STATE OF MINNESOTA
IN SUPREME COURT
A23-1354

Joan Growe, et al.,

Petitioners,

v.

Steve Simon, Minnesota Secretary of State, et al.

Respondents.

DONALD J. TRUMP'S BRIEF REGARDING JUSTICIABILITY, SECTION THREE OF THE FOURTEENTH AMENDMENT, AND OTHER MATTERS

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INTRODUCTION

Whether a Presidential candidate is qualified for office is a non-justiciable political question. Individual states have no authority to adjudicate Presidential qualifications, and allowing states to make conflicting determinations about who may appear on the ballot for nationwide office would lead to electoral chaos.

In any event, Section Three of the Fourteenth Amendment is not self-executing, and can be enforced only as prescribed by Congress. Moreover, as a matter of law, Section Three does not apply to Presidents. And President Trump did not "engage[] in insurrection" within the meaning of the 14th Amendment. The Petition, therefore, must be denied.

ARGUMENT

I. Presidential Qualification Disputes Are Non-Justiciable Political Questions.

The courts regularly decline to decide disputes over whether candidates are qualified to be President. Courts consistently hold that the Constitution commits such disputes to the political process and to Congress. The Constitution does not contemplate that Presidential qualifications will be litigated in the courts—and certainly not in a 51-jurisdiction ballot-access-litigation marathon in ***state*** courts. Finally, *this* particular dispute is emphatically outside the courts' jurisdiction, because Congress in impeachment proceedings already expressly decided *not* to disqualify President Trump from future office.

The Court therefore should dismiss this petition for lack of jurisdiction as presenting a paradigmatic political question.

A. Political Questions are Non-Justiciable.

Under the federal Constitution, some questions are "entrusted to one of the political branches or involve[] no judicially enforceable rights." *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019). The Constitution places these "political question[s] … beyond the courts' jurisdiction." *Id.*[1]

The U.S. Supreme Court has held that hallmarks of a non-justiciable political question include "a textually demonstrable constitutional commitment of the issue to a coordinate political department," "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "an unusual need for unquestioning adherence to a political decision already made," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Both state and federal courts are bound by this standard. *See id.*

B. The Courts have Consistently Held that Disputes About Presidential Candidates' Qualifications are Political Questions.

Seeking to remove a Presidential candidate from the ballot as ineligible is not a new phenomenon. Courts regularly declined to decide such challenges. In particular, many suits alleged that John McCain or Barack Obama were barred from the Presidency by the Constitution's "natural born citizen" requirement. In response, the courts regularly held that "the Constitution assigns to Congress, and not to … courts, the responsibility of determining whether a person is qualified to

[1] Minnesota's state political-question doctrine is similar. *See Cruz-Guzman v. State*, 916 N.W. 2d 1, 21 (Minn. 2018). But if there were any divergence between the state and federal standards, when the question is whether the federal Constitution removes an issue from judicial competence, the federal standard of course applies. *See Clayton v. Kiffmeyer*, 688 N.W.2d 117, 133 (Minn. 2004).

serve as President," so "whether [a candidate] may legitimately run for office … is a political question that the Court may not answer." *Grinols v. Electoral College*, 2013 WL 2294885, at *6 (E.D. Cal. May 23, 2013).[2] As a New York court explained:

> If a state court were to involve itself in the eligibility of a candidate to hold the office of President … it may involve itself in national political matters for which it is institutionally ill-suited and interfere with the constitutional authority of the Electoral College and Congress. Accordingly, the political question doctrine instructs this Court and other courts to refrain from superseding the judgments of the nation's voters and those federal government entities the Constitution designates as the proper forums to determine the eligibility of presidential candidates.

Strunk v. N.Y. State Bd. of Elections, 35 Misc. 3d 1208(A) (N.Y. Sup. Ct. 2012) *aff'd,* 126 A.D.3d 777 (N.Y. App. Div. 2015).

The same conclusion has been reached by state and federal courts across the country. *E.g., Taitz v. Democrat Party of Miss.*, 2015 WL 11017373, at *16 (S.D. Miss. Mar. 31, 2015) (Plaintiffs want this court to … bar the Secretary of State from placing President Obama on the ballot …. [T]hese matters are entrusted to the care of the United States Congress, not this court."); *Jordan v. Reed*, 2012 WL 4739216, at *2 (Wash. Super. Ct. Aug. 29, 2012) ("[T]his court lacks subject matter jurisdiction" because "[t]he primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S. Constitution."); *Kerchner v. Obama*, 669 F.Supp. 2d 477, 483 n.5 (D.N.J. 2009) ("The Constitution commits the selection of the President to [specific and elaborate procedures] …. None of these provisions

[2] Occasionally courts have held they lack jurisdiction over such cases because the plaintiffs lack standing—but that of course does not preclude the presence of a political question. *E.g., Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009) (rejecting challenge to President Obama's qualifications on standing grounds, but noting also that it "seemed to present a non-justiciable political question").

evidence an intention for judicial reviewability of these political choices."); *Robinson v. Bowen*, 567 F.Supp.2d 1144, 1147 (N.D. Cal. 2008) (such a challenge "is committed under the Constitution to the electors and the legislative branch, at least in the first instance").

Petitioners ignore this line of on-point cases. Instead, they rely on inapposite cases, (Petitioners' Brief, hereinafter, "Br.," at 11), in which candidates *admitted* they were ineligible for the Presidency, but sued to be on the ballot anyway. *See Lindsay v. Bowen*, 750 F.3d 1061, 1064 (9th Cir. 2014) (27-year-old candidate); *Hassan v. Colo.*, 495 F.App'x 947, 948 (10th Cir. 2012) (candidate concededly was not a natural-born citizen); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D.Ill. 1972) (31-year-old candidate). In allowing these candidates to be excluded from the ballot, these cases cited Supreme Court precedents that allow "reasonable restrictions on ballot access." *See Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986), *cited in Hassan*, 495 F.App'x at 948.[3]

These decisions are not relevant to the political-question analysis. None of those cases presented the question that Petitioners want this Court to decide: whether a candidate is qualified to be President. In all the cases Petitioners cite, that question was already answered. When it has ***not*** been answered—when, as here, the candidate's qualification is the very dispute being presented for

[3] Petitioners also cite one case involving a Congressional candidate, who had not "include[d] a developed legal argument that the State of Georgia lacks authority to enforce" Section Three disqualification. *Greene v. Raffensperger*, 599 F.Supp. 3d 1283, 1319 (N.D. Ga. 2022). Even had the argument been made, the Constitutional provisions for electing Members of Congress are different from those for electing the President, and so the political-question analysis likely would be different.

decision—the courts overwhelmingly dismiss it as a non-justiciable political question. This Court should not break that longstanding line of precedent.

