Incompatibility Clause (Art. II § 1 cl. 2), and the Religious Test Clause (Art. VI cl. 3);

(3) "Officer" of "the Government of the United States," used in the Necessary and Proper Clause (Art. I § 8 cl. 18); and

(4) "Office under the Authority of the United States," used in the Ineligibility Clause (Art. I § 6 cl. 2).

The relevant canon of interpretation here is "whole act" rule. That rule presumes that when identical phrases are used in a document, they are presumed to have the same meaning; however, when different words are used in a document, they are presumed to have different meanings. That canon should be applied in this context, and the Court should presume that each different phrase referring to federal officers used different words to express different meanings unless no such reasonable interpretation exists.

According to the Colorado Supreme Court, all of the phrases at issue have the same meaning: namely, they refer to any federal officer. The opinion below therefore held that the scope of these phrases must include the President, because the Constitution identifies him as an "officer." But that interpretation cannot hold if there is another reasonable interpretation of these phrases that would give them different meanings.

Indeed, there is a reasonable original understanding of these different phrases (as explained further below) that gives different meanings to each of these phrases:

(1) "Officers of the United States" refers to appointed positions in the Executive and Judicial Branches.

(2) "Office under the United States" refers to appointed positions in the Executive, Judicial, and Legislative Branches (not including the Speaker of the House or the Senate President pro tempore).

(3) "Officers of the Government of the United States," refers to the apex officials identified in the Constitution: the President, the Vice President, the Chief Justice, the Speaker of the House, and the Senate President pro tempore.

(4) "Office under the Authority of the United" includes all "Offices under the United States" and some irregular officers, such as transitional positions from the old Articles of Confederation government and holders of letters of marque and reprisal.

Because the third and fourth types of officers are not relevant to the issues involved in this case, this brief does not describe these categories' nature and scope.

Several proposals were made during the Constitutional Convention that used these phrases to refer to officers inconsistently. The Committee on Style was tasked with assigning a consistent meaning to these words throughout the Constitution; therefore, the Committee had to rewrite several of these phrases to ensure their meanings stayed constant. For instance, as originally proposed, the Religious Test

Clause was "[B]ut no religious test shall ever be required as a qualification to any office or public trust under the authority of the U. States." Art. VI cl. 3. The Committee on Style retained the phrase "under the Authority" in the Ineligibility Clause, Art. I § 6 cl. 2, but purposely removed that phrase from the Religious Test Clause, Art. VI cl. 3.

Likewise, the Committee on Style stripped the words "of the United States" from the Succession Clause, Art. II § 1 cl. 6, and that action implied a difference between an "officer" and an "Officer of the United States"—presumably, "officer" had a broader meaning than the qualified term "Officer of the United States." For instance, the Speaker of the House is not a position appointed by the President, and thus could not be in the line of Presidential succession, as is the case today, if (counterfactually) the Constitution had used the words "Officer of the United States" However, because the word that is used is just "officer," the Speaker has a place in line.

This different treatment shows that the members of the Committee on Style believed these phrases had different meanings. More precisely, this shows that they believed that it was proper to use these phrases in some contexts but not in others.

With respect to this case, it is only necessary to recognize that "Officers of the United States" and "Office under the United States" refer to appointed positions; therefore, they do not include the President of the United States.

A. THE "OFFICERS OF THE UNITED STATES" ARE APPOINTED POSITIONS IN THE EXECUTIVE AND JUDICIAL BRANCHES, NOT THE PRESIDENT.

As originally proposed during the Constitutional Convention, the Impeachment Clause, Art. II § 4, only applied to the President. Then, on September 8, 1787, the Impeachment Clause was amended to add "[t]he [V]ice-President and other Civil officers of the U. S." to the Impeachment Clause so as to broaden the field of possible targets of impeachments. 2 Max Farrand, *The Records of the Federal Convention of 1787*, 546 (journal), 552 (Madison's notes) (Max Farrand eds., Yale University Press, 1911). The word "other" implies that the President and the Vice-President are officers of the United States. In order to ensure the constitutional phrases had consistent meanings, the Committee on Style changed phrases by removing the word "other" and replacing it with the word "all," thus explicitly demonstrating in the final enacted version of the Constitution that the President and Vice-President are not "Officers of the United States." *Compare* Proceedings of the Convention Referred to the Committee of Style and Arrangement, *Id.* at 575, *with* Report of the Committee of Style, *Id.*at 600. There is no other apparent reason to remove the word "other" and replace it with the word "all" than to reflect this distinction explicitly.

