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 PROFESSOR JAMES T. LINDGREN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Benjamin M. Flowers*
**Counsel of Record*
Joseph A. Ashbrook
Julie E. Byrne
James S. Kresge
ASHBROOK BYRNE KRESGE LLC
PO Box 8248
Cincinnati, OH 45249
(513) 201–5775
bflowers@ashbrookbk.com

Counsel for Amicus Curiae Professor James T. Lindgren

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitutional Provisions

Other Authorities

INTEREST OF *AMICUS CURIAE*

Professor James T. Lindgren is an Emeritus Professor of Law at Northwestern University Pritzker School of Law.* He has authored or co-authored articles in leading law reviews and sociology journals. These works include articles on how Presidents exercise their appointment power and how appointees determine their tenure, along with articles that include discussions of proper constitutional and congressional limits on the President's power under the Appointments Clause of Article II, §2. For several years Professor Lindgren co-taught a course on Judicial Behavior at Northwestern and the University of Chicago Law School with faculty from both schools and with two judges of the United States Court of Appeals for the Seventh Circuit. This Court has cited his historical research. *See, e.g.*, *Evans v. United States*, 504 U.S. 255, 260 nn.4–6, 261 n.9, 264 n.13, 267 n.18, 275, 277, 280 (1992).

In his studies, Professor Lindgren has encountered and reviewed cases and scholarship concerning the phrase "Officers of the United States." U.S. Const., art. II, §2, cl.2. The meaning of that phrase is critical to one of the questions before this Court. Professor Lindgren submits this brief to highlight an important yet insufficiently discussed precedent bearing directly on that question.

---

* No counsel for any party authored this brief in whole or in part. Further, no counsel for any party—and no one other than the *amicus curiae* and his counsel—made a monetary contribution intended to fund the preparation or submission of the brief. *See* Sup. Ct. Rule 37.6.

Professor Lindgren wishes to emphasize that his decision to file is not motivated by his personal political preferences regarding any candidate. Instead, he is filing this brief because it reflects his honest assessment of the legal principles that govern this important case. Presidents are not above the law. But neither are they beneath it. If our constitutional system is to endure, this Court—and the American people—cannot lose sight of that foundational rule-of-law principle.

SUMMARY OF ARGUMENT

Did Donald Trump, in virtue of having served as President, previously serve as an "officer of the United States"? It is undisputed that, unless the answer is "Yes," Section 3 of the Fourteenth Amendment does not apply to Donald Trump and thus does not preclude him from again holding the office of President. Pet.App.70a–73a; Pet.App. 277a.

Yet the answer is "No": the President is not an "officer of the United States." This brief will not belabor arguments raised by other parties and *amici*. Instead, it highlights precedent—namely, *United States v. Smith*, 124 U.S. 525 (1888)—to which scholars and courts have paid too little heed. In fact, the Supreme Court of Colorado did not even cite *Smith* in its decision below. But *Smith* is dispositive. It observed that an "officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department." *Id.* at 532. It then expressly held: "A person in the service of the government who does

not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution." *Id*. The President does not derive his position from one of these sources. He is, therefore, not an officer of the United States *in the sense of the Constitution*.

It follows that Donald Trump never served as "an officer of the United States." Section 3 of the Fourteenth Amendment, therefore, does not apply to him. That is sufficient to reverse the judgment of the Supreme Court of Colorado.

ARGUMENT

This case presents the question whether the Supreme Court of Colorado correctly held that Section 3 of the Fourteenth Amendment prohibits Donald Trump from again serving as President. Correctly understood, it does not.

Section 3 applies only to individuals who previously took an oath to support the Constitution "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." U.S. Const., am. 14, §3. President Trump never served "as a member of Congress, … as a member of any State legislature, or as an executive or judicial officer of any State," and thus never took the requisite oath in those roles. That much is undisputed. Thus, Section 3 applies to Donald Trump only if he previously served "as an officer of the United States." According to the Supreme Court of Colorado, President Trump served as such an officer when he served as President.

The Supreme Court of Colorado erred: the President is not an "officer of the United States" for constitutional purposes. This brief (which is indeed brief) highlights binding precedent saying so. In *United States v. Smith*, 124 U.S. 525 (1888), this Court "authoritatively" defined "officer of the United States" for constitutional purposes. Its authoritative definition excludes the President.