C. This Case Bears Multiple Hallmarks of a Political Question.

1. The Constitution commits Presidential qualification disputes elsewhere.

As noted, a dispute is not justiciable if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker*, 369 U.S. at 217. The many courts that declined to inquire into the circumstances of Barack Obama's and John McCain's births held that such disputes are to be resolved in other non-judicial venues. They were correct.

Article II, Section 1 of the Constitution permits state legislatures to direct how electors for President should be appointed. The Twelfth Amendment to the Constitution prescribes that the electors' votes must be "sealed," and may be opened and counted only in a joint session of Congress. This process may include certain objections to electors or their votes, which Congress then can consider and decide. *See* 3 U.S.C. 15(d)(B)(ii).

If this process results in a President-elect who is not qualified, the Constitution specifies further political procedures. Pursuant to Section 3 of the Twentieth Amendment, "if the President elect shall have failed to qualify" at the beginning of his or her term, "then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President." Finally, Section Three of the Fourteenth Amendment itself provides an important safety valve: if the voters choose someone who is arguably disqualified, Section Three gives Congress the option to,

"by a vote of two-thirds of each House, remove such disability."

In the context of Fourteenth Amendment disqualifications, this conclusion is reinforced by Section Five of that Amendment, which expressly gives "Congress … the power to enforce, by appropriate legislation, the provisions of this article." *see also Hansen v. Finchem*, 2022 WL 1468157, at *1 (Ariz. May 9, 2022); *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy.").

2. Conflicting state-court decisions on Presidential candidate qualifications would create practical difficulties.

Another hallmark of non-justiciability is "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. That too is present here. Having Presidential candidates' qualifications decided in a patchwork of 51 jurisdiction-specific ballot-access proceedings would be a confusing and crippling morass. As the California Court of Appeal recently held, it would be

> truly absurd … to require each state's election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each [state official] the power to override a party's selection of a presidential candidate. The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results…. [T]he result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines.

Keyes v. Bowen, 189 Cal. App. 4th 647, 660 (Cal. Ct. App. 2010).[4]

[4] The *Keyes* opinion is somewhat ambiguous as to whether it was based on the political-question doctrine or on California election law. *See id.* But the quoted rationale plainly supports a federal constitutional rule.

The Constitution cannot be interpreted to license such an enormously difficult situation.

C. The U.S. Senate Already Decided this Political Question.

Finally, a dispute may be rendered non-justiciable by "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" or "an unusual need for unquestioning adherence to a political decision already made." *Baker*, 369 U.S. at 217. Here, the relief requested in the Petition is particularly inappropriate because it asks this Court to undo the Senate's political decision to acquit President Trump in its impeachment proceedings—yet another hallmark of a political question.

President Trump was impeached by the 117th Congress and acquitted by the Senate. *See* Pet'n ¶ 246 & n.183. That impeachment proceeding decided the precise question at issue here: whether Section Three of the 14th Amendment disqualifies Donald Trump from being President. The facts cited by Petitioners here are the same that were issue in the impeachment: President Trump's alleged involvement in the events of January 6. *See* S. Doc. 117-2 at 2-3. The legal theories are the same: the Article of Impeachment specifically cited Section Three of the 14th Amendment. *Id.* And the requested remedies are exactly the same. Because the impeachment proceedings after President Trump left office,[5] its only practical effect would have been disqualifying President Trump from holding future office.[6] The very first paragraph of the House managers' trial brief made clear that this

[5] The Senate impeachment trial started on February 9, 2021.

[6] This was widely recognized at the time. *E.g.*, Bertrand, "Legal scholars, including at Federalist Society, say Trump can be convicted," *Politico,* Jan. 21, 2021, available at https://www.politico.com/news/2021/01/21/legal-scholars-federalist-society-trump-convict-461089.

was the trial's sole object of the trial: "[T]he Senate should convict President Trump and disqualify him from future federal officeholding." S. Doc. 117-2 at 23. And the Senate expressly determined that President Trump was "subject to the jurisdiction of a Court of Impeachment for acts committed while President of the United States, notwithstanding the expiration of his term in that office." 167 Cong. Rec. S609 (daily ed. Feb. 9, 2021).

The Senate then proceeded to a verdict, and President Trump was "adjudge[d]" to be "not guilty as charged," was "acquitted of the charge," and was not disqualified from holding future office. 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021).

No court (including this one) could formally review or reverse the Senate's impeachment verdict. The U.S. Constitution gives the Senate the sole "authority to determine whether an individual should be acquitted or convicted," and so judicial review is barred by the political-question doctrine. *Nixon v. United States*, 506 U.S. 224, 231 (1993). But although Petitioners here do not ***say*** they want to undo the Senate's verdict, that is the sole outcome they are seeking in practice. Just weeks after January 6, the U.S. Senate re-convened in the very chamber that was endangered and damaged by the crimes of that day. The Senate entered judgment refusing to bar President Trump from holding future office. Petitioners now want the Minnesota Supreme Court to enter exactly the opposite judgment, barring President Trump from holding future office. That cannot be done without "expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. This Court should refrain from stepping into the shoes of elected

officials to reverse a political decision already made by duly elected representatives of the fifty states.

* * *

For these reasons, the Court should dismiss this case as nonjusticiable. Petitioners' arguments should be raised in our nationwide and statewide political and legislative debates, not in this (or any) Court.

II. Section Three Requires Enforcement Mechanisms From Congress, Not The States.

Even if the Court had jurisdiction over the Petition, it would have to be dismissed for lack of a cognizable cause of action. For a century and a half after the Fourteenth Amendment's enactment, the unbroken understanding has been that Section Three is enforceable only through procedures prescribed by the Constitution or Congress. There is no reason to break from that settled law now.

A. Section Three Can be Enforced Only as Prescribed by Congress.

Just months after the Fourteenth Amendment was ratified, Chief Justice Salmon P. Chase held that Section Three requires Congressionally prescribed enforcement procedures.

In *Griffin's Case*, a man recently convicted of attempted murder in the Virginia state courts sought a writ of habeas corpus. The petitioner's trial had been presided over by a state judge named Sheffey, who had been appointed judge by the Virginia government loyal to the Union that had met in West Virginia for most of the Civil War. *Griffin's Case*, 11 F. Cas. 7, 23 (C.C.D. Va. 1869) (Chase, C.J.). But during the war, Sheffey had been the Speaker of Virginia's rebel House of Delegates and had supported the Confederate military. *Id.* at 22-23. The petitioner,

Griffin, therefore argued that his conviction was invalid because the judge was disqualified by Section Three. *Id*.

