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* CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence ("CCJ") was founded in 1999 as the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The CCJ advances that mission through strategic litigation and the filing of amicus curiae briefs in cases of constitutional significance, including cases such as this in which the nature of our federal system of government and the balance of powers between the national and state governments are at issue. The CCJ has previously appeared as amicus curiae before this Court in such cases involving questions of federalism, naturalization, and the respective powers of the national and state governments.

INTRODUCTION AND SUMMARY OF ARGUMENT

A former President is not among those whom Section 3 of the Fourteenth Amendment subjects to sanctions. Respondents rely on a flawed understanding of the constitutional term "officer of the

[1] No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

United States." That term or near synonyms appears four times in the original 1788 Constitution. In all these occurrences, the President is distinguished from an "officer of the United States." No court ever before has construed the term "officer of the United States" in the constitutional sense to include the President. Together with other textual and historical materials, the evidence is compelling that Section 3's jurisdictional element does not include the President.

Furthermore, Section 3 is not self-executing. More precisely, it cannot be enforced in court without implementing congressional legislation under Section 5 of the Fourteenth Amendment (or other appropriate legislative power). Only very rarely does the Constitution enforce itself so as to secure a plaintiff affirmative relief. Neither expressly nor by implication does Section 3 provide a cause of action for its own enforcement.

Nothing in the text of the Section explicitly creates such a cause of action. Nor, in light of this Court's recent decisions, can a cause of action be implied from Section 3. In *Egbert v. Boule*, 596 U.S. 482, 496 (2022), this Court recently counseled against implying novel causes of action from the Fourteenth Amendment. A cause of action to disqualify a Presidential candidate under Section 3 would be unprecedented. Without compelling evidence that Section 3's drafters and ratifiers intended such a result, this Court should not imply a cause of action. Instead, the courts should look to Congress to enact enforcement legislation under Section 5 of the 14th Amendment. But no relevant congressional legislation

enabling the States or private persons to enforce Section 3 exists here.

The difficulties of interpreting Section 3's offense element, such as defining having "engaged" in "insurrection" "against the Constitution," support the conclusion that the Section is judicially non-self-executing. Guidance from federal justiciability doctrines and separation of powers theory counsels against a wide-reaching application of Section 3 by the judiciary without congressional authorization. References to the common understanding of the term "insurrection" in the 19th century do not provide adequate interpretative guidance to the courts, because Section 3 expressly requires that the covered offense be insurrection "against the Constitution"; and the breadth of the term "insurrection" as so qualified is, in the absence of legislative definition, uncertain and indeterminate. If an "insurrection against the Constitution" includes any interference with the execution of any of the functions of the branches of the federal government, it sweeps too widely. But if it applies more narrowly only to some interferences, it is hazardous to say, without congressional clarification, exactly which interferences are included. At least in the first instance, it is for Congress to define what offenses are covered by Section 3.

ARGUMENT

I. A Former President is not within the jurisdictional scope of Section 3 of the Fourteenth Amendment

Section 3 of the Fourteenth Amendment declares:

> 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.

U.S. Const. amend. XIV, § 3.

Section 3 has four elements. *See* Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?,* 15 N.Y.U. J. L. & Liberty 1, 2–3 (2021). First, it has a *jurisdictional element* that

identifies those who are subject to its terms. These are those 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." Significantly, there is no explicit reference in the jurisdictional clause to those who took an oath as President or Vice President.

Second, Section 3 has an *offense element* that defines the conduct that triggers disqualification. It refers to the conduct of a person covered by the jurisdictional element who "shall have engaged in insurrection or rebellion against the [the Constitution], or given aid or comfort to the enemies thereof."

Third, Section 3 has a *disqualification element*. The legal consequences for a covered person who is found to have committed a covered offense are that he or she shall not 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."

Fourth and finally, Section 3 has an *amnesty* element. This component allows Congress to remove a disqualification: "Congress may by a vote of two-thirds of each House, remove such disability."