1. *Smith* arose out of a federal indictment. The United States charged Douglas Smith, "a clerk in the office of the collector of customs," *id.* at 531, with seventy-five counts of embezzlement, *id.* at 525 (statement of the case). Relevant to the present discussion, the federal government charged Smith with violating §3639 of the Revised Statutes. *Id.* at 531. That law applied to people responsible for safekeeping money, including "all collectors of the customs, . . . and *all public officers* of whatsoever character." *Id.* at 526 (statement of the case) (quoting Rev. Stat. §3639) (emphasis added). The case turned on whether Smith's job as a clerk made him a "public officer."

In an opinion by Justice Field, the Court held that the phrase "all public officers" did not apply to Smith. The statutory phrase "public officers," the Court explained, captured only "officer[s] of the United States" in the constitutional sense of that phrase. *Id.* at 531–32. And a clerk of a customs collector "is not an officer of the United States." *Id.* at 531. The reason why is key to this case. "An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department." *Id.* at 532. "A person in the

service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution." *Id*. Because clerks of customs collectors did not derive their positions through one of these means, they did not qualify as "officers of the United States," and thus failed to qualify as "public officers" subject to the statute under which Smith was charged. *Id*. at 531–32.

In announcing this definition, the Court did not consider itself to have broken new ground. This definition, it explained, "was considered" and accepted in prior cases—namely, *United States v. Germaine*, 99 U.S. 508 (1878) and *United States v. Mouat*, 124 U.S. 303 (1888). *See Smith*, 124 U.S. at 532. *Smith*'s unanimous understanding of the phrase "officer of the United States" was "but a repetition of what was there *authoritatively declared*." *Id*. (emphasis added).

All told, *Smith* announces an authoritative definition of the constitutional phrase "officer of the United States." *Id*. at 531. That definition constitutes a holding, not dicta, since it provided the foundation for the Court's judgment deeming Smith not subject to the statute in question. Further, the *Smith* decision does not limit the scope of the phrase "officer of the United States" to the Appointments Clause or its use in the original Constitution of 1787. Rather, *Smith* delineates what it means to be an "officer of the United States … in the sense of the Constitution" generally.

2. *Smith*'s holding gains force in light of two cases decided two weeks earlier: *Mouat*, 124 U.S.

303, and *United States v. Hendee*, 124 U.S. 309 (1888).

Justice Miller wrote for the unanimous Court in both cases. Both turned on whether the clerks of Navy paymasters were "officers of the Navy" under federal statutes governing credit time for pensions (in *Hendee*) or the reimbursement of travel expenses (in *Mouat*). In both, the Court determined that a paymaster's clerk was not an "officer of the United States" in the constitutional sense. *Mouat*, 124 U.S. at 307; *Hendee*, 124 U.S. at 313. Yet across these two cases—in opinions written by the same Justice and issued the same day—the Court held that a Navy paymaster's clerk was an officer under one federal statute (one intending a broader, "more popular signification") but not another (that one intending the constitutional sense of "officer of the United States"). *Compare Hendee*, 124 U.S. at 313–14, *with Mouat*, 124 U.S. at 307–08.

Both decisions thus recognized that Congress, when it uses the word "officer" in legislative enactments, may sometimes use that word in a broader, non-constitutional sense. *Mouat*, 124 U.S. at 308; *accord Hendee*, 124 U.S. at 313–14. But both decisions also recognized that the phrase "officer of the United States" has a very specific meaning as it appears in the Constitution: both recognized that, "[u]nless a person in the service of the Government … holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States." *Mouat*, 124 U.S.

at 307; *see also Hendee*, 124 U.S. at 313.

In sum, the same Court that decided *Smith* decided two other cases just weeks earlier, both of which reiterated that "officer of the United States," as that phrase appears in the Constitution, bears a specific meaning not always reflected in other contexts. That specific meaning is the authoritative constitutional definition that *Smith* acknowledged. It follows that the Supreme Court of Colorado's reliance on the purported everyday meaning of "officer of the United States" was plain error. *See* Pet.App.70a–71a (holding that in interpreting Section 3's "officer of the United States" language one turns to "ordinary" or "colloquial" meaning).