The appeal of the case was heard by Chief Justice Chase, sitting as Circuit Justice in Richmond, Virginia. *Id.* at 7. The petitioner argued what Petitioners argue here: that Section Three "acts *proprio vigore*, and without the aid of additional legislation to carry it into effect," and "[t]hat it is binding upon all courts, both state and national." *Id.* at 12. Chief Justice Chase noted what a serious mismatch this construction would be for the post-War circumstances. He observed that, by the time the Fourteenth Amendment was proposed and adopted, the post-war governments of the southern states—that is, the legitimate governments recognized as loyal to the Union—were made up of "[v]ery many, if not a majority" of individuals who had supported the Confederacy to some degree. *Id.* at 25. If the Fourteenth Amendment were self-executing as the petitioner argued, then, the result would be a chaotic undoing of these governments' actions. *Id.* ("No sentence, no judgment, no decree, no acknowledgment of a deed, no record of a deed, no sheriff's or commissioner's sale—in short no official act—[would be] of the least validity."). The Chief Justice explained that he was reluctant to adopt this interpretation. *Id.* at 24.

Instead, Chief Justice Chase held that Section Three "clearly requires legislation in order to give effect to it," because "it must be ascertained what particular individuals are embraced by" Section Three's disability, and "these [procedures] can only be provided for by congress." *Id.* at 26. Therefore, "the intention of the people of the United States, in adopting the fourteenth amendment, was to create

a disability … to be made operative … by the legislation of congress in the ordinary course." *Id.*

There is no record of any serious outcry or protest about this decision. At least one state supreme court expressly applied *Griffin* to an analogous provision of its state constitution. *Alabama v. Buckley*, 1875 WL 1358, at *13-15 (Ala. Dec. 1, 1875). Multiple newspaper editorials of the time—including in Northern states—expressed approval of the decision; only one appears to have criticized it.[7] The U.S. Supreme Court was not called upon to revisit Chief Justice Chase's conclusion, and it has not been called upon to revisit the matter since.

Congress responded promptly by doing what Chief Justice Chase suggested: it created enforcement procedures for Section Three. The federal Enforcement Act of 1870, also known as the Ku Klux Klan Act, contained robust provisions that protected the rights of freed slaves to vote. Also, Section 14 of the Enforcement Act authorized United States Attorneys in their respective districts to seek writs of *quo warranto* in the federal courts to remove from office anyone who was disqualified by Section Three of the Fourteenth Amendment. 16 Stat. Ch. 114, at p.143 (41st Cong., 2d Sess. 1870). Section 14 even instructed the federal courts to prioritize these proceedings over "all other cases on the docket." *Id.* Similarly, Section 15 of the Enforcement Act provided for separate federal criminal prosecution of anyone who *assumed office* in violation of Section Three. *Id.* pp. 143-44.

U.S. Attorneys brought numerous Section 14 *quo warranto* petitions and Section 15 criminal prosecutions. Although many of them did not result in reported

[7] *See* Blackman & Tillman, *Sweeping and Forcing the President into Section 3,* 28 Tex. Rev. L. & Ol. *(*forthcoming 2024), at 126-27 & nn.344-350 (collecting many sources), ssrn.com/abstract=4568771.

opinions, there were as many as 180 such cases just in Tennessee—including against several members of the Tennessee Supreme Court.[8] But so far as the historical record shows, no court anywhere held that it could enforce Section Three itself, except through the procedures created by Congress.[9]

This continued until, in 1872, Congress passed the Amnesty Act by two-third majorities in both houses, which—as Section Three permits—removed the Section Three disability for most ex-Confederate officials and supporters. 17 Stat. 142, Ch. 193, at p.142 (42d Cong. 2d Sess. May 22, 1872). Finally, in 1898, Congress lifted all Section Three disqualifications of any kind. 49 Stat. 132, Ch. 389, at p.432 (55th Cong. 2d Sess. June 6, 1898).

It does not appear that any state or federal court considered Section Three after 1898. At this time, there is no implementing legislation that executes Section Three. The Enforcement Act was codified as 13 Judiciary ch. 3, sec. 563 and later recodified into 28 Judicial Code 41 — but in 1948, Congress repealed 28 U.S.C. 41 in its entirety. *See* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 993; Act of June 25, 1948, ch. 645, § 2383, 62 Stat. 683, 808. In 1978, the U.S. Court of Appeals for the

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[8] Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870,* 49 TENN B.J. 20, at 24-26 (2013); *see also United States v. Powell*, 27 F.Cas. 605 (D.N.C. 1871) (Section 15 prosecution).

[9] Congress also enforced Section Three disqualifications through the mechanisms created by the Constitution itself for judging the qualifications of Members of Congress. Several times following the enactment of the Fourteenth Amendment, the House or Senate voted on whether a member-elect was or was not disqualified by Section Three. Later, in 1919 and 1920, the House again declined to seat a member-elect who had been convicted of espionage. 6 C. Cannon, Cannon's Precedents of the House of Representatives §§ 56-59, (1935) *available at* https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/html/GPO-HPREC-CANNONS-V6-10.htm.

Fourth Circuit noted in passing Chief Justice Chase's holding "that the third section of the Fourteenth Amendment … was not self-executing absent congressional action." *Cale v. City of Covington, Va.*, 586 F.2d 311, 316 (4th Cir. 1978).

After January 6, 2021, Congress expressly considered reviving federal Section Three enforcement procedures. A bill was introduced in the House of Representatives "[t]o provide a cause of action to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States." H.R. 1405 (117th Cong. 1st Sess.). Its procedures would have been similar to the *quo warranto* proceedings: an expedited civil suit by the Attorney General in a three-judge U.S. District Court. *Id.* §§ 1(b), (d). But Congress did not enact this proposal.

Since January 6, 2021, the courts of two States have also addressed the question, albeit indirectly. The Supreme Court of Arizona recently said that "the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause," although it eventually ruled on other grounds. *Hansen*, 2022 WL 1468157 at *1. And a New Mexico trial court stated that state courts may enforce Section Three with respect to local office, although it did not record that any party had argued to the contrary. *New Mexico v. Griffin*, 2022 WL 4295619, at *16 (D.Ct. N.M. Sept. 6, 2022).

