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 *AMICUS CURIAE* FOR G. ANTAEUS B. EDELSOHN, IN SUPPORT OF RESPONDENTS

JOAN D. B. EDELSOHN
*Counsel of Record**
460 Center Street
Unit 6045
Moraga, CA 94570
(415) 944-9509
SAGEPropertiesLLC09@gmail.com

* *Counsel for Amicus Curiae G. Antaeus B. Edelsohn*

January 21, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

<u>Constitutional Provisions</u>

Statutes

Congressional Materials

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE*

G. Antaeus B. Edelsohn respectfully submits this brief in support of Respondents, Norma Anderson, *et al.*[1] Mr. Edelsohn is a licensed attorney living in Henrico County, Virginia. He is a registered Virginia voter and intends to vote in the Open Primary and subsequent General Election in that state. As of this filing, a suit is pending in Virginia state court seeking to disqualify Donald Trump from the Virginia ballot. *Perry-Bey et al., v. Alvis-Long et al.,* No. CL24000022-00 (Va. Cir. Ct., Richmond City, filed Jan. 2, 2024). How the Court rules in this present case will have a determinative effect on the Virginia case. The ruling will materially affect the composition of the Republican Primary, not just in Colorado, but also here in Virginia, and across the nation.

Given the political and social impact of the matter this case presents, Mr. Edelsohn felt a personal ethical obligation to take a stand on behalf of the U.S. Constitution and to advocate for accurate and honest elections, where voters are able to make an informed decision among candidates who are actually eligible to serve if they were to receive a winning number of votes.

---

[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amicus curiae or his counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The central issue of this case, from which all other questions derive, is what is the intent and scope of the Fourteenth Amendment, Section 3. Once that is established, the rest of the answers become apparent and are easily addressed. This Brief uses historical records of both Congress and the general public to show the drafters clear intention for Section 3 of the Fourteenth Amendment to apply to the offices of the President and Vice President, and that this was consonant with the understanding the wider public would have had.

This Brief emphasizes that the operative element of Section 3 is whether someone in a position of governmental power or authority took an oath to support the Constitution, and then broke that oath. Accordingly, any interpretation which fails to apply section 3 to the President and Vice President would not only lead to an absurd result but would be demonstrably at odds with the intentions of the drafters.

This Brief shows how both the language of Section 3 states a factual condition, not a potential outcome based upon speculative enforcement, and that the provision granting congressional authority to act is permissive but not required for applicability. As such this renders Section 3 to be self-executing and thus not in need of supplemental enacting legislation by Congress for federal entities or states to enforce it. This is supported by rulings of state supreme courts and by the language and history of other constitutional provisions and amendments with similar language granting Congress authority to act if necessary. Additionally, Congressional passage of

acts to remove the disability incurred by Section 3 would have been unnecessary if it was not self-executing. The fact Congress did in fact pass legislation explicitly to remove disabilities imposed by Section 3 conclusively proves Congressional understanding and intent that the provision was self-executing.

Finally, this Brief addresses the argument that preclusion of a potential candidate from a ballot due to a constitutional disability would be a violation of the First Amendment. Caselaw and the application of basic legal principles proves there is no First Amendment issue, and in fact preclusion serves a vital interest to avoid misleading the public regarding an ineligible candidate, and the protection of accurate and honest elections.

Ultimately, answer to the Court's question is that the Colorado Supreme Court did not err in ordering President Trump excluded from the 2024 presidential primary ballot, and its ruling should be affirmed.

ARGUMENT

I. Application of Section 3 of the Fourteenth Amendment to the offices of the president and vice president both conforms with the intent of the drafters and is the obvious plain meaning of the section.

1. The keystone of Section 3 is whether someone in a position of governmental power or authority took an oath to support the Constitution, and then broke that oath.

The central issue in the present case revolves around the purpose and intent of Section 3 of the Fourteenth Amendment, which is written as follows:

> 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.[2]

---

2 U.S. CONST. amend. XIV, § 3.

To understand the intent of the section and appreciate what both the drafters and public at large would have understood as the plain meaning of the section, it is imperative to comprehend the time in which it was written and ratified. In *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989), Justice Scalia wrote on the importance of analyzing statutory language in a manner to best discern and understand the key legislative focus of the law:

> The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated. . . . I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a different result from the one that these factors suggest.[3]

The Fourteenth Amendment to the Constitution was drafted, passed, and ratified in the aftermath of the Civil War, and must be read in the context of addressing scenarios of fundamental threats to the political and social stability of the nation. Though the war had officially ended in May of 1865, the sentiment among many of the rebels was one of continued antipathy toward the North, and especially toward

---

[3] 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

any notion that a state would be subservient to the federal government.[4] Indeed, a journalist at the time found that among the people of the South there was "not merely a broad assertion of the rights of the States, but an open enunciation of the supremacy of the State over the general government. . ."[5] Congress, and the rest of the nation were aware of these sentiments, and the potential for dangerous outcomes which could result if reasserted at the federal level.[6] Specifically, if this view were to prevail in the post-bellum republic, then it stood to reason that *any* oath to support and defend the Constitution would be secondary to one's state allegiance. Since the war had been fought precisely to affirm that the Constitution of the United States was supreme, not the states, any situation which would not firmly establish that fact would have extirpated the most basic lesson from the conflict.

