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 THE STATE OF COLORADO

BRIEF OF *AMICUS CURIAE* THE LEAGUE FOR SPORTSMEN, LAW ENFORCEMENT AND DEFENSE IN SUPPORT OF PETITIONER

EARL N. "TREY" MAYFIELD, III
Counsel of Record
JURIS DAY, PLLC
10521 Judicial Drive, Suite 200
Fairfax, Virginia 22030
(703) 268-5600
tmayfield@jurisday.com

Counsel for Amicus Curiae

326929

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Statutes and Other Authorities

Cited Authorities

Page

INTEREST OF THE AMICUS CURIAE[1]

The League for Sportsmen, Law Enforcement and Defense works to defend Americans' inalienable rights set forth in the United States Constitution. Every American has the right to an honest and lawful government. The League opposes government officials who contort the law for political gain Government officials should look to the teachings of our forefathers for guidance when making decisions about America's future. The League advocates for government limited by the rule of law instead of the rule of personal political preferences.

SUMMARY OF THE ARGUMENT

The original Constitution's use of the word "officer" and in the Fourteenth Amendment, Section 3's legislative history (hereafter, "§ 3") demonstrates the President is not "an officer of the United States" within § 3's meaning. In the original Constitution, the word "officer" is always used in contradistinction to the President, so the President cannot be deemed "an officer of the United States." Likewise, congressional debates on § 3 preceding its adoption show that Senators and Representatives understood that "officer" was distinct from the President, and the President was not "an officer of the United States." The Colorado Supreme Court's construction of

1. Pursuant to Rule 37.6, *Amicus Curiae* represents that no counsel for a party authored this Brief in whole or in part, and no party, or counsel for a party, made a monetary contribution intended to fund the preparation or submission of this Brief; and no person, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution that was intended to fund the preparation or submission of this Brief.

§ 3 in *Anderson v. Griswold*, 2023 CO 63 (Dec. 19, 2023), that the President is among those barred from federal office in the Civil War's wake, is both textually and historically erroneous. Moreover, *Anderson*'s and others' reliance on the article *Our Questions, Their Answers* to ascertain § 3's framing history is unjustified, as the article repeatedly gets the historical record wrong.

ARGUMENT[2]

THE PRESIDENT IS NOT AN "OFFICER OF THE UNITED STATES"

Introduction

This brief addresses the narrow question in Petitioner Trump's third argument: whether the President is an "officer of the United States" within § 3's meaning.[3] As a threshold matter, former President Trump was not an "officer" within the class of disqualified persons and is

2. This brief's analysis is largely drawn, with permission, from an upcoming article by Richard E. Gardiner, which will be available at the Social Science Research Network. Counsel thank him for allowing his research to be presented the Court.

3. "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).

thereby not barred by § 3, even if he had, *arguendo,* "engaged in insurrection or rebellion . . . ." Because, as shown, *infra*, the President (and thus former President Trump) is not an "officer of the United States" within § 3's meaning, he is not barred from holding "any office, civil or military, under the United States"[4] as he has not "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 . . . ."

I. The Constitution's Text Demonstrates That The President Is Not An "Officer Of The United States"

To understand a term's use in a constitutional amendment, the term's use in the original Constitution must be referred to. *See*, *e.g.*, *Hurtado v. People of the State of Cal.*, 110 U.S. 516, 534-35 (1884) (terms in the Constitution are to be construed *usus loquendi*—holding that "due process of law" in the Fourteenth Amendment must have the same meaning as in the earlier-ratified Fifth Amendment).

Anderson erroneously construed an "officer" under § 3 as applying to the President. 2023 CO 63 ¶¶ 144-160. The Constitution's consistent use of the term "officer" demonstrates that conclusion is counter-textual.

The original Constitution uses the word "officer" seven times. In all but one instance (Art. I, § 8, discussed, *infra*),

4. *Amicus Curiae* does not dispute that the Presidency is an "office, civil or military, under the United States . . . ."

an "officer" is distinguished from the President, plainly indicating that when the Constitution refers to "officer," it is not referring to the President.[5]

Article II, § 3 provides the most telling example, stating: "He shall . . . commission all the officers of the United States." U.S. Const. Art. 2, § 3. If the President has the constitutional duty to commission "all the officers of the United States," he cannot simultaneously be an "officer of the United States." Otherwise, he would (nonsensically) have to commission himself. Equating the President to an "officer of the United States" is thus not constitutionally feasible. The question of who is an "officer" is answered by Art. II, § 3's explicit distinction.

Consistent with Art. II, § 3, Art. II, § 4 also conceptually distinguishes the President from "all civil officers":

> The President, Vice President *and all civil officers of the United States*, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

U.S. Con. Art. 2, § 4 (emphasis added).