B. Petitioners Offer No Reason for Departing from This Settled Law.

1. Petitioners' attacks on *Griffin* are mistaken and inapposite.

Petitioners make a series of implausible arguments asking the Court to ignore *Griffin*. Petitioners assert that "*Griffin's Case* never explained why state law could not be the basis for Section Three enforcement." (Br. at 25.) But to a Circuit

Justice sitting in Richmond, Virginia in 1869, the reason would have been obvious. As explained above, and as Chief Justice Chase described at length in *Griffin*, the post-war southern state governments contained many—perhaps a ***majority***—of officials who were likely disqualified by Section Three. It would have been extraordinarily problematic to allow those officials to judge each others' qualifications for office under the federal Constitution without Congress' approval.

Petitioners contend that *Griffin* "was affirmed on other grounds." (Br. at 27.) But that is erroneous on at least three levels. First, *Griffin* was not reviewed by any higher court. Although that era's practice allowed simultaneous proceedings in the Circuit Court and the U.S. Supreme Court, the Supreme Court "never announced any conclusion" in *Griffin*. *See* 11 F. Cas. 7 (reporter's note explaining this). Chief Justice Chase simply noted in his opinion that the Justices had discussed the case, and he relayed their views on it. *Id.* at 27. Second, Chief Justice Chase was careful to label the "other grounds" as unnecessary to his decision. He explained that, because Section Three enforcement procedures must be prescribed by Congress, "it becomes unnecessary to determine … the effect of the sentence of a judge *de facto*." *Id.* He simply added that "I should have no difficulty in" denying habeas corpus on that basis as well, and that the other Justices agreed. *Id.*

Third, and most importantly, Petitioners' arguments cannot change the reality that *Griffin* is the authoritative precedent on Section Three enforcement. It represents the conclusion, "[a]fter the most careful consideration" (*id.)*, of the sitting Chief Justice regarding the meaning of Section Three, rendered a mere ten months after Section Three's enactment, on precisely the issue that Petitioners seek to raise here. Both as a matter of *stare decisis* and as a matter of Section Three's

original public meaning, therefore, *Griffin* is by far the most important authority for this Court's consideration.

Petitioners contend that Chief Justice Chase expressed a "conflicting point[] of view" about Section Three in dicta in the separate prosecution of Jefferson Davis. (Br. at 23-24 & n.14.) The alleged conflicting remark—which was belatedly inserted into the transcript of the trial proceedings, and which came after Davis was pardoned and the trial was adjourned—was that Section Three might preempt any other penalties (beyond disqualification from office) for former government officials who had supported the Confederacy. *Case of Davis*, 7 F.Cas. 63, 102 (C.C.D. Va. 1871). This supposed remark—that Section Three preempts other *penalties* for unlawful conduct within its scope—does not conflict with *Griffin*'s holding that Section Three gave Congress the sole power to prescribe *procedures* for trying violations of its terms. But even if there *were* some conflict between the *Griffin* holding and the *Davis* remark, over one hundred years of precedent have firmly settled that *Griffin* remains the standard.

Finally, Petitioners try to impugn Chief Justice Chase's motives in deciding *Griffin. (*Br. at 23-24 & n.13.) That is strikingly inconsistent with Salmon Chase's long career opposing slavery and advocating for the legal rights of former slaves.[10] But it is also nonsense legally: as noted, *Griffin* caused southern officials' disqualifications under Section Three to be judged by U.S. Attorneys and district courts,

[10] As a lawyer, Chase had so frequently defended escapees from slavery that he became known as "the Attorney General for Fugitive Slaves." Randy E. Barnett, *From Antislavery Lawyer to Chief Justice: The Remarkable but Forgotten Career of Salmon P. Chase*, 63 Case W. Rsrv. L. Rev. 653, 676 (2013). And as a Senator and Cabinet official, Chase was prominent among the "Radical Republicans" who took a hardline against pro-slavery governments. *Id.* at 671.

rather than the southern officials themselves. That was not a favorable decision to southern officials.

2. Post-Civil-War practice does not suggest anyone thought Section Three was self-executing.

Petitioners argue that people in the post-War era treated Section Three as potentially self-executing. (*See* Br. at 18-21.) First, Petitioners assert that, as soon as the Fourteenth Amendment was enacted, ex-Confederates began seeking, and Congress began enacting, bills that removed the Section Three disability for specific people. (*See* Br. at 18–19.) Petitioners suggest this "would have made no sense" if Section Three required further enforcement legislation. (*Id.* at 19.) This argument's weakness is obvious: since Congress had just adopted the Fourteenth Amendment, it made perfect sense to assume that Congress would imminently provide for its enforcement. So the relief-bill history proves nothing about whether Section Three is self-executing.[11]

Petitioners point to three states (Florida, North Carolina, and Louisiana) that created state-law disqualifications against state officeholders who were barred by Section Three. (Br. at 20-21.) But States are free to enact eligibility requirements for their own state offices, and may incorporate federal disqualifications if they wish. The fact that States did that says nothing about how Section Three of the

[11] Petitioners do not explain how ex-Confederates would have "much to lose[ ]by putting their fates in the hands of congressional votes" if Section Three could not immediately be enforced. (Br. at 19.) An unsuccessful request for a relief bill carried no legal consequences—and in the absence of enforcement procedures, it would carry no practical consequences either..

Fourteenth Amendment could be enforced in the absence of such a parallel state-law requirement.[12]

* * *

In the year following the Fourteenth Amendment's enactment, the Chief Justice held that Congress needed to enact enforcement legislation. Congress promptly did so, and any minor initial confusion quickly gave way to a uniform nationwide practice. That practice prevailed for as long as Section Three was enforced in the post-War era, and was not questioned for the following century and a half.

Petitioners give no reason for upending this well-settled law. So even if this Court had jurisdiction over the Petition (and it does not) this case should be dismissed as a matter of law.

III. Section Three Does Not Apply To Presidents.

As relevant here, Section Three of the Fourteenth Amendment applies only to someone who has "previously taken an oath … as an officer of the United States … to support the Constitution." Petitioners' claim that President Trump is disqualified depends upon him having been, as President, an "officer of the United States" within the meaning of Section Three. But reading this phrase in harmony with the

[12] The sole arguable exception is *Louisiana ex rel. Downes v. Towne*, which is complex and ambiguous on the relevant points. The Louisiana Supreme Court decided *Downes* exactly two months after Chief Justice Chase's decision in *Griffin's Case* and did not appear to have been aware of it. The *Downes* opinion held that the Louisiana governor could not unilaterally remove state judges from office, pursuant either to Section Three or Louisiana's parallel state-law requirement. 1869 WL 4432, at *1-2 (La. July 1, 1869). It is less clear from the opinion whether the Louisiana Supreme Court itself proceeded to decide the disqualification question, or whether it contemplated that the question could be taken up in a different proceeding. *See id.* at *2.

rest of the Constitution makes quite clear that, for these purposes, the President is not "an officer of the United States."