In 1869, in one of the earliest cases where a court was tasked with analyzing the meaning and intent of Section 3, the North Carolina Supreme Court articulated the clear focus of the provision, stating "[*t*]*he oath to support the Constitution is the test*. The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded

---

[4] Sidney Andrews, a journalist for two Northern newspapers, spent September, October, and November of 1865 touring the South and speaking with the people there, documenting what he saw and heard, and published a series of articles in 1865 and then a book in May of 1866. SIDNEY ANDREWS, THE SOUTH SINCE THE WAR: AS SHOWN BY FOURTEEN WEEKS OF TRAVEL AND OBSERVATION IN GEORGIA AND THE CAROLINAS (1866).

[5] ANDREWS, at 333.

[6] *See* note 4, *supra*.

from taking it again, until relieved by Congress." *Worthy v. Barrett and Others*, 63 N.C. 199, 204 (N.C. 1869) (emphasis in original). This statement neatly addresses what should be the extent of the matter at hand.

Worthy appealed that decision to this Court under Section 25 of the Judiciary Act of 1789, which allowed for Supreme Court review of state court decisions regarding state interpretation of the "validity of a treaty or statute of, or an authority exercised under the United States."[7] Though this Court dismissed the appeal for want of jurisdiction, it noted "[t]here was no decision by the Supreme Court of North Carolina . . . in favor of the validity of a statute of, or authority exercised under a state, and alleged to be repugnant to the Constitution, treaties, or laws of the United States." *Worthy v. Commissioners*, *dismissed* 76 U.S. 611, 613 (1869). The Court was aware of Worthy's claim that the County Commissioners who refused to swear him in as sheriff lacked any authority under the Fourteenth Amendment, when it dismissed his case, effectively siding with the ruling of the North Carolina Supreme Court. Again, that ruling said the central focus of Section 3 rests on whether one has taken an oath to support the Constitution and, if taken, whether the oath was honored or broken. If the public trust in a person holding an important state or federal position is likened to an arch, an oath to support the Constitution would be the keystone of such an arch. This means, by extension, if the oath is broken, through "engaging in insurrection or rebellion against the same, or given aid or comfort to the

[7] Judiciary Act of Sept. 24, 1789, ch. 20, §25, 1 Stat. 73, 85 (1789).

enemies thereof,"[8] then the keystone of the arch is broken, and the whole thing comes crumbling down. A broken arch becomes a constitutional disability, which can support no public trust unless and until Congress acts to "remove such disability."[9]

As the Court evaluates the arguments in this case it is important to remember this is a constitutional amendment, and not a highly specialized piece of legislation. The US Courts website proudly proclaims, "[t]he U.S. Constitution is the nation's fundamental law" and "codifies the core values of the people."[10] The Constitution includes the amendments thereto, and as such, the proper method of analysis is to look at what would have been readily understood by the general public. This argues against a convoluted interpretation, relying on arcane and abstruse knowledge. As the decision in *Worthy v. Barrett* shows, the meaning of Section 3 is plain and boils down to a simple binary; whether someone of significant governmental position swore an oath to support the Constitution and then broke that oath, or not.

While the specifics of *Worthy* dealt with the applicability of Section 3 to a lower-level state officer, the central issue is identical in the case at bar, and the result should likewise be identical.

---

[8] U.S. CONST. amend. XIV, § 3.

[9] *Id.*

[10] *Overview – Rule of Law*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law# (last visited Jan. 16, 2024).

2. Any interpretation which fails to apply section 3 to the President and Vice President would not only lead to an 'absurd result,' but would be demonstrably at odds with the intentions of the drafters.

Since the fundamental core of Section 3 lies in the swearing of an oath to support the Constitution, any judicial declaration on the scope of applicability must include the President and Vice President, as any other outcome would be patently absurd. This Court has remarked on numerous occasions against deciding cases based on interpretations which would lead to "absurd results." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). *See also*, *United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994) (rejecting an interpretation of a criminal statute which would result in an "absurd result"); *and*, *Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989) ("Where [a] reading of a statutory term would compel 'an odd result' . . . we must search for other evidence of congressional intent to lend the term its proper scope."). After all, while the Constitution specifically notes how the legislators and executive and judicial officers at both the federal and state levels "shall be bound by Oath or Affirmation, to support [the] Constitution,"[11] only the President has the oath of office explicitly laid out in the text of the Constitution: "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

[11] U.S. CONST. art. VI, cl. 3.