---

5. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). *See also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U. S. 787, 829 (2015) ("When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself." (Roberts, C. J., dissenting).

Likewise, Art. II, § 1 is consistent with Art. II, § 3:

> [T]he Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what *officer* shall then act as President, and such *officer* shall act accordingly, until the disability be removed, or a President shall be elected.

U.S. Con. Art. 2, § 1.

If an "officer" can "*act* as President," an "officer" is not the same as the President.

Similarly, Article II empowers the President to nominate and appoint "ambassadors, other public ministers and consuls, judges of the Supreme Court, and *all other officers of the United States*, whose appointments are not herein otherwise provided for, and which shall be established by law . . . ." U.S. Con. Art. 2, § 2 (emphasis added). The President who nominates and appoints "officers" cannot also be an "officer." *See, e.g.*, *Wright v. United States*, 302 U.S. 583 (1938):

> In expounding the Constitution of the United States, . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.

302 U.S. at 588 (cleaned up).

Thus, the original Constitution recognizes a distinction between the President and officers of the United States.

Its distinction between the President and "officers of the United States" is further exemplified by its oath requirements. Art. VI requires that "senators and representatives" and "the members of the several state legislatures, and all executive and judicial *officers*, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution . . . ." U.S. Con. Art. 6 (emphasis added). By contrast, Art. II, § 1 establishes a unique oath for the President:

> I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.

U.S. Con. Art. 2, § 1.

Moreover, § 3 refers to persons who have "taken an oath . . . *to support* the Constitution of the United States . . . ." (Emphasis added). This is clearly a reference to the Art. VI oath (which is for "senators and representatives" and "the members of the several state legislatures, and all executive and judicial *officers*, both of the United States and of the several states") as the Art. VI oath is an oath "to support" the Constitution. By contrast, the President 's oath is not "to support" the Constitution, but "to preserve, protect and defend" the Constitution.

Section 3 was plainly not addressing the President.[6]

Finally, while Art. I, § 8, cl. 18 does not draw the stark distinction between the President and "officers of the United States" that the above-referenced provisions do, Clause 18 also recognizes that distinction when it empowers Congress to:

> make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or *officer* thereof.

U.S. Con. Art. 1, § 8, cl. 18 (emphasis added).

Clause 18 thus equates an "officer" as being someone who is in a Government "department." The President is not in a "department."

---

6. Mark Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers*, (University of Maryland Legal Studies Research Paper No. 2023-16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591133 (hereafter, "*Our Questions*"). "*Our Questions*"), states:

> The President of the United States was among the officials who took the oath to the Constitution that under Section Three triggered disqualification for participating in an insurrection.

Our Questions 17.

In light of the President's specific oath and a different oath for others, this statement is incorrect.

Article 2, § 2 similarly recognizes an "officer" as being in a department ("The President . . . may require the opinion, in writing, of the principal *officer in each of the executive departments*") (emphasis added). Indeed, long after the Fourteenth Amendment was adopted, the Twenty-Fifth Amendment continued the same recognition of an "officer" as being a member of a department: "Whenever the Vice President and a majority of either the *principal officers of the executive departments*" and "a majority of either the *principal officers of the executive departments* . . . ." U.S. Con. 25th Amd., § 4 (emphasis added).

In sum, the original Constitution's text (and the Twenty-Fifth Amendment) amply demonstrate that the President is not an "officer of the United States."

II. Section 3's Legislative History Demonstrates The President Is Not An "Officer Of The United States"

In 1866, just after the Civil War's conclusion, Congress extensively debated various provisions designed to undo the War's underlying causes and to establish legal equality for black Americans, provisions that would eventually become the Fourteenth Amendment. *See*, *generally*, Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determining the Amendment's Original Meaning*, 49 CONN.L.REV. 1069, 1069-1108 (May 2017). Among those Congressional objectives was limiting the ability of former rebels to hold public office, which led to the inclusion of what is now § 3. *Id.* at 1091-92.

A. Section 3's Legislative History[7]

i. Initial Consideration In The House of Representatives

Section 3 originated in House Resolution No. 127, stating:

> Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President or Vice President of the United States.

Cong. Globe, 39th Cong., 1st Sess. 2542 (1866).

With little debate, the House passed it on May 10, 1866, and sent it to the Senate. *Id.* at 2545.

ii. Senate Consideration

The Senate took up H.R. No. 127 on May 23, 1866 as the Committee of the Whole. Senator Howard (R-MI) contended that § 3 will not "be of any practical benefit to the country" because it "will not prevent rebels from voting for members of the several State Legislatures," which may then be "made up entirely of disloyal elements."

---

7. *Anderson* and parties seeking to deny Petitioner Trump ballot access relied on *Our Questions*' ascertainment of § 3's legislative history. *See*, *e.g.*, 2023 CO 63 ¶¶ 139, 146. As demonstrated herein, that reliance was misplaced.