Start with background principles. Section Three specifically references elected officials to whom it applies, such as members of Congress and members of state legislatures. It does not similarly name the President. Canons of statutory interpretation counsel that "expression of one thing implies the exclusion of others." Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012). That at the outset is an indication that the President is not included. From there, the signs only get stronger.

A. The Constitutional Phrase "Officers of the United States" Does Not Include the President.

When used in the Constitution, the phrase "officers of the United States" has a specific, historic meaning that does not include the President.

The phrase "officers of the United States" appears three times in the original Constitution—in three consecutive sections of Article II, dealing with the Executive Branch.[13] These provisions clearly exclude the President. First, Section 2 of Article II empowers the President to

> appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for.

Presidents, of course, do not appoint themselves or their successors—and the Constitution does not "otherwise provide[] for" the President's appointment because

[13] While Article II uses the plural phrase "Officers of the United States" and the Fourteenth Amendment refers to a singular "officer of the United States," neither Petitioners nor, to counsel's knowledge, any commentator—contemporary or historical—has suggested this distinction makes a difference in interpreting the phrase.

it requires the President to be ***elected.*** So this reference to "Officers of the United States" plainly excludes the President.

Second, Section 3 of Article II requires that the President "shall Commission all the Officers of the United States." Presidents do not commission themselves or their successors, so they cannot be "Officers of the United States" for these purposes.

Third, Section 4 of Article II provides requirements for impeachment of "[t]he President, Vice President and all civil Officers of the United States." This also shows that the President is not included in the "Officers of the United States"—otherwise, there would be no need for the separate listing. If Section 4 had appeared in isolation, there might be some question whether the President and Vice President were listed as *examples* of officers of the United States—so that the text might effectively refer to "[t]he President, Vice President and all ***other*** civil Officers of the United States." But Article II's text and history rule out that meaning. Section 2 ***does*** refer to "all other Officers of the United States." In the Constitutional Convention, the original draft of Section 4 did refer to the President, Vice President, and "other civil Officers of the U.S."—but the Framers changed it to "all civil Officers."[14] On top of that, immediately preceding Section 4's reference to "The President, Vice President and all civil Officers of the United States" is Section 3's requirement that the President "Commission ***all*** the Officers of the United States" (emphasis added). Since that definitely excludes the President, it is extraordinarily unlikely that the Constitution's very next sentence, in Section 4, would use such an ambiguous signal to give similar words a very different meaning.

[14] 2 *Records of the Federal Convention of 1787*, 545, 552, 600 (Farrand ed., 1911).

In short, the Constitution uses the words "officer of the United States" as a term of art referring to non-elected functionaries who exercise governmental power. This excludes the President.

Petitioners appear to concede that, during the Founding era, the phrase "Officers of the United States" excluded the President. (Br. at 39.) They argue that this meaning was forgotten, and replaced with a different one that included the President, sometime between the Founding and the Fourteenth Amendment. That is mistaken: the constitutional meaning of "officers of the United States" as excluding the President has been recognized by a long list of eminent authorities throughout our nation's history.

In the 1830s, Justice Joseph Story's magisterial *Commentaries on the Constitution of the United States* discussed this precise issue. With respect to the Impeachment Clause, Justice Story stated that "the enumeration of the president and vice president, as impeachable officers, was indispensable," because "the clause of the constitution … does not even affect to consider them officers of the United States," and that "they were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States."[15] Less than twenty years after the adoption of the Fourteenth Amendment, the U.S. Supreme Court observed that there was a "well established definition" of "[w]hat is necessary to constitute a person an officer of the United States:" specifically, 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

[15] Joseph Story *Commentaries on the Constitution of the United States* (Lonang Inst. 2005) § 791.

officer of the United States." *United States v. Mouat*, 124 U.S. 303, 306 (1888). Although *Mouat* was interpreting a federal statute, its reference to the Constitution's Appointments Clause—and its consideration of who qualifies "strictly speaking" as an officer of the United States—makes clear that the Court was referring to the constitutional term of art. Similarly, in the 1870s a Senator stated that "the President is not an officer of the United States," and an influential treatise stated that "[i]t is obvious that … the President is not regarded as 'an officer of, or under, the United States.'"[16]

This continued in recent times. In 1969, future Chief Justice William Rehnquist authored a memo for the White House Office of Legal Counsel explaining that "[g]enerally, statutes which refer to 'officers' or 'officials' of the United States are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive."[17] In 1974, future Justice Antonin Scalia reiterated in a different OLC memorandum that "when the word 'officer' is used in the Constitution, it invariably refers to someone *other than* the President or Vice President …. This … has led the Department of Justice consistently to interpret the word in other documents as not including the President or Vice President unless otherwise specifically stated."[18] In 2007, citing *Mouat,* the

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[16] *See* Blackman & Tillman, *supra* at 102-03 & nn.298-300 (quoting *Congressional Record Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap*, at 145 (1876), and David A. McKnight, *The Electoral System of the United States* at 346 (1878).)

[17] *Closing of Government Offices in Memory of Former President Eisenhower*, at 3, https://perma.cc/P229-BAKL.

[18] *Applicability of 3 C.F.R. Pt. 100 to the President and Vice President*, at 2, https://perma.cc/GQA4-PJNN.

OLC reaffirmed "that an individual not properly appointed under the Appointments Clause cannot technically be an officer of the United States."[19] And in 2010, Chief Justice Roberts stated in an opinion for the Supreme Court that "[t]he people do not vote for the 'Officers of the United States.' They instead look to the President." *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 498 (2010).

On this point, there is no room for reasonable dispute: there is a long tradition of using the words "officers of the United States" as a constitutional term of art, in a strict sense that excludes the President.

B. Petitioners Cannot Deny this Constitutional Tradition.

Petitioners note that various non-constitutional sources refer to the President as an "officer"—and on some occasions, even as an "officer of the United States." (*See* Br. at 36-43.) That is not surprising: the nature of a term of art is that it applies to specific words used in a specific context; similar words used in other contexts may have a different meaning. In most of these Petitioners' examples, there is no indication that the speaker or writer intended to use the phrase in the strict Constitutional sense.[20] Only one of them warrants examination: Petitioners' argument based on the Necessary and Proper Clause.

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[19] *Officers of the United States Within the Meaning of the Appointments Clause*, at 116 (Apr. 16, 2007), https://www.justice.gov/file/451191/download#:~:text=The%20Appointments%20Clause%20provides%3A%20%5BThe%20President%5D%20shall%20nominate%2C,of%20Law%2C%20or%20in%20the%20Heads%20of%20Departments.