The phrase "Officer of the United States" had no common-law meaning associated with it. The Constitution itself therefore had to define the term. It did so in the Appointments Clause, Art. II § 2 cl. 2. The Appointments Clause specifies several requirements

for a position to be considered an "Officer of the United States":

(1) The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States." *Id.* This phrase requires that the President must appoint any principal officer who is to be an "Officer of the United States." *Id.* The President, Vice-President, and elected Members of Congress are not appointed by the President. Therefore, they cannot be considered "Officers of the United States" according to the Appointments Clause.

(2) It is an office that "shall be established by law." *Id.* The phrase "shall be established" takes the future tense, because the phrase "Officers of the United States" refers to positions that will be created in the future by statutes passed by Congress and signed into law by the President. The President, on his own, cannot create new "Officers of the United States." This was of central importance, given the Declaration of Independence's accusation that the King of England "has erected a multitude of New Offices, and sent hither swarms of Officers to [harass] our people, and eat out their substance." The Declaration of Independence para. 12 (U.S. 1776). The positions of the President, Vice-President, and Members of Congress are established by the Constitution itself, not enacted by future statutes; these positions therefore cannot be "Officers of the United States."

The Commissions Clause (Art. II § 3), which requires that the President "shall Commission all the Officers of the United States," is also relevant here. Under English common law, commissions were issued

by the King by means of a document that recognized that the person named was vested with the powers of a given office. Similarly, such documents have been signed by the President of the United States and have been issued to officers from the very beginning of the United States until the present day. But throughout that history, the President, Vice-President, and members of Congress have never been commissioned by the President and thus cannot be considered "Officers of the United States."

Although not explicitly mentioned, Officers of the United States are the only individuals who can lawfully exercise the sovereign authority of the United States—outside of those specifically authorized by the Constitution, such as the President. To become an officer, one must endure the process of appointment to a position created by law, Senate confirmation (or whatever alternative process is set forth by law for inferior officers), be commissioned as an "Officer of the United States" by the President, and, finally, swear the oath of office before lawfully exercising federal sovereign authority. Anyone who purports to be exercising federal sovereign authority but has not completed the confirmation process is not acting lawfully.

"Officers of the United States" does not include appointed officers in the legislative branch, such as the Clerk of the House of Representatives or the Sergeant at Arms. These officials are neither appointed nor commissioned by the President. They can, at most, use the inherent powers of the congressional body that creates them; they cannot be given further authority by law. If they had to be appointed or commissioned by the President, the legislature would depend upon the

President for its internal operations. Notably, the judicial branch doesn't face these problems, as its officers serve for life.

The Impeachment Clause applies to "The President, Vice President and all civil Officers of the United States." Art. II § 4. As noted above, the Committee on Style explicitly changed the words "and other civil Officers of the United States" to "and all civil Officers of the United States," purposefully distinguishing the President and Vice President from being considered "Officers of the United States."

One might ask: even beyond the changes made by the Committee on Style, why would the President and Vice President be listed separately in the Impeachment Clause if they are "Officers of the United States?" If the President and Vice President were "Officers of the United States" then they would already be included. If the two of them were in that class, the Impeachment Clause would just state that "all civil Officers of the United States" are subject to impeachment. The "interpretive canon against surplusage" is "the idea that 'every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.'" *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012)). Under the canon against surplusage, the President and Vice-President must be excluded from the class of "Officers of the United States"; otherwise, the fact that they are both expressly mentioned would have no consequence.