Id. at 2768. Senator Clark (R-NH) then stated that he had an amendment, stating:

> That no person shall be a Senator or Representative in Congress or permitted to hold any office under the Government of the United States who, having previously taken an oath to support the Constitution thereof, shall have voluntarily engaged in any insurrection or rebellion against the United States, or given aid or comfort thereto.

Cong. Globe, 39th Cong., 1st Sess. 2768 (1866). He formally offered his proposal as an amendment. *Id.* at 2770.

a. The Senate Establishes Which "Offices" Rebels May Not Occupy, Which Includes the Presidency

On May 29, 1866, the Senate struck the House version of § 3. *Id.* at 2869. Senator Howard offered a new § 3:

> 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.

Id.

With the exception of the final clause becoming a separate sentence, this is the extant version of § 3 in the ratified Fourteenth Amendment.

During the May 30, 1866 debate, Senator Hendricks (D-IN) moved to amend Senator Howard's proposal by inserting the words "during the term of office" before "have engaged in insurrection or rebellion against the same." *Id.* at 2897. Senator Howard opposed the amendment. *Id.* at 2898.

During the debate, Senator Johnson (D-MD) observed that Senator Howard's proposal "does not go far enough." He did:

> not see but that any one of these gentlemen 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.

Id. at 2899.

The "gentlemen" to whom Senator Johnson was referring were "all the members of the State Legislature, all the judicial officers of the State . . . ." *Id.* at 2898. Notably, Senator Johnson did not include the President (or the Vice President) in the class of "gentlemen" that § 3 would bar.

Senator Morrill (R-VT) pointed out, however, that Senator Howard's amendment included the words "or hold any office, civil or military, under the United States." *Id.* No senator disagreed. Senator Johnson thus conceded that he was "wrong as to the exclusion from the Presidency . . . ." *Id.* It was thus evident to the Senate that the Presidency was encompassed by the "any office, civil or military, under the United States" language—which sheds no light on whether the President was contemplated as being an "officer of the United States."

b. The Senate Establishes Which Rebel "Officers" Are Ineligible to Hold "Office," and Those "Officers" Do Not Include the President of the United States

Debating who § 3 barred, Senator Sherman (R-OH) discussed "Senators . . . who resigned" and "went directly to the South and took up arms," as well as "officers of the Army and Navy" who "proceeded to the South and organized rebellion against the Government of the United States." He concluded:

> If those men who have once taken an oath of office to support the Constitution of the United States and have violated that oath in spirit by taking up arms against the Government of the United States are to be deprived for a time at least of holding office, it is not a very severe stipulation.

Id.

Referring only to Senators and military officers as "men who have once taken an oath of office to support the Constitution," Senator Sherman did not suggest that § 3 barred the President, who had a different oath: "to preserve, protect and defend" the Constitution.[8]

Senator Hendricks' amendment was defeated (8 yeas and 34 nays). *Id.* at 2899.

Senator Johnson then moved to strike the words "or as a member of any State Legislature, or as an executive or judicial officer of any State." *Id.* His amendment was defeated (10 yeas and 32 nays). *Id.* at 2900. His next amendment moved to strike the words "having previously taken," and insert the words "at any time within 10 years preceding the 1st of January, 1861, had taken." That amendment was also defeated. (10 yeas and 32 nays). *Id.*

Debating whether Senator Howard's proposal was a punishment, Senator Trumbull (R-IL) noted: "No officer is responsible to the President, but his responsibility is to the law under which he acts." *Id.* at 2901. Senator Trumbull thus drew a distinction between the President and an officer. No Senator disagreed.

The Senate renewed consideration of Senator Howard's amendment on May 31, 1866. *Id.* at 2914. Senator Doolittle (R-WI) echoed Senator Trumbull's comment about officers, noting that the President is "the chief

---

8. Hence, *Our Questions* incorrectly cites Senator Sherman as an example of "the persons responsible for the Fourteenth Amendment [who] sought to bar from present and future office all persons who betrayed their constitutional oath." *Our Questions* 17.

Executive" and that "executive officers who are under him are responsible to him in that sense that he must see that they faithfully discharge their duties." *Id.*[9] Senator Doolittle also referred to "the oath which Congress required all *officers* under the Government of the United States to take . . . ." *Id.* at 2915 (emphasis added). He distinguished that oath from the President's oath, which is not "the oath which *Congress required* all *officers* under the Government of the United States to take," but a unique oath "specified in the Constitution . . . ." *Id.* (*see* Art. I, § 1) (emphasis added).[10] Thus, Senator Doolittle distinguished the President from an officer under the United States Government.[11] No Senator disagreed with him.