By its plain text, Section 3 does not apply to those who have held the office of the Presidency or seek to hold it. Section 3's jurisdictional component

specifies exactly whom it covers. It applies only to those who had taken an oath to "support" the Constitution as a) "a member of Congress," b) "an officer of the United States," c) "a member of any State legislature," or d) "an executive or judicial officer of any State." Petitioner, former President Donald Trump, was not a member of Congress or of a state legislature, or a state executive or judicial officer. For Section 3 to apply in this case, therefore, the petitioner must fall within the second category, "an officer of the United States." As we argue below, he does not.

The constitutional text indicates that the Fourteenth Amendment's Framers chose not to include Presidents within Section 3. If they had wanted to, they knew how to do so. Section 3 disqualifies officials involved with insurrection from ever becoming an elector for "President and Vice-President." Here, the Section specifically uses the words "President" and "Vice President." But it chooses not to use those terms in the enumeration of officials subject to its jurisdictional element. The natural reading of the omission of the two elected members of the Executive Branch is to exclude them from the Section. The federal courts adopt a similar approach in the statutory context. This Court refuses to read a law to apply to the President unless it specifically and clearly says so. *Franklin v. Massachusetts,* 505 U.S. 788, 800-01 (1992). Presumptively, Section 3 does *not* jurisdictionally cover the President.

The constitutional text also makes clear that Section 3's use of the phrase "officer of the United States" does not tacitly include the President. Four

other provisions of the original Constitution employ the term in ways that establish that the President is *not* an "officer of the United States." Section 3 must be read consistently with them.

First, Article II, Section 2's Appointments Clause distinguishes between the President and Officers of the United States. The Clause provides that the President may nominate, and with the advice and consent of the Senate, may appoint "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all other Officers of the United States*." U.S. Const. art. II, § 2, cl. 2 (emphasis added). This Clause distinguishes the President from appointed "Officers of the United States." Indeed, the Constitution specifies that the President is "elected," not appointed. U.S. Const. art. II, § 1, cl. 1. As Chief Justice John Marshall observed, an "officer of the United States" must be "an individual [who] is appointed by government." *U.S. v. Maurice,* 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, C.J., Circuit Justice).

Second, Article II's Impeachment Clause follows the distinction drawn in the Appointments Clause. Article II expressly provides that "[t]he President, Vice President *and all civil Officers of the United States,* shall be removed" upon impeachment and Senate conviction. U.S. Const. art. II, § 4 (emphasis added). The carefully considered specification of the President, as distinct from "all civil Officers of the United States," shows that the President is not to be considered as belonging to the latter class. If officers of the United States included

the President, then the Impeachment Clause's listing of the President would have been redundant – a violation of Chief Justice Marshall's dictum in *McCullough v. Maryland,* 17 U.S. (4 Wheat.) 316, 414-20 (1819), that every word of the Constitution must be given meaning.

This conclusion is confirmed by the drafting history of the Impeachment Clause. As Professor Blackman and Tillman observe, "the phrase '[President, Vice President,] and *other* Civil officers of the U.S.' was changed to 'President, Vice President, and Civil Officers of the U.S.' And in its final form, the Impeachment Clause became: 'President, Vice President, and *all* civil Officers of the United States.'" Blackman & Tillman, *supra*, at 9. These surgical changes reveal that the Framers paid close and careful attention to the precise meaning and scope of the term "civil Officers of the United States." They further show that the Framers settled on language that made clear that the President and Vice President were not "other" civil Officers of the United States, but that "all" of the latter belonged to a different constitutional category from the former.

Justice Joseph Story, in his *Commentaries on the Constitution of the United States*, reached exactly that conclusion: he affirmed that the language of the Impeachment Clause established that the President and Vice President "were enumerated, as contra-distinguished from, rather than as included in the description of, civil officers of the United States." 3 Joseph Story, Commentaries on the Constitution of the United States § 791, at 259–60 (1833).