The application of the canon against surplusage was recognized in the Founding era by Justice Story,

who wrote that the Impeachment Clause "lead[s] to the conclusion, that [the President and the Vice President] were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 791, at 260 (Boston, Hilliard, Gray, & Co. 1833).

As this Court held in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010), "[t]he people do not vote for the 'Officers of the United States.'" 561 U.S. 477, 497–98. Likewise, in *United States v. Smith* (1888), this Court held that "An officer of the United States can only be appointed by the [P]resident, by and with the advice and consent of the [S]enate, or by a court of law or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the [C]onstitution." 124 U.S. 525, 532. Thus, this Court has already held that the President, Vice President, and Members of Congress are not "Officers of the United States" because they are elected positions. These cases are in direct conflict with the Colorado Supreme Court's interpretation that the President is an "Office of the United States."

B. AN "OFFICE UNDER THE UNITED STATES" REFERS TO APPOINTED POSITIONS IN THE EXECUTIVE, JUDICIAL, AND LEGISLATIVE BRANCHES, NOT THE OFFICE OF THE PRESIDENT.

The phrase "Office under the United States" was and is a term of art. It should be understood as quite

similar to the common law phrase "Office under the King," used to refer to appointed positions in British common law. For instance, the British Act of Settlement required that "no person who has an office . . . under the King . . . shall be capable of serving as a member of the House of Commons." The Act of Settlement, 12 & 13 Will. III, c. 2, § 3 (1700). Thus, at common law, if a member of Parliament accepted a position of an "office under the King," he immediately lost his seat in Parliament. A person elected to Parliament was not considered to have an "office under the King," but once he accepted a position appointed by the King, he held an office under the King.

The British Act of Settlement thus sheds light on the function of the phrase "Office under the United States" in the Incompatibility Clause of the United States Constitution, Art. I § 6 cl. 2, which prevents a member of Congress from continuing to serve in Congress after that person takes an appointed position in the executive or judicial branches. Similar prohibitions using the phrase "Office under the United States" exist in the Articles of Confederation—which has no mention of any "officer of the United States."

Because of this common law history, the American public would have understood the meaning of the phrase "Office under the United States" to refer to any appointed position without further clarification in the Constitution.

The text of the Incompatibility Clause distinguishes between elected offices and an "Office under the United States." Art. I § 6 cl. 2. That Clause states: "no Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office." *Id.* The end of that Clause,

"during his Continuance in Office," makes clear that Senators and Representatives—like the President—hold an office and thus are an officer. But although these officeholders are officers, the Clause also makes clear that they do not hold "any Office under the United States"; for as soon as they accepted such a position, they would lose their seat in Congress. The Clause also implies that neither the Speaker of the House nor the Senate President pro tempore are an "Office under the United States," because that would cause them to lose their seat in Congress.

Thus, just holding an office or being an officer, like the President, does not mean that the person holds an "Office under the United States" as the Colorado Supreme Court held. Instead, such a position must also be appointed, in the same way that an "Office under the King" was appointed under common law. This excludes the President.

Under the authority of the statute An Act to Establish the Treasury Department, ch. 12, § 2, 1 Stat. 65, 65–66 (1789), the Senate in 1792 directed the Secretary of the Treasury to produce a statement listing the "salaries, fees, and emoluments" of "every person holding any civil office or employment under the United States, (except the judges)." 3 Annals of Cong. 138 (1793). The 1793 report issued by Alexander Hamilton, then Secretary of the Treasury, listed every appointed position in the United States at the time, but explicitly excluded the President, the Vice President, Senators, or Representatives from his list of "every person holding any civil office . . . under the United States." Alexander Hamilton, U.S. Sec'y of the Treasury, *List of Civil Officers of the United States, Except Judges, with Their Emoluments, for the Year*

Ending October 1, 1792 (1793), in 1 American State Papers: Miscellaneous 57 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834). This underscores that none of these elected officials were thought to hold an "Office under the United States."