3. *Smith* gives this Court all it needs to reverse the Supreme Court of Colorado. Under *Smith*, a person qualifies as an "officer of the United States" only if he "derive[s] his position from" an appointment "by the President … or by a court of law or the head of a department." 124 U.S. at 532. Presidents do not derive their positions through these means; they derive their positions from the voters acting through the Electoral College. It follows that Presidents are not "officer[s] of the United States." Thus, Donald Trump did not serve as an officer of the United States when he served as President. Because he has never held any other position that would qualify him as an "officer of the United States," and because he never held any other position that could have brought him within the scope of Section 3 of the Fourteenth Amendment, Section 3 does not apply to him.

To reach any other conclusion, this Court would

need to hold that *Smith*'s authoritative definition of the phrase "officer of the United States," *id.*, does not apply in one isolated constitutional context: that of the Fourteenth Amendment. But any such carveout would be very hard to defend.

For one thing, *Smith*'s controlling language defining "officer of the United States" admitted no exceptions. *Smith* applied it to the Constitution as it stood in 1888, including the Fourteenth Amendment. *Smith* announced what it called the authoritative declaration of the phrase "officer of the United States … in the sense of the Constitution." *Id.* The Court did not announce a definition of the phrase as it appears in a particular constitutional provision or set of provisions—it identified *the* constitutional sense of the phrase. Had the Court intended to limit its definition to a particular context, it presumably would have said so.

The absence of any exception is especially telling given the Justices involved in *Smith*, *Mouat*, and *Hendee*. Justice Field (who wrote for the Court in *Smith*) and Justice Miller (who wrote for the Court in *Mouat* and *Hendee*) are not likely to have inadvertently overlooked the fact that Section 3 contains the phrase they purported to define. Both men were Union loyalists, appointed to the Supreme Court by President Lincoln. Both understood the potential legal consequences facing those who sided with the Confederacy. And they understood the manner in which officer status might bear on those consequences. They even wrote dueling opinions in *Ex parte Garland*, 71 U.S. 333 (1866), a case holding that, because federal attorneys were "officers of the court" rather than

"officers of the United States," and because President Johnson had issued blanket amnesty for former rebels, Congress was limited in its power to enact laws preventing former Confederate loyalists from practicing in federal court. *Id*. at 380–81 (Field, J., writing for the Court); *id*. at 382 (Miller, J., dissenting). By the time the Court issued *Smith*, *Mouat*, and *Hendee*, these Justices had spent decades grappling with the fallout of the Rebellion and with issues relating to officer status. It is highly doubtful that they suddenly forgot about Section 3 and its use of "officer of the United States."

Regardless, under normal interpretive principles, *Smith* retains its force *even if* the Court had provisions other than Section 3 in mind when it announced its authoritative definition. Section 3 employs a phrase ("officer of the United States") borrowed from the original Constitution. *See* U.S. Const., art. II, §2., cl.2; *see also, e.g.*, U.S. Const., art. II, §§3, 4; U.S. Const., art. VI, cl.3. If, hypothetically, *Smith* had defined the phrase with only the original provisions in mind, its definition should still apply with full force to Section 3 as well; "as Justice Frankfurter advised, 'if a word is obviously transplanted from another legal source, … it brings the old soil with it.'" *Evans*, 504 U.S. at 260 n.3 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). Any argument that the phrase had come to mean something different by the time of the Fourteenth Amendment's ratification, *cf. New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 82–83 (2022) (Barrett, J., concurring),

is refuted by *Smith* itself, which announced its "authoritative" definition just a few months short of twenty years after the Fourteenth Amendment's ratification, *Smith*, 124 U.S. 525.

All in all, *Smith*'s explicitly authoritative definition of "officer of the United States" should be treated as authoritative in the context of Section 3.

CONCLUSION

Smith establishes that the President is not an "officer of the United States" covered by Section 3 of the Fourteenth Amendment. This means the Court cannot affirm the Supreme Court of Colorado without overruling a century-old, unchallenged precedent. The rule of law places a heavy burden on anyone asking the Court to take so dramatic a step. The respondents do not—and could not—carry it.

Respectfully submitted,

Benjamin M. Flowers*
**Counsel of Record*
Joseph A. Ashbrook
Julie E. Byrne
James S. Kresge
ASHBROOK BYRNE KRESGE LLC
PO Box 8248
Cincinnati, OH 45249
(513) 201–5775
bflowers@ashbrookbk.com

Counsel for Amicus Curiae
Professor James T. Lindgren

JANUARY 2024