Third, Article VI's Oath or Affirmation Clause reads, in part:

> The Senators and Representatives before mentioned, 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. Const. art. VI, cl. 3. The President is not explicitly designated in this Clause, nor is the President implicitly subsumed into the Clause's category for "all executive and judicial Officers[] . . . of the United States." The President is not constitutionally required, before entering into office, to swear an Article VI oath to "support" the Constitution.

Instead, consistent with the President's unique constitutional role, Article II provides a separate Presidential Oath Clause:

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "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. Const. art. II, § 1, cl. 8. The jurisdictional language of Section 3 instead echoes Article VI's Oath

Clause. The connection between Section 3's jurisdictional element and Article VI's Oath Clause further indicates that Section 3 covers office-holders who took Article VI's oath, while it does not cover the President, who takes a separate Article II oath.

Moreover, the Article VI Oath Clause requires the officers subject to it to swear an oath (or make an affirmation) to "support" the Constitution. The Article II Presidential Oath Clause prescribes a form of words for the President that does not require him to "support" the Constitution, but rather to "preserve, protect and defend" it. Section 3 of the Fourteenth Amendment applies to "officer[s] of the United States" who have taken an oath to "support" the Constitution. The fact that the President – unlike officers of the United States – does not take an oath to "support" the Constitution further confirms that Section 3 does *not* include the President within its jurisdiction. Instead, Section 3 applies only to those officers who have taken the Article VI oath.

Note that the Article II Presidential Oath Clause explicitly states that the Presidency is an "Office." But it does not follow that the President is therefore an "Officer of the United States." The fact that the Presidential oath is constitutionally distinct from the Article VI oath prescribed for "Officers of the United States" underscores that the President is *not* in the latter category. Some might incorrectly infer that the President is an "officer of the United States" from constitutional language referring instead to "offices." For example, some scholars cite the Presidential Oath Clause's reference to "Office" to

show that the President must be an "officer of the United States." William Baude & Michael S. Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 109), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 ("If the Presidency is not an office, nothing is.") But that Article II Clause, when compared with the Article VI Oath Clause, shows that the President is *not* an "Officer of the United States."

Fourth, the Commission Clause provides that the President "shall Commission *all* the Officers of the United States." U.S. Const. art. II, § 3. The President does not commission himself, the Vice President, Senators, or Members of Congress. Instead, the Constitution declares that the President is elected. The President does, however, commission *appointed* officials, such as those who serve in the Executive Branch. Here again, as it does in the Appointments, Impeachment, and Oath Clauses, the Constitution draws a clear line between the President and Officers of the United States. Just as Chief Justice John Marshall declared in *McCullough* that every word in the Constitution must be given a meaning, we also cannot give identical words in the Constitution different meanings.

The term "officer of the United States," as used in Section 3 of the Fourteenth Amendment, must be read to have the same meaning as it obviously carries in the four other places of the original Constitution. There is no powerful, contrary evidence that the Fourteenth Amendment's use of "officers of the United States" must deviate from the meaning it has

throughout the original Constitution's text. Nor is there any evidence of a generally recognized semantic shift in the meaning of "officers of the United States" between the adoption of the Constitution and the ratification of the Fourteenth Amendment. Some might argue that the term "officer of the United States" should be interpreted by reference to the term "office" as it is used elsewhere. See, e.g., Baude & Paulsen, *supra*, at 109 (arguing that the President is an officer because "Article II refers to the 'office' of President innumerable times"). They make the mistake of focusing on the wrong constitutional term. They should have looked instead at the *identical* term, "Officer of the United States," as it appears in four other constitutional texts, to determine what that term means in Section 3.[2]