United States."[12] To infer the drafters intended a situation where the single-most powerful office holder in the nation could violate a sacred oath to the nation and retain eligibility for future service but prohibit the same to other, less powerful positions, would be akin to leaving a proverbial 500lb gorilla out of the zoo enclosure.

Instead, the Court should look to the large repository of information displaying the intent of the drafters, present in the historical record, and rule in the manner to best conform to that intent. This Court has made clear the importance of legislative intent when applying constitutional or statutory law: "We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted . . ." *Mattox v. United States*, 156 U.S. 237, 244 (1895).[13] As part of the process to determine the constructive intent, this Court has repeatedly stated it is at "liberty . . . to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress." *United States v. Great Northern Ry.*, 287 U.S. 144 (1932). Perhaps most relevant to the nature of this case, this Court has declared that where the "application of a statute [or lack of application] will produce a result demonstrably at odds with the intentions of its drafters . . . those intentions must be controlling." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). The intent is clearly in favor of application of Section 3 to the President.

---

[12] U.S. CONST. art. II, § 1, cl. 8.

[13] *See also,* Foster v. United States, 303 U.S. 118, 120 (1938) ("Courts should construe laws in harmony with the legislative intent and seek to carry our legislative purpose.").

In more concrete terms, when analyzing the meaning and intent of the drafters, the Court should keep in mind that just because the people of the mid- and late 1860's could not reasonably foresee a forthcoming instance of a United States President turning traitor to the country and supporting rebellion or insurrection, does not mean they intended Section 3 to be limited in scope. Rather, a look at the historical records shows that while the most immediate and pressing issue at the time to be the prevention of rebels who had previously sworn oaths of loyalty, either in Congress, the military, departments of the Executive, or in the Judiciary, from regaining positions of governmental power,[14] that was not the extent of the concern. In fact, while the people of the South "owned their defeat" from a military perspective, "Southerners saw no reason why they should not simply resume their traditional leading role" in the functions of the nation, "dominat[ing] the White House, the Supreme Court, and Capitol Hill."[15] As noted journalist and writer Whitelaw Reid described, there was considerable push in the end of 1865 by Southern elites to get back into Congress and begin reestablishing their hold over the federal government: "The Capital had been full of

---

[14] *See*, *e.g.*, Garrett Epps, *The Undiscovered Country: Northern Views of the Defeated South and the Political Background of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 411 (2004). *Cf.* CONG. GLOBE, 39th Cong., 1st Sess., at 6 and 24-30 (1865) (detailing the introduction in the House of a resolution by Congressman Stevens to establish a Joint Committee on Reconstruction, and the debate over the resolution in the Senate, respectively; this Committee would end up drafting the 14th Amendment).

[15] Epps, at 415.

exciting rumors for a fortnight, on the subject of the admission or the rejection of the Southern Representatives and Senators; and, finally, the action of the House Union Caucus had been announced; but, still the Southern aspirants hoped against hope."[16] While this push was effectively stymied by the insistence of key Congressional members to apply the Ironclad Oath,[17] the intent of the former rebels was clear:

> The preponderating Rebel element, which reorganized the State Governments under Mr. Johnson's proclamations, first expected to take Congress by a *coup de main*, organize the House through a coalition with the Northern Democracy, and, having thus attained the mastery of the situation, repeal the war legislation and arrange matters to suit themselves. Defeated in this by the incorruptible firmness of Mr. McPherson, the Clerk, they next hoped by Executive pressure, combined with Southern clamor, to force a speedy admission of all Representatives from the rebellious States who could take the prescribed oath. These once in, the rest was easy. They were to combine with the Northern Democracy and such weak Republicans as Executive influence could control, repeal the test oath, thus admit all the other Southern applicants, and turn over the Government

---

[16] WHITELAW REID, AFTER THE WAR, A SOUTHERN TOUR: MAY 1, 1865, TO MAY 1, 1866, at 429 (1866).

[17] Act of July 2, 1862, ch. 128, 12 Stat. 502 (1862).

> to a party which, at the North, had opposed the war for the Union, and at the South had sustained the war against it.[18]

While this shows the first step was Congress, the ultimate goal of former rebels was unmistakably set at reclaiming all levels and branches of government, up to and including the Presidency. After all, the best way to ensure their interests could be served, and agenda implemented, would be to have a sympathetic President who would not veto the bills, and a federal judiciary which would not challenge their actions.