Senator Doolittle offered two extensively-debated amendments to § 3. *Id.* at 2918. Neither related to whether the President was an "officer," and both were defeated.

---

9. Senator Doolittle noted that a few minutes earlier he had: "stated that executive officers were responsible to the President as the chief executive officer of the Government," which his subsequent statement corrected.

10. *Our Questions* states that Senator Doolittle "included 'the President of the United States' as one of the 'officers under the Government of the United States' who was required to take an oath." *Our Questions* 22. Senator Doolittle said no such thing. Indeed, as shown, *supra*, he stated the opposite.

11. *Our Questions* erroneously states:

> No member of the Congress that (*sic*) drafted the Fourteenth Amendment distinguished between the presidential oath mandated by Article II and the oath of office for other federal and state officers mandated by Article VI.

Our Questions 18. As discussed *supra*, Senator Doolittle drew exactly that distinction.

Id. at 2921.[12] The Senate then passed Senator Howard's proposal for § 3 by a vote of 32 yeas to 19 nays and 7 absences. *Id.* No further floor debate on § 3 occurred until June 8, 1866.

On June 7, 1866, Senator Davis (U-KY) published remarks in the Appendix to the *Congressional Globe* pointing out the distinction between the respective oaths of the President and "officers of the United States," and thus that the President is not an "officer of the United States." Referring to the Constitution's Framers, Senator Davis stated:

> They provided . . . that all officers, both Federal and State, should take an oath to support [the Constitution]; that the President . . . should take an oath, to the best of his ability to preserve, protect, and defend the Constitution.

Cong. Globe, 39th Cong., 1st Sess., App., 234 (1866). Senator Davis plainly recognized that there *was* a legal difference by referring to one oath for "all officers" and a different oath for the President.[13]

---

12. His first proposed amendment was to add the word "voluntarily" before "engaged in insurrection or rebellion." The second was to add before the word "but" the words: "excepting those who have duly received pardon and amnesty under the Constitution and laws, and will take such oath as shall be required by law."

13. *Our Questions* erroneously states:

> Senator Davis 'saw no legal difference between the constitutional requirement that "all officers, both Federal and State, should take an oath to support' the Constitution and the constitutional requirement that the president 'take an oath, to the best of his ability to preserve, protect, and defend the Constitution.'

On June 8, 1866, debate on § 3 resumed. Senator Henderson (U-MO) observed:

> When the section is closely scrutinized, it will be seen that comparatively few men will fall subject to the exclusion. It does not, as sometimes supposed, reach all who may have taken an oath to support the Constitution of the United States. *The civil officers of the Federal Government, previous to the war, were comparatively few. With the exception of postmasters, perhaps not a thousand are yet remaining in the South.*

Id. at 3036 (emphasis added).

Senator Henderson then reviewed the probable numbers of other persons who would be barred by § 3: military officers, former members of Congress, state executive and judicial officers, and former members of the state legislatures.

Notably, at no point, did he suggest that § 3 encompassed former Presidents. Given his thorough analysis of who was included, it seems unlikely that Senator Henderson would have omitted the President from the enumeration of those to be barred by § 3. Indeed, he effectively excluded the President from being considered a civil officer of the United States when he observed that, with the exception of postmasters, "perhaps not a thousand [civil officers of the United States] are yet *remaining in the South.*" *Id.* (emphasis added).[14]

---

14. Senator Henderson also noted that § 3 "strikes at those who have heretofore held high *official* position . . . ." *Cong. Globe*, 39th Cong., 1st Sess. 3036 (emphasis added). *Our Questions* incorrectly

Moreover, there was a common sense reason that the President was not included in Section 3:

In 1866, there were three living former Presidents: James Buchanan (Pennsylvania; died June 1, 1868), Franklin Pierce (New Hampshire; died October 8, 1869), and Millard Fillmore (New York; died March 8, 1874), none of whom was from the South, let alone joined the Confederacy.[15]

On the other hand, Confederate President Jefferson Davis (a former United States Senator) and Confederate Vice President Alexander Stephens (a former United States Representative) would have been understood to have been barred by § 3 by virtue of their "having previously taken an oath, as a member of Congress . . . ."[16] Further,

---

states that Senator Henderson stated that § 3 "strikes at those who have heretofore held high *office* position" (citing *Congressional Globe*, 39th Cong., 1st Sess. P. 3035-36), *Our Questions* 18 (emphasis added). Changing "official" to "office" is not a minor error, because the *Our Questions*' entire premise is that because the President occupies a civil office, he must be an "officer of the United States." *Our Questions* misleadingly attempts to show that Senators and Representatives referred to § 3 as barring those in "high office," *i.e.*, the President.

15. Only one former President, James Tyler, joined the Confederacy. Tyler, however, had died on January 18, 1862, so there was no reason to include the President in § 3 to bar him from holding office.