[20] To give just one example, in *United States ex rel. Stokes v. Kendall*, the court was distinguishing the President's authority from the King of England's absolute sovereignty—not discussing the technical meaning of words in the Constitution—

Petitioners appear to concede that, ***every time*** the phrase "Officers of the United States" appears in the Constitution, it excludes the President. (*See* Br. at 37.) Nonetheless, they point to the Necessary and Proper Clause's reference to "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." This is inapposite. The words "Officer thereof" appear to refer to an "Officer *of the Government* of the United States." That would be of limited, if any, relevance to the question of whether the different phrase "Officers of the United States" is a term of art in the Constitution, and, if so, what it means.

But perhaps more importantly, Petitioners say nothing to substantiate their claim that the Necessary and Proper Clause's reference to "Officer thereof" must "unquestionably include the President." (Br. at 37.) The opposite is closer to the truth. The Necessary and Proper Clause separately authorizes Congress to legislate with respect to the powers of "any Department" of the United States, which of course includes the Executive Branch—the powers of which are vested entirely in the President. Article II, Section 1; *see Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020) ("The President is the only person who alone composes a branch of

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when it stated that "[t]he president himself … is but an officer of the United States." 26 F. Cas. 702, 753 (C.C.D.D.C. 1837).

Petitioners make one other roundabout argument that is much less strong than it seems. They contend that the Presidency is an office "under" the United States—an issue on which this brief takes no position—and then point to an 1868 Congressional committee report stating that the terms "of" and "under" the United States "are made by the Constitution equivalent and interchangeable." (*See.* Br. at 42-43.) But the report provides only tenuous support for this line of reasoning. The report was not addressing Section Three, or the Presidency, nor was there any apparent reason for it to address the meaning of "Officer of the United States" at all.

government."). So, an additional mention of the President in the Necessary and Proper Clause would be redundant.

Ultimately, everyone in this case seems to agree that the phrase "officers of the United States" in the Constitution ***never*** refers to the President, as recognized by prominent legal minds throughout our history.

C. Presidents Do Not Take Oaths to "Support" the Constitution, which Section 3 Requires for Disqualification.

Section Three's text significantly parallels another provision of the Constitution that excludes the President: the Oaths Clause of Article VI of the original Constitution. Section Three specifies that it applies only to people who took "an oath … to support the Constitution of the United States." This is a direct reference to Article VI, which requires many government officials to "be bound by Oath or Affirmation, to support this Constitution." These are the only two times that the Constitutional text refers to "support[ing]" the Constitution, and both of them do so in connection with an oath. No reasonable reading of Section Three can dismiss this parallel as unintentional.[21]

The Article VI oath, which Section Three clearly refers to, is taken by practically every state and federal official in the United States ***except for the President***. Article II, Section 1 of the Constitution prescribes, word-for-word, a ***different*** oath

[21] As if to confirm the deliberateness of this parallel, the officials covered by Section Three and by Article VI are very similar, if not identical. The Oaths Clause of Article VI applies to "Senators and Representatives …, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States." Section Three applies to anyone who took 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." Unless there are non-elected "officers of the United States" in the Legislative Branch, these two lists include the same people.

for the President—an oath that does not refer to "support" for the Constitution, but instead includes a promise to "preserve, protect, and defend the Constitution." The President is inaugurated with that oath, not the Article VI oath.

Petitioners argue in a footnote that the Article II and Article VI oaths are "not materially distinct." (Br. at 42 n.23.) They suggest that Section Three's reference to an "oath … to support the Constitution" was supposed to be a generic reference both to Article VI's non-Presidential "Oath … to support this Constitution" *and* to Article II's differently-worded Presidential oath. In context, that is not plausible. As explained above, there is a well-established Constitutional tradition of using the words "officers of the United States" to exclude the President. In that context, the drafters of Section Three (1) used that same phrase, and then (2) deliberately copied the language of ***another*** provision of the Constitution that also excludes the President.

So the textual evidence is quite plain: Section Three was drafted to exclude the President.

D. The Post-Civil-War Era Presented No Need to Address this Question, So the Framers of the Fourteenth Amendment Left It to Future Generations.

Petitioners insist that it would have been foolish, or even unthinkable, for the post-Civil War generation not to have addressed the possibility of an ex-President who engaged in insurrection. (*See* Br. at 41, 43, 45). This again is insensitive to history. The Civil War Amendments to the Constitution were not abstract academic proposals. As their name indicates, they emerged from the Civil War and the specific historical circumstances following it—which did not include any possibility that a former-President-turned-rebel might seek office again. As Petitioners

concede (Br. at 41), the only former President who joined the Confederacy, John Tyler, had died early in the Civil War.[22]

That makes it unsurprising that, to counsel's knowledge, the historical record does not reflect any discussion about why Section Three was drafted to exclude the President. But it also reveals at least one likely reason for this choice: the post-Civil War generation focused on amending the Constitution to address the evils they had experienced firsthand rather than speculative ones. In all events, the text of Section Three plainly does exclude the President.

IV. Minnesota Law Does Not Permit Candidates To Be Removed From The Ballot Based On Alleged Disqualifications That Can Be Remedied.

Even if the federal Constitution did not assign this dispute elsewhere, Minnesota law does not grant the courts jurisdiction over ballot-access disputes under Section Three of the Fourteenth Amendment. Petitioners invoke this Court's jurisdiction under Minn. Stat. 204B.44(a)(1), which—as relevant here—allows this Court to correct "an error or omission" that takes the form of "the placement of a candidate on the official ballot who is not eligible to hold the office." This cannot include the listing on the ballot of an allegedly-ineligible candidate who can ***become*** eligible by the time she would be in office.

A. Section 204B.44 Does Not Provide Jurisdiction to Strike Candidates from the Ballot Based on Temporary Disqualifications.

As this Court has observed with respect to another provision of Section 204B.44, "we have not viewed the original jurisdiction provided by [this statute]

[22] As Petitioners also concede (Br. at 41), Tyler had previously been a member of the House of Representatives, so even had he lived until the Fourteenth Amendment's adoption, he would have been covered by Section Three regardless of whether it applied to the President.

broadly." *Minn. Voters All. v. Simon,* 885 N.W.2d 660, 664 (Minn. 2016); *accord, e.g., Begin v. Ritchie*, 836 N.W.2d 545, 548 (Minn. 2013) ("section 204B.44 'is not a broad vehicle …'"). But the Court does not appear to have defined what qualifies as "an error or omission" regarding the listing of a candidate on the ballot—especially one related to a candidate being "not eligible."