* * *

Due to limited space, this brief cannot go into the detail that Professors Blackman and Tillman provide in their excellent law review articles on this subject. Seth Barrett Tillman and Josh Blackman, *Offices and Officers of the Constitution, Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62(4) S. Tex. L. Rev. 349–454 (2023); Seth Barrett Tillman and Josh Blackman, *Offices and Officers of the Constitution, Part IV: The "Office . . . under the United States" Drafting Convention*, 62(4) S. Tex. L. Rev. 455–532 (2023).

II. SECTION THREE OF THE FOURTEENTH AMENDMENT CONSTITUTIONALIZED THE SECOND CONFISCATION ACT, WHICH USED THE SAME MEANING OF "INSURRECTION" USED IN THE MILITIA ACT

Some have argued that the President should not be excluded from the application of Section Three of the Fourteenth Amendment. That argument rests on a misunderstanding of what Congress was doing.

The Fourteenth Amendment was, in many ways, meant to constitutionalize existing law. Major parts of the Fourteenth Amendment, such as the Equal Protection and Citizenship Clauses, were designed to constitutionalize the Civil Rights Act of 1866, 14 Stat.

27. Likewise, Section Three of the Fourteenth Amendment was designed to constitutionalize the Second Confiscation Act which President Abraham Lincoln signed into law on July 17, 1862. 12 Stat. 589.

Sections Two and Three of the Second Confiscation Act are similar to Section Three of the Fourteenth Amendment. Section Two of the Second Confiscation Act reads:

> That if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in, or give aid and comfort to, any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars . . . .

Id.

Section Three of the Second Confiscation Act reads:

> That every person guilty of either of the offences described in this act shall be forever incapable and disqualified to hold any office under the United States.

Id.

Sections Two and Three of the Second Confiscation Act have been recodified and modified slightly over the years, but their essentials remain the U.S. Code. 18 U.S.C. § 2383.

The Second Confiscation Act was enacted four years before the Fourteenth Amendment's introduction. Notably, Congress lacks the authority to add new

requirements to become President, absent a change in the Constitution. Nevertheless, the Second Confiscation Act used just the same phase to prohibit such individuals from holding any "office under the United States." Because Congress doesn't have the authority to limit by statute who can be President, the term "office under the United States" must not include the President in order for the Second Confiscation Act to be lawful. The appropriate reading of the Second Confiscation Act is therefore that it referred to appointed positions for which Congress can set the qualifications.

This raises a question: what did the Fourteenth Amendment and the Second Confiscation Act mean when they used the word "insurrection"? The Fourteenth Amendment was not the first time the word "insurrection" was used in the Constitution. Congress has the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections . . ." Art. I § 8, cl. 15. Congress implemented that authority in enacting the Militia Act of 1861, which was amended shortly before the Fourteenth Amendment was proposed. 12 Stat. 281. That Act reads:

> That whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory of the United States, it shall be lawful for the President of the United States to call

> forth the militia of any or all the States of the Union. . . .

Id.

This defines what Congress thought "insurrection" meant under the Constitution; a group of people whose resistance to the authority of the United States makes it impracticable to enforce the law "by the ordinary course of judicial proceedings."

Of course, the Civil War is the premier example of an insurrection in which, due to armed resistance, judicial proceedings were ineffective in enforcing the law in the southern states; however, the law was and is being successfully enforced against thousands who participated on January 6 through the ordinary course of judicial proceedings. Thousands have already been successfully prosecuted through ordinary judicial proceedings.

What this suggests is that, if we use Congress's definition of "insurrection" when the Fourteenth Amendment was ratified, January 6 was not an "insurrection."

Although there was violence during the January 6 protests, President Trump's speech did not engage in any unlawful activity. He stated in his speech "that everyone here will soon be marching over to the Capitol building to *peacefully and patriotically make your voices heard*." Rally on Electoral College Vote Certification, C-Span (Jan. 6, 2021). President Trump's admonition that the crowd act *peacefully* did not amount to a call for insurrection. Some of the crowd didn't follow President Trump's instruction to act peacefully, but that does not mean President

Trump engaged in any unlawful acts, and certainly not a call for an insurrection.