The Court should also note the expansive scope of the text of the aforementioned Ironclad Oath, which read in part:

> I, AB, do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto.[19]

---

[18] REID, *supra* note 16, at 439.

[19] Act of July 2, 1862, ch. 128, 12 Stat. 502 (1862).

At the time the Fourteenth Amendment was being drafted and debated, the people in the country, were intimately aware of this oath, and who it would affect. Southerners were constantly informed, as harangues against it featured prominently in Southern newspapers, and people in the North had been personally subject to the oath since its passage.[20] Congress itself would have been keenly aware of the scope and text of the oath, as Representative Schuyler Colfax was sworn in as Speaker of the House for the 39th Congress, in December 1865, with the oath, in front of the entirety of the members-elect and a full press corps.[21] Almost more important than the text of the oath itself though, is to whom it was to be applied:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter every person elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military, or naval department of public service, *excepting the President of the United States*, shall, before entering upon the duties of such office, and before being entitled to any of the salary or other

[20] Reid notes the amount of public outcry in Southern newspapers over the requirement to take the oath after the South had lost. REID, *supra* note 16, at 291. Clearly, the public was well aware of the situation regarding the oath.

[21] REID, *supra* note 16, at 436–437.

> emoluments thereof, take and subscribe the following oath or affirmation.[22]

Congressional knowledge of the fact the Ironclad Oath did not apply to the President is centrally important when analyzing Section 3 of the Fourteenth Amendment, specifically in the fact Section 3 *does not* have an exclusion for the President. This Court's jurisprudence specifically ascribes an intentionality to Congress' actions when language is omitted. *See, e.g.*, *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 79 (1990) ("In casual conversation, perhaps, such absent-minded duplication and omission are possible, but Congress is not presumed to draft its laws that way."). Given the fact the members of the 39th Congress were aware the language prefacing the Ironclad Oath, the decision of the drafters of Section 3 to omit any exclusion for the President and Vice President is deeply telling and indicative of an intent for coverage by the provision.

In response to the obvious question of why not include direct reference to the President and Vice President, the principle of Occam's razor suggests the most pressing concern was preventing former rebels from regaining positions they had held prior to the war or had vacated as part of their adherence to the rebellion. People who had served in state government and in various positions across the U.S. government would have been quite numerous. In contrast, there simply were too few people who had served as President or Vice President who were alive at the

---

[22] Act of July 2, 1862, ch. 128, 12 Stat. 502 (1862) (emphasis added); The prefatory language was brought up before Congress again in December of 1863. CONG. GLOBE, 38th Cong., 5th Sess., at 1553 (1863).

time, and none of them had served the Confederacy.[23] This lack of attention almost certainly would have been different had John Tyler been alive at the time, as he not only actively worked to create the Confederacy, but he died as a member of the Confederate House of Representatives in 1862.[24] His death, 4 years before the Amendment was even considered, made any issue of his regaining a position in the federal government moot, though he would have also been prohibited from future service as a former Congressman. That being said, it simply strains credulity that should Tyler have been alive, and not otherwise covered as a former member of Congress, the drafters of Section 3, or the population at large, would have understood Section 3 to not apply to him as a former President.

The statements of the drafters of Section 3 resoundingly support this position. Senator Henry Wilson (MA) argued that "no person who has resigned or abandoned or may resign or abandon any office under the United States, and has taken or may take part in rebellion against the Government thereof, shall be eligible to any office under the United States.

---

[23] When the 14th Amendment was being discussed in early to mid-1866, the only living former presidents were Millard Fillmore, Franklin Pierce, and James Buchanan, all of whom were from Northern States. The only living former Vice Presidents at the time (not including Fillmore) were John Breckinridge (with Buchanan) and Hannibal Hamlin (with Lincoln). *See generally*, *Presidents, Vice Presidents, and First Ladies*, USA.GOV, https://www.usa.gov/presidents (last visited Jan. 9, 2024).

[24] *John Tyler*, WHITEHOUSE.GOV, https://www.whitehouse.gov/about-the-white-house/presidents/john-tyler/ (last visited Jan. 9, 2024).

. ."[25] Senator Daniel Clark (NH) echoed this position, arguing that proposed language which would only disenfranchise insurrectionists until 1870 did not adequately address the seriousness of engaging in rebellion, and instead stated that "the exclusion of many of those who participated in the rebellion from participation in the administration of our Government, is desirable."[26] In explaining to whom he meant this embargo to apply, Clark stated Congress "should take the leaders of the rebellion, the heads of it, and say to them, 'You never shall have anything to do with this Government.'"[27] The Court should also take care to note that Clark was not seeking a broad policy of vindictive revenge as he actually encouraged Congress to "let those who have moved in humble spheres return to their loyalty and to the Government."[28] To point out the obvious, in the case at hand, it should be clear the President, by simple reason of the office, is NOT one who 'move[s] in humble spheres.'