16. *Our Questions* asserts that Jefferson Davis and Alexander Stephens:

> both could have sworn truthfully that they did not 'exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States' if presidents and vice-presidents were not officers under the government.

§ 3 would have been understood to include Confederate General Robert E. Lee a former United States Army officer, and thus barred by "having previously taken an oath, . . . as an officer of the United States . . . ."

Because no living President had joined the Confederacy, Congress' desire (as Senator Sherman summarized) to deprive from holding office "those men who have once taken an oath of office to support the Constitution of the United States and have violated that oath in spirit by taking up arms against the Government of the United States" (*Cong. Globe*, 1st Sess., 2899 (1866)), was fulfilled by § 3.[17]

Our Questions 24.

First, the quoted language is not from § 3; it is from *An Act to prescribe an Oath of Office, and for other Purposes*, 12 Stat. 502 (July 2, 1862). Second, the language refers to the functions of any "office" under any pretended authority in hostility to the United States, not to "officers." This is another example of *Our Questions* conflating two distinct concepts: assuming that, because the President occupies a civil office, he must be an "officer of the United States." In fact, regardless of whether presidents and vice presidents were officers under the government, Davis and Stephens could not have "sworn truthfully" that they did not "exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States" because they both held offices under a "pretended authority in hostility to the United States."

17. Senator Hendricks observed that the "theory" of § 3 was "that persons who have violated the oath to support the Constitution of the United States ought not to be allowed to hold any office." *Cong. Globe*, 1st Sess., 2898 (1866). As no former living Presidents had violated the oath to support the Constitution of the United States, there was no need to consider the President as an "officer of the United States."

Later on June 8, 1866, Senator Davis moved to remove § 3's references to the States (*id.* at 3041); his motion was defeated. *Id.* The Senate then moved to concur on the amendments made by the Committee of the Whole. With respect to § 3, the Senate voted to concur on the amendment to § 3 proposed by Senator Howard (42 yeas, 1 nay, 6 absences). *Id.* at 3042. The Senate then voted to adopt H.R. No. 127, as amended (33 yeas, 11 nays, 5 absences). *Id.* Once two thirds of the Senate adopted it, it was sent back to the House.

iii. Final Action In The House of Representatives

On June 13, 1866, the House concurred in the Senate amendments to H.R. No. 127 (120 yeas, 32 nays, and 32 not voting), and it was adopted. *Id.* at 3149.

B. The Colorado Supreme Court's Erroneous Analysis Of § 3's Legislative History

The Colorado Supreme Court's opinion is replete with historical errors. For instance, it states that, at page 915 of the *Congressional Globe* for the 39th Congress, 1st Session, the President is referred to as the "chief executive officer of the country." *Anderson,* 2023 CO 63 ¶ 146. This is misleading; the statement occurred on February 19, 1866, long before § 3 even came into existence (May 29, 1866). The term was a passing reference by Senator Saulsbury (D-DE) in debate over whether Congress had the power to disarm the former Confederate state militias. Senator Saulsbury stated: "Mississippi is a State in the Union recognized by the President of the United States, the chief executive officer of the country." His statement was not

intended to be, and could not have been, an interpretation of the word "officer" in the then non-existent § 3.

Anderson also cites *Our Questions* for the proposition that many members of Congress referred to the President as the chief executive officer:

> Many members of Congress, sometimes quoting President Andrew Johnson or Attorney General James Speed, declared that the president was "the chief executive officer of the United States." n.105.

The supporting footnote cites:

> *Congressional Globe*, 39th Cong., 1st Sess., p. 1318. *See Congressional Globe*, 39th Cong., 1st Sess., pp. 335 (Guthrie) (same); 775 (Conkling) (quoting Speed); 915 (H. Wilson); 2551 (Howard) (quoting A. Johnson) ("chief civil officer"); 2914 (Doolittle); *Congressional Globe*, 39th Cong., 1st Sess., App., p. 150 (Saulsbury).

2023 CO 63 ¶ 146 (citing *Our Questions* 18-19).

These citations do not show that "[m]any members of Congress . . . declared" that the President was "the chief executive officer of the United States" and they certainly do not show that the President was "an officer of the United States" within § 3's meaning.[18]

---

18. Much of *Our Questions,* after pages 18-19, focuses on the Presidency being an "office . . . under the United States," thereby suggesting that the President is an "officer of the United States." But

Beginning with the reference to *Congressional Globe*, 39th Cong., 1st Sess., 1318 (debate on March 10, 1866—two months before § 3's existence), Representative Holmes (R-NY) read a Proclamation of President Andrew Johnson "for the purpose of securing a reorganization of the government" of the former states of the Confederacy and appointing provisional governors of those states. In that Proclamation, the President referred to himself as "chief executive officer of the United States . . . ." Representative Holmes did not indicate, nor did any other Representative, that he agreed with the President's non-constitutional characterization.