III. COLORADO CANNOT ENFORCE SECTION THREE OF THE FOURTEENTH AMENDMENT AGAINST FEDERAL OFFICIALS

Shortly after the Fourteenth Amendment was adopted, the Chief Justice of this Court ruled that Section Three of the Fourteenth Amendment is not self-executing. *In re Griffin,* 11 F.Cas. 7 (1869). The logic of *In re Griffin,* which explains the nature of the political chaos that the opposite view of the self-execution question would appear to invite, deserves respect: not only because the case is precedential, but also because it is persuasive.

In that case, Caesar Griffin was convicted of shooting with intent to kill and sentenced to imprisonment for two years. *Id.* at 22. He sought a writ of habeas corpus from a federal court, arguing that his imprisonment violated the Constitution because the judge in his case, Judge Hugh W. Sheffey, had engaged in insurrection and thus was barred by Section Three from holding his office. *Id.* Chief Justice Salmon Chase was riding circuit at the time and was assigned as a judge in this case.

Chief Justice Chase was an abolitionist movement leader who, as a private citizen, had often defended runaway slaves in court against their return under the fugitive slave laws. Randy E. Barnett, *From Antislavery Lawyer to Chief Justice: The Remarkable but Forgotten Career of Salmon P. Chase*, 63 Case W. Res. L. Rev. 653, 662 (2013). His activism preceded his

government service and his appointment to the bench by President Lincoln.

Judge Sheffey indisputably fell within the terms of Section Three of the Fourteenth Amendment: he was previously a member of the Virginia House of Delegates, where he took an oath to support the Constitution of the United States, and as a Virginia Delegate he later voted to support the Confederate States in their war against the United States. *Griffin,* 11 F.Cas. at 22. Griffin argued that Section Three of the Fourteenth Amendment automatically removed Judge Sheffey from his office, and his conviction was therefore invalid. *Id.* at 26. The Chief Justice rejected this argument. *Id.*

In his opinion, the Chief Justice explained the significance of the governments that had been established after the Civil War in the former Confederate states with the federal government's support. *Id.* at 25. These newly formed governments were primarily filled by individuals who had taken an oath to support the Constitution and had then engaged in rebellion against the United States. *Id.* And yet, most, if not all, of these individuals continued to discharge the functions of their office after the Fourteenth Amendment was adopted. *Id.* If the Fourteenth Amendment were determined to be self-executing, all of these officers' acts would have been void. *Id.* That would mean hundreds or perhaps thousands of statutes or legal judgments would be void, some of which are still in effect today. Without any official act declaring which officials were to be removed from office, no one would know which government acts were valid, and the result would have been chaos. *Id.*

Chief Justice Chase's opinion also found that interpreting Section Three as a "provision which, at once without trial, deprives a whole class of persons of offices held by them, for cause, however grave," is inconsistent with the requirement of due process of law, and thus should not be presumed, unless no other interpretation is available. *Id.* at 26.

That opinion suggested another interpretation that was "not only reasonable, but very clearly warranted by the terms of the amendment, and recognized by the legislation of congress." *Id.* That opinion found that, "it is obviously impossible to [exclude from certain offices a certain class of persons] by a simple declaration, whether in the constitution or in an act of congress, that all persons included within a particular description shall not hold office." *Id.* That is because it "must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate." *Id.* "To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." *Id.*

Although the opinion below claims Section Three was self-executing, it doesn't suggest that all insurrectionist officials were automatically removed from office without due process, as it would mean if Section Three were self-executing. Instead, the opinion below claims Colorado can implement a cause of action to execute Section Three. But that presupposes the answer to the next question.

If the amendment is not self-executing, who creates the enforcement mechanisms to determine who falls in the definitions given in Section Three? *In re Griffin* held that, "these can only be provided for by congress."