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[2] These textual conclusions are not disturbed by Attorney General Henry Stanbery's 1867 opinions on the meaning and application of the Reconstruction Acts, which incorporated the proposed (but still unratified) Section 3 by reference in a provision disenfranchising anyone who had "taken an oath as a member of the Congress of the United States, 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, and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof." The Reconstruction Acts, 12 U.S. Op. Atty's Gen. 141, 143 (1867). Stanbery read the *statutory* term "officer of the United States" as applying "it its most general sense, and without any qualification, as legislative, or executive, or judicial . . . it was intended to comprehend military as well as civil officers of the United States." *Id.* at 158. Those advocating President Trump's disqualification map Stanbery's interpretation onto the Reconstruction Act, and then attempt to map the Act onto Section 3. But this move is obviously erroneous. According to Stanbery, the Reconstruction Act includes Senators

II. Section 3 of the Fourteenth Amendment is Not Judicially Enforceable Without Implementing Legislation

Only very rarely does a constitutional clause create an implied private cause of action.[3] Section 3's text does not provide for judicial enforcement at the behest of a private litigant, nor does it explicitly authorize such enforcement by a state. The Section should not be read to enable such litigation absent any

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and Representatives among "officers of the United States." But the Constitution, including Section 3, does not. That conclusion had been confirmed early in the 19th century, with the attempted impeachment of a Senator: the attempt was widely considered to have failed because a Senator was not an "officer of the United States" and hence not subject to impeachment. See Story, supra, at § 791 (impeachment of Senator Blount). If Stanbery's interpretation of the Act were mechanically applied to Section 3 as well, then Section 3's express reference to "member[s] of Congress" would have been superfluous. It was not.

[3] The federal courts have regularly rejected, on Article III standing grounds, the claims of plaintiffs to enforce constitutional disqualifications or prohibitions in the absence of applicable legislation. See, e.g., *Ex parte Levitt,* 302 U.S. 633 (1937) (Ineligibility Clause); *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208 (Incompatibility Clause); *McClure v. Carter,* 513 F. Supp. 265 (D. Idaho 1981) (3 judge district court) (Ineligibility Clause); *Blumenthal v. Trump,* D.C. Cir., No. 19-5237) slip op. (Feb. 7, 2020) (Foreign Emoluments Clause), https://www.cadc.uscourts.gov/internet/opinions.nsf/2EFD382E65E33B3C852585070055D091/$file/19-5237-1827549.pdf.

enforcement mechanism that Congress has enacted under its Section 5 (or other appropriate) powers.

In *Armstrong v. Exceptional Child Center, Inc.,* 575 U.S. 320 (2015), this Court held that the Supremacy Clause, "certainly does not create a cause of action." *Id.* at 325. The Court rejected any notion that that clause, in itself, gave "affected parties a constitutional (and hence congressionally unalterable) right to enforce federal laws against the States." *Id*. It was "unlikely that the Constitution gave Congress such broad discretion with regard to the enactment of laws, while simultaneously limiting Congress's power over the manner of their implementation, making it impossible to leave the enforcement of federal law to federal actors." *Id*. at 325-26.

Armstrong's reasoning undermines any claim that Section 3 creates an implied private right of action. Section 5 of the 14th Amendment specifically vests in Congress a broad discretionary power over how Section 3 is to be enforced. It is unlikely that Section 3 simultaneously *limits* Congress' enforcement discretion by vesting enforcement authority in any number of private litigants as well. Moreover, if Section 3 did create such a private cause of action, then that right would be "constitutionally unalterable," and could not be constrained or divested by an Act of Congress.

The conclusion of the Colorado Supreme Court below that Section 3 of the Fourteenth Amendment is judicially self-executing would severely incapacitate Congress. Congress could not decide how to pursue the policies behind Section 3; it could not channel or control the enforcement of Section 3. Consequently,

uniform national enforcement would have to give way to the vagaries of private enforcement in State and federal courts throughout the country. The results would be extremely disruptive to the national political system by inviting different standards of eligibility for office in as many as fifty jurisdictions and shattering public confidence in our choices of a President or Members of Congress. It is impossible to believe that Section 3 was designed to produce such results. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 (1995) ("Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure. ")