In this same debate, Senator Jacob Howard (MI) joined in colloquy with Senator Clark regarding the scope of who should be included in this embargo from federal service, to specifically address the fact that "[a]ny person who has taken an oath to support the Constitution as a member of Congress or as a Federal officer must be presumed to have intelligence enough if he entered the rebel service to have entered it

---

[25] CONG. GLOBE, 39th Cong., 1st Sess., at 2770 (1866).

[26] CONG. GLOBE, 39th Cong., 1st Sess., at 2771 (1866).

[27] *Id.*

[28] *Id.*

voluntarily."[29] This is to say, for those who were entrusted by the electorate or through appointment by elected officials, to knowingly cleave to those engaged in insurrection or rebellion, or take part in such activities themselves, they can have no excuse or cause for leniency for their actions.

In the House debates over the Fourteenth Amendment, Congressman Rufus Spalding (OH) was explicit in describing the scope and reach of section 3, specifically in light of the clause granting Congress the ability to rehabilitate any person who was disqualified under the section:

> Now, it has been claimed by some that [the ability of Congress to remove the disability from service] would put it into the power of two thirds of each branch of Congress to annul this amendment of the Constitution after it shall have been adopted. I say that such never could be the construction put upon this provision by any court under the light of the sun.[30]

Spalding went on to explain how a disability under this section was personal and would have to be addressed on an individual basis: "Remove what disability? The personal disability in each individual case, and not to remove the provision of the Constitution itself, *which is to stand for all time*."[31]

---

[29] *Id.*

[30] CONG. GLOBE, 39th Cong., 1st Sess., at 3146-3147 (1866).

[31] *Id.* at 3147, (emphasis added).

In a floor debate, after passage but before ratification of the Fourteenth Amendment, regarding whether to seat Senator-Elect Philip Thomas (MD), Senator Lyman Trumbull (IL), the author of the Civil Rights Act of 1866 and the Thirteenth Amendment, and a supporter of the Fourteenth Amendment,[32] stated "it was preposterous that any man should come here to legislate for the United States and take an oath to support the Constitution of the United States who was engaged in an effort to overthrow and disrupt the Union."[33] If the idea that a rebel should legislate for the U.S. was preposterous, how much more preposterous would it be for someone who violated their oath to "preserve, protect and defend the Constitution" to then be allowed to once again be placed in charge to "faithfully execute" those very same duties?[34]

3. The drafters would have been aware the Electoral College could not act as an unassailable bulwark to prevent a constitutional crisis if Section 3 does not apply to the President and Vice President.

In analyzing the reach of Section 3, some constitutional scholars have argued the fact that presidential elections rely on the Electoral College, instead of a direct vote, serves as an unassailable bulwark to prevent an ineligible candidate from being

---

[32] David B Kopel, *Lyman Trumbull: Author of the Thirteenth Amendment, Author of the Civil Rights Act, and the First Second Amendment Lawyer*, 47 LOY. U. CHI. L. J. 1117 (2016).

[33] CONG. GLOBE, 40th Cong., 2d Sess., at 1146 (1868).

[34] U.S. CONST. art. II, § 1, cl. 8.

elected President. This argument is ultimately unsupportable considering the text of the Constitution itself and this Court's own jurisprudence.

A perfect example to explain the irrationality of failing to apply Section 3 to the President and Vice President, and the futility of relying solely on the Electoral College, lies in presidential line of succession. In mid-1866, when the Fourteenth Amendment was being drafted and debated, the issue of presidential succession was covered by legislation from the 2nd Congress in 1792, which provided for the "President of the Senate pro tempore, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives," to act as President in case of emergency.[35] Congress at the time could not but have been fully aware of this fact, as the office of Vice President was vacant since Andrew Johnson had assumed the Presidency upon the assassination of President Lincoln, in April of 1865. It is important to note the Vice Presidency would remain vacant through the entirety of Johnson's administration, through 1869, well after the Fourteenth Amendment had been ratified by 30 states and adopted into the Constitution.[36] Any argument that the general populace would have understood the Electoral College was to be the line of defense against a former rebel assuming the

[35] Pub. L. No. 2-8, § 9, 1 Stat. 239, 240 (1792).

[36] *Intro.3.4 Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments),* CONSTITUTION ANNOTATED, CONSTITUTION.CONGRESS.GOV, https://constitution.congress.gov/browse/essay/intro.3-4/ALDE_00000388/ (last visited Jan. 10, 2024).