Most previous candidate-eligibility challenges under section 204B.44 have involved claims that a candidate was irrevocably ineligible for an upcoming election. The petitioners in such cases typically allege that a candidate for state legislature has not "resided one year in the state and six months immediately preceding the election in the district from which elected," as required by the Minnesota Constitution. (Art. IV, Sec. 6.) Such violations often can be definitively proved well before the election occurs. If a candidate lived outside his or her intended district (or the State) during any part of that six- or twelve-month window, then the disqualification is immutable and cannot be changed for that election. This Court's decisions establish that, in general, Section 204B.44 provides jurisdiction to strike this kind of immutably-ineligible candidate from the ballot.[23]

But this Court has not considered whether Section 204B.44 allows it to enforce alleged disqualifications from office that ***will*** be changed or cured after the Court decides the case. It obviously does not.

Section 204B.44 refers, in the present tense, to a candidate "who is not eligible to hold the office." But this plainly cannot be read in a woodenly literal sense,

[23] The U.S. Constitution also contains durational qualifications that may be definitively disproved before an election. For instance, Members of the House of Representatives and Senators must have been citizens for seven years and nine years, respectively. Art. I, Secs. 2-3.

to refer to any candidate who is ineligible at the time (weeks or months before the election) when a petition is filed and decided by the Court. For instance, if a gubernatorial candidate would reach the constitutionally-required 25 years of age (*see* Minn. Const. Art. V, Sec. 2) the week after the election, it would be literally true that such a candidate "is not eligible to hold the office" at the time the ballots were printed. This is no fanciful hypothetical: voters do elect candidates who are just about to reach the required age. Perhaps most notably, Delaware elected 29-year-old Joseph Biden to the Senate shortly before his Constitutionally-required 30th birthday.[24] If an equivalent candidate were to run in Minnesota, Section 204B.44 surely would not authorize the courts to remove him or her from the ballot. Indeed, with respect to federal offices, that would be unconstitutional. The U.S. Constitution specifies that Representatives, Senators, and the President must be certain ages *in order to hold office.* (Art. I Secs. 2-3; Art. II Sec. 1.) States are not permitted to change or add to the Constitutional requirements for federal officeholders, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995), so they cannot accelerate this age requirement to the time of election, or the time the ballots are printed.

To put it in terms of the statutory language: it is not a correctable "error or omission," under Section 204B.44, to include on the ballot a candidate who is allegedly ineligible when the ballots are printed, but who ***will be eligible*** by the time he or she would be in office.

[24] https://www.whitehouse.gov/administration/president-biden/.

B. Section 204B.44 Does Not Provide Jurisdiction to Strike from the Ballot Candidates with Alleged Disqualifications that *Can* be Removed.

So too, Section 204B.44 does not permit removal of an allegedly-ineligible candidate who ***could become eligible*** by the time she will be in office, depending on future events.

The state and federal Constitutions contain multiple eligibility requirements that a candidate may satisfy after the ballots are printed. For instance, state and federal Senators and Representatives are disqualified from holding any executive-branch office. (Minn. Const. Art. I, Sec. 4; U.S. Const. Art. II, Sec. 6.) But, of course, sitting legislators can be ***elected*** as governor or President—and as the state Constitution specifically provides, they may remove this disqualification after the election by "resign[ing] from the legislature." (Art. I, Sec. 4). Again, this is not an imaginary scenario: Vice President Harris became eligible by resigning her U.S. Senate seat in the middle of her term just days before her inauguration as Vice President.[25] There is no serious argument that Section 204B.44 would have allowed this Court to remove then-Senator Harris from the Minnesota Vice Presidential ballot as "not eligible."

To be sure, resigning from a conflicting office is wholly within a candidate's control. But there are other disqualifications from office that also do not apply at the time the ballots are printed, but that cannot be removed as easily or certainly. For instance, Minnesota's governor and lieutenant governor must be U.S. citizens,

[25] Wright & Duster, *Harris resigns from the Senate ahead of inauguration,* (Jan. 18, 2021), https://www.cnn.com/2021/01/18/politics/kamala-harris-resignation-san-francisco-chronicle/index.html.

(Minn. Const. Art. V, Sect. 2, but only at the time they hold office.[26] And the U.S. Constitution requires Senators and Representatives to be residents of their States "when elected." Art. II Secs. 2-3. So if a candidate was a non-resident or non-citizen at the time ballots were printed, she could still qualify by moving her domicile or becoming naturalized in the future. Although there would be no way to guarantee that she would actually do so in time, it still is not plausible that Section 204B.44 authorizes courts to strike candidates from the ballot on this basis. Indeed, doing so for federal congressional candidates would again be unconstitutional. *Schaefer v. Townsend,* 215 F.3d 1031, 1036 (9th Cir. 2000) ("This specific time at which the Constitution mandates residency bars the states from requiring residency before the election.")

In other words, it is not an "error or omission" under Section 204B.44 to include on the ballot a candidate who is allegedly ineligible when the ballots are printed, but who ***can be eligible*** by the time he or she would be in office.

C. Section Three Disqualification Cannot Create an "Error or Omission" on the Ballot Under Section 204B.44.

That rule disposes of this case. Section Three of the Fourteenth Amendment provides that, if a person is allegedly disqualified from office under its terms, "Congress may by a vote of two-thirds of each House, remove such disability." As Petitioners concede (Br. at 19 & n.22), in the years immediately after the Fourteenth Amendment's adoption, Congress frequently did just this. And there is no question that Congress can do this—and frequently has—after ballots are printed, or

[26] *See State v. Streukens*, 60 Minn. 325, 326 (1895) (for a different office under the then-current constitution, a non-citizen was "eligible to be elected … without being a naturalized citizen of the United States, if before election he had duly declared his intention to become a citizen").

after a candidate is elected. As an 1875 elections treatise explained, "it has been the constant practice of the Congress of the United States since the rebellion, to admit persons to seats in that body who were ineligible at the date of their election, but whose disabilities had been subsequently removed." G.W. McCrary, *A Treatise on the American Law of Elections*, at 193 (1875); *see Smith v. Moore*, 90 Ind. 294, 303 (1883) (recognizing this practice with respect to Section Three). So, if Section 204B.44 jurisdiction does not extend to alleged disqualifications that can be removed, then it does not extend to alleged Section Three disqualifications.

* * *

In short, it is not a correctable "error or omission" under Section 204B.44 to place on the ballot a candidate who ***might or might not*** be qualified for the office when the term would start, depending on what happens in the future. An alleged Section Three disqualification is of that type because Congress can remove the disqualification, as it has before. Accordingly, The Petition must be dismissed.