Id. The basis for this conclusion "is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision of this article.'" *Id. In re Griffin.* It also cites the power of Congress by a two-thirds vote to remove the inability to hold office, making clear that Section Three was "to be made operative in other cases by the legislation of congress in its ordinary course." *Id.*

As further evidence for this interpretation, Justice Chase pointed to the statute passed by Congress in February 1869, 15 Stat. 344, that required individuals in the governments of Virginia and Texas be removed from office if Congress did not remove their prohibition from holding office and they could not swear that they never voluntarily bore arms against the United States or gave aid, countenance, counsel, or encouragement to those demonstrating armed hostility to the United States.

According to Justice Chase, that statute was implementing legislation of Section Three of the Fourteenth Amendment by Congress, which would remove such individuals from office. Therefore, they had not already been removed from office in the absence of such legislation.

For this reason, Justice Chase found that Judge Sheffey had not been removed from office, even though he had actively engaged in insurrection, because Congress had not enforced Section Three against him. *Griffin*, 11 F.Cas. at 27.

Because Section Three of the Fourteenth Amendment was created to constitutionalize the

Second Confiscation Act, as explained in Section I.B of this brief and currently codified at 18 U.S.C. § 2383, it is reasonable for the Court to view this provision as an enforcement mechanism from Congress that implemented Section Three of the Fourteenth Amendment.

Considering the individuals who have been removed from office or blocked from entering office under Section Three of the Fourteenth Amendment, a pattern emerges.

Some state officials have been removed from office by *quo warranto* or mandamus proceedings in state court. But the state may remove its own officials for whatever reasons it chooses, or for no reason at all, and it may determine whatever non-arbitrary procedures it wants for such removal consistent with due process.

The Court should recognize the inherent authority of states over their own officers so that a state may choose to enforce Section Three against such local officials—even if not required to do so by the Constitution due to lack of congressional action. In contrast to these other cases, Justice Chase was a federal judge in a federal court and thus had no authority over state officials outside of Section Three of the Fourteenth Amendment. If a state authority blocks or removes "insurrectionist" state officials, it becomes a state prohibition, even if the prohibition is not enforced by the federal government.

However, members of the House and Senate who have been blocked or removed due to Section Three of the Fourteenth Amendment have generally not been

blocked or removed by a state official such as the secretary of state or by a state court. Instead, insurrectionist representatives and senators were kept from being seated by their House of Congress. Congress is empowered by Section Five of the Fourteenth Amendment to enforce Section Three against such officials. Additionally, Congress has the authority to "Judge of the . . . Qualifications of its own Members." Art. I § 5. As such, it has the authority to determine if they committed insurrection.

The only case of state officials blocking federal officials on Section Three grounds is that of John Wimpy. But that case only highlights the problems when state officials attempt to enforce Section Three of the Fourteenth Amendment against federal officials. John Wimpy and John Christy both ran for the same position in the House of Representatives in Georgia. Asher C. Hinds, 1 Hinds' Precedents of the House of Representatives § 459 (1907). After John Christy won the election, the Georgia Governor refused to certify his victory: arguing that Christy was disqualified under Section Three of the Fourteenth Amendment and instead certified the losing candidate, John Wimpy. *Id.* However, when the certification was delivered to Congress, Congress determined that John Wimpy had also served in the Confederate Army and had committed insurrection. *Id.* In other words, a state official had used Section Three to force the election of someone who had committed insurrection. This case demonstrates the unfairness (and, indeed, the danger) inherent in discretionary or political decisions by state

officials to judge the conduct of federal officials whom they otherwise have no authority.

If President Biden believes President Trump committed insurrection, he may order such a prosecution under 18 U.S.C. § 2383 and have the matter adjudicated in federal court. If convicted, President Trump could be properly barred from federal service as an Officer under the United States. As explained in Section 1.A, such a prohibition would include all appointed positions but not the President or Vice President, who are selected by the ultimate sovereign, the American public. But until afforded due process and being duly convicted, Colorado lacks the authority to judge the conduct of President Trump or determine if he violated Section Three of the Fourteenth Amendment.

CONCLUSION

For the reasons discussed above, the opinion of the Colorado Supreme Court should be reversed.

Respectfully submitted,

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