Presidency fails in light of the fact they would have been aware the Vice Presidency was vacant, and thus the President of the Senate pro tempore would assume the Presidency in case of emergency.

This is almost identical to the current presidential order of succession, as defined by statute, where the Speaker of the House is second in line behind the Vice President, and the President pro tempore of the Senate is third.[37] The Court is aware the Constitution grants the House and the Senate the exclusive rights to "chuse their Speaker"[38] and "President pro tempore"[39] respectively, and while those positions are traditionally filled by members of their respective congressional bodies, there is nothing preventing the appointment of an outside person to the position.[40] This possibility was the subject of much political punditry and media ballyhooing when Mr. Trump's name was floated as a potential candidate for House

---

[37] 3 U.S.C. § 19. Known as the Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380 (1947), the statute provides that in the event "there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall . . . act as President" and if not the Speaker, then the "President pro tempore of the Senate."

[38] U.S. CONST. art I, § 2, cl. 5.

[39] U.S. CONST. art. I, § 3, cl. 5.

[40] *See* CHARLES W. JOHNSON ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 656 (2017); *and see* FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES 1019 (rev. ed. 1992); GPO, STANDING RULES OF THE SENATE 1 (2023).

Speaker in October, 2023.[41] The Court should note outside Section 3, the only requirement for a person in either position to assume the presidency would be to meet the birthright, age, and residency requirements, as laid out in Article II.[42] While the possibility of having a non-member chosen as Speaker or Senate President pro tempore would be a profound break from custom and tradition, the fact remains it is possible. Coupled with the possibility, however slight a possibility it might be, that the holder of either of those positions might need to assume the presidency, and there is a clear example of how the Electoral College would be circumvented. Once again, the specter of "absurd results" looms large.[43]

In contemporary practice, the existence of remote possibilities is not even required to show the impossibility of relying upon the Electoral College to prevent a constitutional crisis. This is in light of the Court's decisions in *Ray v. Blair*, 343 U.S. 214 (1952), and *Chiafalo v. Washington*, 591 U.S. ___, 140 S. Ct. 2316 (2020). In *Ray*, the Court rejected the idea of "absolute freedom for the elector to vote his own choice." *Ray*, 343 U.S. at 228. In *Chiafalo*, the Court reaffirmed its ruling from *Ray*, and further held that a state may even "penalize an elector for breaking his

---

[41] *See, e.g.*, Nick Robertson, *Texas Republican says at least 4 colleagues support Trump for Speaker*, THE HILL (Oct. 4, 2023), https://thehill.com/homenews/house/4237024-texas-republican-colleagues-support-trump-for-speaker/.

[42] U.S. CONST. art. II, § 1, cl. 5.

[43] *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892), *and* United States v. Granderson, 511 U.S. 39, 47 n.5 (1994), referenced *supra*.

pledge and voting for someone other than the presidential candidate who won his State's popular vote." *Chiafalo*, 140 S. Ct. at 2320. If a state can prohibit an elector from deviating from the popular vote, and do so with the threat of punishment for a transgression, any argument that the Electoral College could serve as a sufficient bulwark to prevent election of a President who would otherwise be disqualified under Section 3, fails outright.

II. Section 3 of the fourteenth amendment is self-executing and does not need supplemental legislation by congress for states to apply it to someone who engaged in insurrection or revolt.

1. The language of Section 3 states a factual condition, not a potential outcome based upon speculative enforcement.

Using simple linguistic analysis, the most obvious reading of Section 3 of Article 14 is that it is self-executing and does not need supplemental legislation by Congress in order to apply as a constitutional disability. Accepting as axiomatic the grade school adage that every complete sentence contains two parts, a subject and a predicate, where the predicate explains or describes the subject, the predicate of Section 3 makes a definitive statement of eligibility for elected or appointed positions for any given person, the subject. The language reads, "[*n]o person* shall be . . . or hold any office, civil or military, under the United States . . . *who*, having previously taken an oath . . . 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."[44] This language lays out a strict binary guideline of eligibility, where one either has the capacity to hold a position or, as in the case before the Court, they do not.

This is nearly identical in operation to the last sentence of the Twelfth Amendment, which states, "[b]ut no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States,"[45] and Section 1 of the Twenty-second Amendment: "No person shall be elected to the office of the President more than twice . . ."[46] There is no debate of substance that Congress need enact supplemental legislation to ensure either of these constitutional amendments are enforceable. The passage and ratification of the amendments established simple binary tests, with which prospective individuals either passed or they did not. No legislation from on high was or is necessary.

Some modern scholars have argued Section 3 is not self-executing and try to point to Congressman Thaddeus Stevens' remark during a debate over proposed text of the amendment, that "it will not execute itself."[47] This argument is spurious as Stevens made the remark in response to proposed text which would have merely disenfranchised the insurrectionists from voting for federal officers or

---

[44] U.S. CONST. amend. XIV, § 3. (emphasis added).