Chief Justice Salmon Chase's opinion (as Circuit Justice) in *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869), confirms the conclusion that Section 3 is not judicially self-executing. Although not binding precedent on this Court, *Griffin* is highly probative evidence of the original public meaning of Section 3. It was decided within a year of the Fourteenth Amendment's ratification, and it issued from the pen of the Chief Justice of the United States. Chief Justice Chase was a seasoned antislavery lawyer who had been a leading abolitionist before the Civil War, who had served as President Abraham Lincoln's Secretary of Treasury, and whom Lincoln had appointed as Chief Justice in 1864. Chase personally, and closely, witnessed the events of the Civil War and the early Reconstruction, including the debates over the drafting and ratification of the Fourteenth Amendment. (Indeed, he advised President Andrew

Johnson to abandon his objections to the proposed amendment.)

Griffin's Case was an appeal from a Virginia state court's grant of habeas relief to Caesar Griffin, who had been sentenced to imprisonment for two years by a state trial judge. Griffin maintained that the state judge had been a member of the Virginia state legislature and later had joined the Confederacy, and hence was disqualified to hold office under Section 3. Chief Justice Chase denied habeas relief on three separate grounds, one of which concerned the meaning of Section 3. Chief Justice Chase framed this question as follows: "whether upon a sound construction of the [fourteenth] amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition [in Section 3], and as depriving them at once, and absolutely, of all official authority and power." *Id*. at 23. Chief Justice Chase held that it did not.

Chief Justice Chase announced and applied two canons of constitutional construction. First, Chief Justice Chase affirmed the primacy of "plain words or clear reason." *Id*. at 24. But neither "plain words" nor "clear reason" dictated acceptance of Griffin's reading of Section 3. In such a case, recourse to canons of construction was necessary. First, then, "great attention is properly paid to the argument from inconvenience." *Id.* Chief Justice Chase found that the potential consequences of upholding Griffin's claim would be extremely damaging. Then Chief Justice Chase invoked a second canon of construction that was "entitled to equal consideration." *Id.* at 25. "Of two

constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended." *Id.* at 25. "This principle," Chief Justice Chase affirmed, "forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution." *Id.* Chief Justice Chase found that Griffin's construction fell afoul of this canon. Interpreting Section 3 to be judicially non-self-executing, Chief Justice Chase concluded, presented a reasonable alternative construction that met these two conditions.

Chief Justice Chase buttressed his reading of Section 3 with other language from the Fourteenth Amendment. First, he pointed to Section 5. Chief Justice Chase obviously assumed that by vesting the power to create enforcement mechanisms for the Fourteenth Amendment in Congress, the Amendment had not authorized implementation of all of its provisions by private litigants through the courts. Second, he argued that "[t]here are, indeed, other sections than the third, to the enforcement of which legislation is necessary; but there is no one which more clearly requires legislation in order to give effect to it." *Id.* at 26. Chief Justice Chase thought that the enforcement of Section 3 "clearly requires" implementing legislation, *id.*, more so than any of the amendment's other provisions, including Section 1. Third, he noted the amnesty element of Section 3, under which Congress could remove a disability imposed under Section 3 by a two-thirds vote of each House. The amnesty element, Chief Justice Chase

noted, "gives to congress absolute control of the whole operation of the amendment." *Id*.

This is not to argue for the correctness of every step of Chief Justice Chase's reasoning – although his conclusion is sound. Rather, the point is that in 1869 – within a year Section 3's ratification – the Chief Justice understood the Amendment to mean that Congress, not the courts or private litigants, had the authority to decide how and by whom Section 3 was to be enforced. Chief Justice Chase's holding accords with the strong sense of his fellow Republicans in Congress – the very people who had drafted Section 3, debated it for two years, and proposed it for ratification – that Congress, not private litigants or courts, should play the lead role in enforcing the Section.