Turning to page 335 (debate on January 20, 1866—again, many months before § 3 existed), the Senate was debating enlarging the Freedmen's Bureau's powers. Discussing the President's constitutional duty to bring former Confederate states back into the Union, Senator Gutherie (D-KY) stated: "I think it was in the perfect line of his duty, either as Commander-in-Chief or as chief executive officer of the United States, to bring them back." *Cong. Globe*, 39th Cong., 1st Sess., 335. No other Senator expressed agreement with Senator Gutherie's non-constitutional characterization.

Most egregiously, at page 775 (February 9, 1866—months before § 3 came into being), Representative Conkling (R-NY) did not "quot[e] [Attorney General James] Speed;" rather, Representative Conkling merely

---

because the Presidency is an "office under the United States" does not necessitate the conclusion that the President is an "officer of the United States." Thus, much of *Our Questions* is simply immaterial to the issue before the Court.

asked that a report from Attorney General Speed to the President be read to the House. In that report, the Attorney General stated:

> Sundry reports of the facts that go to show that Jefferson Davis and other rebels have been guilty of high crimes have been made to you as the chief executive officer of the Government.

Cong. Globe, 39th Cong., 1st Sess., 775.

Importantly, Representative Conkling did not indicate, nor did any other representative, that he agreed with the Attorney General's non-constitutional characterization of the President.

At page 915 (February 19, 1866), Senator H. Wilson (R-MA) made no reference to the President being "the chief executive officer of the United States."

At page 2551 (May 11, 1866), Senator Howard quoted from a Proclamation of President Johnson (the same Proclamation referred to by Representative Holmes, *supra*, at *Cong. Globe*, 39th Cong., 1st Sess., 1318) appointing "various provisional governors" of the former Confederate states. Senator Howard stated:

> After reciting in various laborious phrase the fact that he is President of the United States, that he is Commander-in-Chief of the Army and Navy, and *adding what is not contained in the Constitution or the laws of the land, that he is also 'chief civil executive officer of the United States,'* he says . . . .

Cong. Globe, 39th Cong., 1st Sess., 2551 (emphasis added).[19]

Thus, far from endorsing the characterization of the President as "chief civil executive officer of the United States," Senator Howard *condemned* the use of the term, as it was not "contained in the Constitution or the laws of the land . . . ."

The next reference is to page 2914, where, as discussed, *supra*, Senator Doolittle initially referred to the President as "the chief executive officer of the Government," but then clarified that "the President being the chief Executive," "executive officers who are under him are responsible to him in that sense that he must see that they faithfully discharge their duties." *Cong. Globe*, 39th Cong., 1st Sess., 2914.

The next reference is to the *Appendix* for the *Congressional Globe*, at page 150, and a statement by Senator Saulsbury. In fact, Senator Saulsbury made no reference to the President being "the chief executive officer of the United States."

Our Questions contains other misleading assertions upon which the Colorado Supreme Court apparently relied. For example, it states that "Representative Andrew Rogers of New Jersey included the presidency when he stated, 'Without the States an officer of the Government cannot be elected,'" citing *Cong. Globe*, 39th Cong., 1st Sess., 198. Representative Rogers' statement was made on January 11, 1866, long before § 3 came into existence, so it was plainly not intended to interpret § 3.

---

19. *Our Questions* incorrectly states that President Johnson had referred to himself as "chief civil officer."

Our Questions also states that the *Congressional Globe* for the Thirty-Ninth Congress, 1st Session, is "littered with statements acknowledging that the President and Vice President were officers." *Our Questions* 22. Most of the citations (51) are to debates on other topics in the months before § 3 came into being, so they are not material, even if they did "acknowledg[e] that the President and Vice President were officers." Of the ten citations from the § 3 debates, none is an acknowledgment by a member of Congress that the President and Vice President were officers for purposes of § 3.

Starting at page 2451, Senator Trumbull referred to the "office of the President . . . ." At page 2453, Senator Howe (R-WI) referred to the "presidential office . . . ." At page 2523, Senator Nye (R-NV) stated nothing concerning the President and Vice President being officers. At page 2550, Senator Howard referred to the President as the "Executive of the United States." At page 2696, Representative Ross (D-IL) referred to the "office of President." At page 2773, Representative Eliot (R-MA) stated nothing concerning the President and Vice President being officers. At page 2899, Senator Johnson referred to the "two highest offices in the gift of the nation." Senator Doolittle's statement at page 2914 is discussed, *supra*. At page 3172, Representative Windom (R-MN) referred to President Johnson as the person "who at present fills the executive chair of the United States." And, at page 9 of the Appendix, the Secretary of War, in a report to Congress dated November 22, 1865 (the year before § 3 came into being), mentioned the "comprehensive conspiracy to assassinate the President, the Vice President, Secretary of State, Lieutenant General, and other officers of the Government." As the Secretary of

State and Lieutenant General are certainly officers of the Government, it is likely that "other officers of the Government" meant officers similar to the Secretary of State and Lieutenant General and was not a suggestion that the President and Vice President were "officers."