[45] U.S. CONST. amend. XII.

[46] U.S. CONST. amend. XXII, § 1.

[47] CONG. GLOBE, 39th Cong., 1st Sess., at 2544 (1866).

presidential electors.[48] Similarly, some scholars point to *Griffin's Case,* 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5815), which held that not only was Section 3 not self-executing, but also that Congress has exclusive control over the operation of the amendment. This is also grossly misguided for multiple reasons, not least of which is the fact the arguments in the opinion are self-contradicting.[49] Beyond that though, the ruling ignores the fact that Congress has limited scope in which to act regarding legislating at the state or municipal level.[50] Without express authority to act included in the amendment, Congress would effectively be hamstrung in any attempt to ensure state-level actions complied with the constitutional mandate. Furthermore, it incorrectly equates the ability to act, through a grant of power, with an obligation to act in order to give the Section meaning. This essentially renders Section 3 (and by extension, any other constitutional amendment with a similar section) a dead letter until some supplemental legislation is passed. The idea that the drafters of the Amendment, and especially Section 3 for the purposes of this case, expended the amount of time and energy

---

[48] The proposed text on which he was commenting read, "Until the 4th day of July, in the year 1870, all person 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 and Vice President of the United States." CONG. GLOBE, 39th Cong., 1st Sess., at 2542 (1866).

[49] A lengthier analysis of the faulty reasoning in that case, is discussed in depth by prominent constitutional scholars. *See,* William Baude & Michael Paulsen, *The Sweep and Force of Section Three,* 172 U. PA. L. REV. (forthcoming 2024).

[50] U.S. CONST. art. I, § 8.

on crafting the language only for it to be unenforceable upon ratification is perverse. The language of Section 5 granting Congress the power to "enforce, by appropriate legislation, the provisions of [the] article,"[51] should properly be understood as a means of preemptively ensuring Congress would have the ability to act *in case it needed to*, in order to ensure the sections of the amendment were being respected.

The understanding that the language of Section 5 is intended to serve as a fail-safe instead of a mandatory requirement is borne out by this Court's jurisprudence regarding women's suffrage and the Nineteenth Amendment. The complete text of that amendment reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation."[52] In *Leser v. Garnett*, 258 U.S. 130 (1922), this Court held the Nineteenth Amendment was properly added to the Constitution, and accordingly the two female subjects of the case, who local officials tried to block from voter rolls, were properly registered as voters. There is no mention that a lack of supplementary federal legislation to enforce the Nineteenth Amendment somehow rendered it inoperable. By analogy to this case, Section 3 is also operable without supplementary federal legislation.

---

[51] U.S. CONST. amend. XIV, § 5.

[52] U.S. CONST. amend. XIX.

2. Congressional passage of legislation to remove the disability incurred by Section 3 would have been unnecessary if it was not self-executing.

The issue with the logic of those who argue against Section 3 being self-executing, is if the provision did not attach a constitutional disability to persons who fell under its purview without supplemental congressional action, then those individuals would have no need of congressional action to remove such disability. Ignoring the fact that two state supreme courts found Section 3 *did* validly impose a constitutional disability,[53] Congress passed two amnesty acts, explicitly for the purposes of removing the disability imposed by Section 3. The Act of May 22, 1872, ch. 193, 17 Stat. 142 (1872), was titled "An Act to remove political Disabilities imposed by the fourteenth Article of the Amendments of the Constitution of the United States," and applied to persons "except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States." *Id.* The Act of June 6, 1898, ch. 389, 30 Stat. 432 (1898), was titled "An Act To remove the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States." The language of the statute, states "the disability imposed by section three of the Fourteenth Amendment to the Constitution of the

---

[53] *See* Worthy v. Barrett, 63 N.C. 199 (1869), mentioned *supra*; In re Tate, 63 N.C. 308, 309 (1869) (holding Tate was ineligible to be a county attorney); State ex rel. Sandlin v. Watkins, 21 La. Ann. 631 (La. 1869) (holding Section 3 affected a candidate's eligibility for certain positions).

United States heretofore incurred is hereby removed." *Id.* The Court should take special note of the language of the 1898 act, specifically in the use of the words "heretofore incurred." *Id.* This clearly means the amnesty was intended to cover only acts of insurrection which occurred prior to the enactment of the Act. Conversely this means any acts of insurrection which might take place afterwards would be subject to the self-executing disability imposed by Section 3. Simply put, for any event or action which transpired after June 1898, as in the matter at present before the Court, the Section 3 disability would be correctly imposed.