Not long after Chief Justice Chase's decision, Congress exercised its Section 5 power to enact the Second Enforcement Act of 1871. The Act allowed a federal prosecutor to remove an officer by a writ of *quo warranto* brought in federal court, but withheld this power from state prosecutors and courts. It seems likely that the members of the enacting Congress were aware of the recent decision of the Chief Justice on a matter of extraordinary importance and sensitivity. In any event, Congress's action is important evidence of the original public meaning of Section 3. Had Congress disagreed with *Griffin's Case* and wished to permit private enforcement of Section 3 (or even enforcement by state courts and officials), it could have used its Section 5 authority to choose that course instead.

Finally, during the congressional debates over Section 3's enforcement, the prominent and influential Senator Lyman Trumbull affirmed that Section 3 was not judicially self-executing but required Congress to create an enforcement mechanism. Trumbull argued:

> Section 3 declares certain classes of persons ineligible for office, being those who, having once taken an oath to support the Constitution of the United States, afterwards went into rebellion against the Government of the United States. But notwithstanding that constitutional provision we know that hundreds of men are holding office who are disqualified by the Constitution. The Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution (emphasis added).[4]

Chief Justice Chase's analysis of Section 3 in 1869, coupled with Congress's enactment of the Second Enforcement Act, provide compelling evidence of the original public meaning of Section 3. These sources support the view that, in its original public meaning,

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[4] Quoted in Kurt T. Lash, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838, at 46. Others in the Reconstruction Era Congress also took it for granted, with Trumbull, that the Constitution was non-self-executing. In an 1870 debate, Representative Davis of New York remarked that "it was long ago settled that the Constitution does not execute itself." Mr. Davis (New York); Congressional Globe, House of Representatives, 41st Congress, 2nd Session 3881-3882 (May 27, 1870).

Section 3 did not, in and of itself, authorize the disqualification of covered persons seeking or holding federal office by private litigants in State or federal courts.

III. Section 3's Offense Element Requires Congressional Legislation

Section 3's offense element speaks of a covered person who "shall have engaged in insurrection or rebellion *against the same*" (emphasis added). "[T]he same" refers back to the immediately preceding phrase "the Constitution of the United States." Not all "insurrections" are covered; rather, the language reaches *only* those that are "against the Constitution." But the text does not define *those* "insurrections" that fall within Section 3's sweep.

While the term "insurrection" may have had a relatively well-understood common law meaning at the time of ratification, the term "insurrection against the Constitution" did not. The latter term likely subsumes the ordinary elements of "insurrection": violence or the threat of it; the actual or threatened violence is the work of a number of different actors working in concert; law enforcement officials are unable to control those actors; the actions have the intent and effect of interfering with the operation of the law. The further requirement that such action be directed "against the Constitution" indicates that only insurrection against federal law, not state law, is relevant under Section 3. But it seems unlikely that *any* violence directed against federal law enforcement, at however low a level, however brief, and however

limited its impact, should count as "insurrection against the Constitution." Common law does not answer the question.

An initially attractive definition might include within the offense element an "insurrection" that interferes with the execution of a responsibility or function that the Constitution assigns to the federal government it or one of its branches. On this understanding, an insurrection "against the Constitution" equates to an insurrection "to hinder or prevent the execution" of the Constitution. Respondents would attempt to fit the events of January 6 into this definition thus: Congress was seeking to discharge its function under the Twelfth Amendment of witnessing the counting of the votes of the Presidential electors. Disrupting the electoral vote count would interfere with the Vice President and Congress's efforts to execute their roles under the Twelfth Amendment.

The problem with this reading, however, is that hindering or preventing the execution of the Constitution covers an extremely broad range of federal activities. Without more specific congressional definition, any interference by a group of insurrectionists with the performance of any constitutional functions or duties assigned to the federal government would amount to an attempt to prevent the execution of the Constitution. For example, the Constitution assigns to the Senate the responsibility to advise and consent to presidential nominees to certain offices. Suppose that a crowd of demonstrators burst into the Senate while it was debating whether to confirm a nominee, overcame

police, and interfered with the vote on the nomination. The crowd's actions would be an effort to prevent or hinder the "execution" of the Constitution. Demonstrations that prevented the House from voting on a measure to provide military aid to a foreign ally would also seem to rise to the level of an insurrection under respondent's approach. Demonstrations in front of this Court that threatened violence and that disturbed its hearing of a case might also count as an insurrection under respondents' theory.