Of the 51 citations to debates on other topics in the months before § 3 came into being, only twelve mention "officer"—and only four of those statements "acknowledg[e] that the President and Vice President were officers," but none could have been intended to interpret "officer" in § 3, as it did not yet exist and none were endorsed by any other Senator or Representative:

> 335 (Guthrie) ("I think it was in the perfect line of his duty, either as Commander-in-Chief or as chief executive officer of the United States, to bring them back").[20]
>
> 363 (Saulsbury) ("the President of the United States, the highest executive officer of your Government").
>
> 1158 (Eldridge) ("I do not indorse [sic] any unconstitutional act of any President or other officer of the Government").
>
> 1800 (Wade) ("The President is a mere executive officer, bound to obey our mandates and our behests").

20. This statement is discussed, *supra*.

All of these references appear to be colloquial uses equating the President with an "officer," particularly as three of the four use the term "executive officer"—they are not analyses of the term "officer of the United States" as that term would later come to be used in § 3.

Of the remaining eight citations:

Two Representatives presented statements from President Andrew Johnson's Proclamation appointing provisional governors, where President Johnson referred to himself as "the chief executive officer of the nation." *See* 661 (Hubbell) and 1318 (Holmes); neither Representative, nor any other, indicated agreement with the President's characterization.

One Representative merely asked that a report from Attorney General Speed to the President be read to the House. *See* 775 (Conkling), discussed, *supra*. Neither Representative Conkling, nor any other Representative, indicated that he agreed with the Attorney General's characterization of the President.

One Representative introduced a constitutional amendment (931 (Wade)) stating in part:

> Whenever Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, such officer shall not again be eligible to the office of President of the United States during the term of his natural life.

This language not only does not "acknowledg[e] that the President and Vice President were officers," it emphasizes that the President was *not* understood to be an "officer" because an "officer" could "act as President . . . ."

One Representative introduced a constitutional amendment (919 (McKee)) which did not refer to the President as an "officer;" it only referred to "the office of President . . . ."

Three Representative not only did not "acknowledg[e] that the President and Vice President were officers," it distinguished the President from "officers:"

> 351 (Schenck): "My point of order is that these resolutions denominate the President of the United States 'His Excellency.' There is no such officer known to the Constitution of the United States."
>
> 2306 (Henderson): "Mr. Madison gave his opinion simply on the appointment of the chief executive officers who stand in a confidential relationship with the President. . . . [T]he President has the right to remove an officer."
>
> 2310 (R. Johnson): Faithful execution of the laws "can only be done through the instrumentality of subordinate officers named in the Constitution, or officers appointed under the authority conferred on Congress by the Constitution. . . . He cannot execute the laws except by means of officers . . . . But what is to supply the evil consequent upon the inability of

> the President to execute the laws because the officers placed under his charge are not fit . . . ."

In sum, § 3's legislative history is not inconsistent with the original Constitution's use of the term "officer of the United States."

III. Case Law Does Not Support The President Being An "Officer Of The United States"

Anderson also misconstrued federal cases discussing the meaning of "Officer of the United States." It cited *Motions Systems Corp. v. Bush*, 437 F.3d 1356 (Fed. Cir. 2006) for the proposition that "the normal and ordinary usage of the term 'officer of the United States' includes the President." 2023 CO 63 ¶ 145. *Motion Systems* opened with the observation:

> The Constitution repeatedly designates the Presidency as an "Office," which surely suggests that its occupant is, by definition, an "officer." *See*, *e.g.*, U.S. Const. art. I, § 3, cl. 5; art. II, § 1, cl. 1; art. II, § 1, cl. 5; art. II, § 1, cl. 6; art. II, § 1, cl. 8; amend. XXII, § 1; amend. XXV, §§ 1, 3, 4. An interpretation of the Constitution in which the holder of an "office" is not an "officer" seems, at best, strained.

437 F.3d at 1371-72.

The court, however, caveated that observation by acknowledging:

> It is true, however, that our understanding of the category of "officers of the United States" comes primarily from the Appointments Clause and the jurisprudence associated with it. The Appointments Clause and the Commissions Clause, by their terms, apply to all "officers of the United States" and all "civil officers of the United States," respectively. See *id.* at art. II, § 2, cl. 2; art. II, § 3; art. II, § 4. Those clauses, and other constitutional provisions, contemplate a class of "officers" inferior in status to the President, who nominates and commissions them. The key features of that class are nomination by the President, appointment with the advice and consent of the Senate, commission by the President, and removal by impeachment. It is plain that the President is not an "officer of the United States" for Appointments Clause, Commission Clause, or Oath of Office Clause purposes.