III. Preclusion of a potential candidate from a ballot due to a constitutional disability is not a violation of the first amendment, but rather serves to avoid misleading the public.

One of the questions presented in the initial petition for a writ of certiorari, which is still relevant to this case, addressed the applicability of the First Amendment to a political party's choice of candidate.[54] Though the First Amendment prohibition against "abridging the freedom of speech"[55] grants wide latitude to all manner of forms and outlets of expression, it is not a limitless panacea which can grant protection merely by dint of being invoked, as though it were a magic incantation. Any argument

---

[54] Petition for Writ of Certiorari, Colorado Republican State Central Committee v. Anderson, et al., No. 23-696 (S. Ct. Dec. 27, 2023).

[55] U.S. CONST. amend. I.

which is predicated upon an infinite right to free speech should be discounted outright. In fact, as Justice Goldberg, speaking for the Court, so aptly noted, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).[56] To use the First Amendment without restraint as a bludgeon against all other parts of the Constitution would effectively render the entire document useless. As mentioned, *supra*, Article II of the Constitution lays out birth, age, and residency requirements for the Office of President,[57] and the Twenty-second Amendment imposes term limits on how many times a President may be elected.[58] For example, any suggestion that preventing Arnold Schwarzenegger or George W. Bush from being on the 2024 ballot for President would be a violation of the First Amendment, would be utterly preposterous as in the case of both gentlemen, the text of the Constitution bars them from running; *viz.*, they both have a constitutional disability. The situation addressed by this case is analogous to these hypotheticals, as Section 3 of the Fourteenth Amendment attaches a constitutional disability to anyone under its purview, including Mr. Trump, as decided by a Colorado trial court and affirmed by the Colorado Supreme Court. *Anderson v. Griswold,* No. 23SA300, slip op. at 123, 132 (Colo., Dec. 19, 2023).

---

[56] Justice Jackson also made a cautionary warning not to "convert the constitutional Bill of Rights into a suicide pact." Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

[57] U.S. CONST. art. II, § 1, cl. 5.

[58] U.S. CONST. amend. XXII, § 1.

This Court need not rely on hypotheticals however, as Justice Gorsuch has previously ruled on the issue of preventing an unqualified individual from being on a presidential ballot. In *Hassan v. Colorado*, 495 Fed. Appx. 947 (10th Cir. 2012), the Tenth Circuit rejected the notion that an unqualified candidate has a right to be on the ballot when then-Judge Gorsuch wrote: "[A] state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Id.* at 948.

Presented from a different angle, this Court has a long history of holding "the First Amendment does not shield fraud." *Illinois v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003). *See, also, Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established."). Under common law, fraud is "a knowing misrepresentation . . . of a material fact made to induce another to act to his or her detriment."[59] The *Hassan* court implied that the public should be able to rely upon the contents of a government printed ballot, and know that any candidate listed therein would be eligible for the position, and could hold it should they be elected. If an individual is however *ineligible* to hold a position, the deliberate choice to still put that individual on a ballot would reasonably be a knowing misrepresentation of a material fact. Accordingly, it follows that anyone who would then rely on the

[59] *Fraud*, BLACK'S LAW DICTIONARY (10th ed. 2014).

inclusion of the ineligible person in the ballot to incorrectly conclude they were in fact eligible, would be deprived of the opportunity to make an informed decision about which candidate they would choose to support, and would render invalid any vote cast for the ineligible candidate. Put simply, to allow a candidate to appear on a ballot could almost certainly be considered fraud, and therefore not protected by the First Amendment.

* * *

In summary, the constitutional and historical record accords with a straightforward and logical reading of Section 3 whereby the intent of the drafters was clearly to put the focus of the provision on the taking and breaking of an oath to the Constitution. Based on the fact the Colorado Supreme Court upheld the trial court's determination that Mr. Trump engaged in insurrection under the Fourteenth Amendment,[60] Mr. Trump is properly disqualified from the position of President under Section 3 of that Amendment.

CONCLUSION

For the foregoing reasons, the Colorado Supreme Court was correct in its decision to exclude Donald J. Trump from the Colorado ballot after confirming that

[60] A determination which came after a trial with the presentation of evidence and testimony of numerous witnesses. *See, Anderson*, No. 23SA300 slip op. at 47, ¶84. ("The trial took place over five days and included opening and closing statements, the direct- and cross-examination of fifteen witnesses, and the presentation of ninety-six exhibits.").

Mr. Trump engaged in insurrection. Accordingly, the judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

JOAN D. B. EDELSOHN
*Counsel of Record**
460 Center Street
Unit 6045
Moraga, CA 94570
(415) 944-9509
SAGEPropertiesLLC09@gmail.com

**Counsel for Amicus Curiae*
G. Antaeus B. Edelsohn