The potential breadth of what it means to "execute" the Constitution, and thus to interfere with its "execution," is illustrated by *In re Debs*, 158 U.S. 364 (1885), in which this Court denied habeas relief to a person imprisoned under a lower court's criminal contempt authority for failing to comply with that court's injunction in a labor dispute. Defendants in that case had interfered with laws enacted pursuant to Congress's authority to regulate interstate commerce and the carrying of the mails. *Id.* at 581. Under respondents' theory, violent union actions that violated labor laws would amount to an insurrection under Section 3. Further underscoring respondent's boundless interpretation, the Constitution charges the President with the faithful execution of the law. Insurrectionary attempts to prevent or hinder the implementation of federal statutory law would thus also appear to be insurrections "against the Constitution."

The task of defining the offense element of Section 3 belongs, at least in the first instance, to Congress.[5] Defining the scope and limitations of the offense element is not like defining the meaning of "insurrection" in the common law or under a statute. There is simply insufficient evidence for state courts to decide, without congressional guidance, what this component of Section 3 means. And that in turn buttresses the conclusion that the Section is not judicially self-executing.

Even if this Court were to conclude that Congress has taken steps to implement Section 3, none of these possible measures would apply to the Petitioner. Congress's punishment of insurrection occurs at 18 U.S.C. § 2383. That law declares that "whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto," is subject to prosecution for a felony. Congress set the penalty at a fine and/or imprisonment for up to ten years and rendering a felon "incapable of holding any office under the United States." To the extent that the federal government even permits a judicial proceeding against anyone for insurrection against the United States, Section 2383 requires that a federal prosecutor bring charges in federal court, rather than allowing the states to invent their own definitions of insurrection using their own idiosyncratic procedures.

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[5] To be sure, Congress' determination is subject to this Court's review. *See City of Boerne v. Flores*, 521 U.S. 507, 519-28 (1997).

But more importantly, even if 18 U.S.C. § 2383 were considered an implementation of Section 3 of the Fourteenth Amendment, petitioner has not been convicted in federal court of such an offense. Not only has the Petitioner not been convicted, he has not even been charged. The U.S. Department of Justice declined to include Section 2383 in its August 1, 2023, indictment of the petitioner. See Indictment, *United States of America v. Donald J. Trump*, No. 1:23-cr-00257-TSC (D.D.C.) Aug. 1, 2023, https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf. Instead, the Special Counsel of the U.S. Justice Department charged Petitioner with conspiracy to defraud the United States, obstruction of an official proceeding, and conspiracy to deprive voters of their constitutional rights. Id.

It might even be the case that Congress could carry out Section 3 of the Fourteenth Amendment through impeachment. A President who "engaged in insurrection or rebellion" against the Constitution would certainly have committed "Treason, Bribery, or other high Crimes and Misdemeanors" sufficient for impeachment and removal from office. U.S. Const. art. II, § 4. In its 2021 impeachment of the Petitioner, the U.S. House of Representatives approved a first article charging him with "incitement of insurrection." A Resolution Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, H.Res.24, 117th Cong., 1st Sess. (2021). The U.S. Senate, however, acquitted the Petitioner with 57 voting guilty and 43 voting not guilty, ten votes short of the two-thirds required for removal. Roll Call Vote No. 59, Feb. 13, 2021, 117th Cong., 1st

Sess., https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00059.htm. Thus, the only arm of the federal government to have rendered an official judgment on the question in this case has found that the Petitioner did not engage in insurrection. In the absence of any factual or legal conclusion to the contrary by any branch of the United States government, this Court should pre-empt decisions by the states attempting to implement Section 3 of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below of the Supreme Court of Colorado.

Respectfully submitted,

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