Id. at 1372.

Indeed, as noted in Part I, *supra*, the President cannot be an "officer of the United States" since it is the President's duty to "commission all the officers of the United States." U.S. Con. Art. 2, § 3. The President cannot simultaneously be an "officer of the United States;" otherwise, he would have to commission himself, a nonsensical concept.

Contrary to *Motion Systems*' assertion that is "strained" to construe the holder of an "office" not to be an "officer," the distinction is entirely sensible. "Officer"

has a very specific meaning under our Constitution: though someone may be "an agent or employ[ee] working for the government and paid for it, as nine-tenths of the persons rendering service to the government are, without thereby becoming its officers." *United States v. Germaine*, 99 U.S. 508, 509 (1978). As previously discussed, "officers" are persons appointed by the President who exercise significant discretion under the laws of the United States. *See Lucia v. SEC*, 138 S. Ct. 2444, 2051-53 (2018). Merely holding an office does not make one an "officer" for purposes of the Constitution.

Anderson also cited *dictum* from *The Floyd Acceptances*, 74 U.S. 666 (1868), suggesting that the President was an "officer of the United States":

> We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law.

74 U.S. at 676-77 (cited at 2023 CO 63 ¶ 146).

But *Anderson* misses *Floyd*'s context entirely. *Floyd* was making the point that anyone who holds an office under the United States does so "under the law" and

that there are thus no offices which exist but those which have been established by law. *Floyd* was not remotely attempting to establish that the President is an "officer of the United States."

IV. Attorney General Opinions Do Not Support The President Being An "Officer Of The United States"

After Congress passed the Fourteenth Amendment on June 13, 1866 (but before its ultimate ratification in 1868), it passed the Reconstruction Acts, which set forth the conditions under which most of the Confederate states would be readmitted to the Union. The Acts included § 3 of what would become the Fourteenth Amendment, likewise intended to prevent rebels who had violated their oaths to the federal Constitution from holding certain public offices. *See*, *e.g.*, Gerald N. Maglioca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 97-98 (Spring 2021); *United States v. States of La., Tex., Miss., Ala., and Fla.*, 363 U.S. 1, 124-25 (1960).

There was some question as to whether the Acts applied to military as well as civil officers. In an Opinion of May 24, 1867, Attorney General Stanbery opined on that issue. Under the Reconstruction Acts, voters in the former Confederate states were limited to "male citizens of said State twenty-one years old and upwards, of whatever race, color, or previous condition, who have been resident of said State for one year previous to the day of election." The Opinion's focus was on "[w]ho are entitled to vote and who are disqualified from voting at the elections provided for or coming within the purview of these Acts?" 12 *Op. Att'y Gen.* 141. The Opinion did not consider whether the President was an "officer of the United States."

The Attorney General's Opinion stated in part:

> Who is to be considered 'an officer of the United States,' within the meaning of the clause under consideration? Here the term officer is used in its most general sense, and without any qualification, as legislative, or executive, or judicial; and I think, as here used, *it was intended to comprehend military as well as civil officers of the United States* who had taken the prescribed oath.

12 *Op. Att'y Gen.* 141, 158 (1867) (emphasis added).

Thus, Attorney General Stanbery was not considering whether the President, in his unique constitutional role, was an "officer of the United States."

In a subsequent Opinion of June 12, 1867, the Attorney General opined on the authority of military commanders in the former Confederate states; he also provided a "Summary" of his earlier Opinion on the question of who could vote in the former states of the Confederacy, stating:

> As to [officers of the United States], the language is without limitation. The person who has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States, is subject to disqualification.

12 *Op. Att'y Gen.* 182, 203.

As with his first Opinion, the Attorney General was determining only who could vote in elections in the former Confederate states. Indeed, in the very next paragraph of the Opinion, the Attorney General stated: "Military officers of any State, prior to the rebellion, are not subject to disqualification." *Id.* Hence, the subsequent Opinion did not purport to address whether the President was an "officer of the United States."

CONCLUSION

The Court should hold the President is not an "officer of the United States" within the meaning of Section 3 and should thus conclude that former President Trump is not within the class of persons who are barred from holding "any office . . . under the United States . . . ."

Respectfully submitted,

Earl N. "Trey" Mayfield, III
Counsel of Record
Juris Day, PLLC
10521 Judicial Drive, Suite 200
Fairfax, Virginia 22030
(703) 268-5600
tmayfield@jurisday.com

Counsel for Amicus Curiae