V. President Trump Did Not Engage In Insurrection.

Finally, Petitioners' ultimate claim that President Trump "engaged in insurrection" fails badly on its face. Section Three prohibits only active support for an ongoing rebellion or a hostile foreign power. Although Petitioners weakly argue that merely speaking about a future insurrection can violate Section Three, this debate is academic because Petitioners do not allege that President Trump did anything like that. Instead, Petitioners argue that President Trump is disqualified by Section Three because he allegedly should have done more to discourage or stop an alleged insurrection. There is no plausible construction of Section Three's phrase "engaged in … insurrection" language that extends that far.

A. The January 6th Riot was not an "Insurrection" under Section Three.

Section Three speaks in terms of "insurrection" and "rebellion." Congress confirmed that insurrection and rebellion describe two types of treason—not lesser crimes. *See* 37 Cong. Globe 2d Session, 2173, 2189, 2190-91, 2164-2167 (1862). After ratification, Congress reinforced these same conclusions when debating enforcement of Section Three. 41 Cong. Globe 2d Session, 5445-46 (1870). The drafters chose words that encompassed at least the main actors in that act of treason, but not indirect supporters. They were not trying to legislate with an eye toward political riots.

Section Three appears to have been modeled on two primary sources. One was the original Constitution's Treason Clause (Art. III, Sec. 3, Cl. 1), which defines "[t]reason against the United States as "levying War against them, or … adhering to their Enemies, giving them Aid and Comfort." The other was Section 2 of the Second Confiscation Act, which Congress enacted early in the Civil War, and which punished anyone who "shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States … or give aid or comfort thereto. 12 Stat. 589, 627 (1862); *see* 18 U.S.C. § 2383. These sources illustrate the meaning of Section Three's terms.

Even during the Civil War, the courts construed the term "insurrection" in the Confiscation Act relatively narrowly. The year after the Confiscation Act became law, Justice Field—a Lincoln appointee—held that the Insurrection Act prohibits only conduct that "amount[s] to treason within the meaning of the constitution." *United States v. Greathouse*, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863). In the same case, another judge confirmed that, for these purposes, "engaging in a rebellion

and giving it aid and comfort[] amounts to a *levying of war*," and that insurrection and treason involve "different penalt[ies]" but are "substantially the same." *Id.* at 25 (Hoffman, J.) (emphasis added).

Dictionaries of the time confirm this understanding. John Bouvier's 1868 legal dictionary defined "insurrection" as a "rebellion of citizens or subjects of a country against its government," and "rebellion" as "*taking up arms* traitorously against the government." *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* (Philadelphia, G.W. Childs, 12th ed., rev. and enl. 1868) (emphasis added).

"Insurrection," as understood at the time of the passage of the Fourteenth Amendment, thus meant the taking up of arms and waging war upon the United States. The historical context of Section Three corroborates this. At the time of Section Three's enactment, the United States had undergone a horrific civil war in which over 600,000 combatants died.

The riot that occurred at the Capitol on January 6, 2021, was terrible. The January 6 rioters entered the Capitol for a few hours and fought with police. But as awful as the melee was, and as disturbing as the rioters' actions were, it was not a war upon the United States. Ultimately, Congress counted the electoral votes early the next morning. No evidence shows that the rioters—even the worst among them—made war on the United States or tried to overthrow the government.

Indeed, rebellion or insurrection is a federal crime, and no court in the United States has found President Trump guilty of 18 U.S.C. § 2383. To the contrary, the Senate found President Trump not guilty of impeachment charges of

insurrection. Not a single prosecutor has filed an indictment against President Trump for rebellion or insurrection, much less obtained a conviction on such a charge. Indeed, not a single prosecutor charged any of the thousand-plus people connected to the riot at the Capitol under 18 U.S.C. § 2383, the federal criminal statute that covers "insurrection." *United States v. Griffith*, No. CR 21-244-2 (CKK), 2023 WL 2043223, at *6 fn. 5 (D.D.C. Feb. 16, 2023), ("[N]o defendant has been charged with [violating 18 U.S.C. § 2383]").[27]

The events of January 6 devolved into a riot that was repugnant to any objective observer. But they were not an "insurrection" in the Constitutional sense.

B. Engaging in Insurrection Does Not Include Pure Speech.

Even if January 6 was an insurrection (it was not), Petitioners fail to establish that one can "engage" in insurrection through speech alone—and regardless whether one *could,* there is no indication whatsoever that President Trump *did*.

The framers of the Fourteenth Amendment made a deliberate choice that Section Three should cover only actual "engage[ment] in" insurrection or rebellion (or assisting a foreign power), and not pure speech—even if advocating rebellion or insurrection. The Second Confiscation Act made it a crime to "incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or . . . give aid or comfort thereto, or . . . engage in, or give aid and comfort to, any such existing rebellion or insurrection 12 Stat. at 627.

[27] *See* Alan Feuer, *More Than 1,000 People Have Been Charged in Connection with the Jan. 6 Attack*, THE NEW YORK TIMES (Aug. 1, 2023), https://www.nytimes.com/live/2023/08/01/us/trump-indictment-jan-6#more-than-1000-people-have-been-charged-in-connection-with-the-jan-6-attack.

In other words, it recognized that inciting, assisting, and engaging in insurrection are different things.

The word "engage" connotes active involvement—to "employ or involve oneself; to take part in; to embark on." *Black's Law Dictionary* (11th ed. 2019). This suggests a significant level of activity, not mere words. This textual analysis is supported by the historical context. The same representatives who voted for the Fourteenth Amendment understood that, under its terms, even strident and explicit antebellum advocacy for a future rebellion was not "engaging in insurrection" or providing "aid or comfort to the enem[y]." In 1870—just two years after the Fourteenth Amendment was ratified—Congress considered whether Section Three disqualified a Representative-elect from Kentucky who, before the Civil War began, had voted in the Kentucky legislature for a resolution to "resist [any] invasion of the soil of the South at all hazards." 41 Cong. Globe, 2d Session, 5443 (1870). The House found that this was not disqualifying under Section Three. *Id.* at 5447. Also in 1870, the House considered the qualifications of a Representative-elect from Virginia who, before the Civil War, had voted in the Virginia House of Delegates for a resolution that Virginia should "unite" with "the slaveholding states" if "efforts to reconcile" with the North should fail, and stated that Virginia should "if necessary, fight." *Hinds' Precedents of the House of Representatives of the United States*, 477 (1907). The House found that this did not disqualify him under Section Three. *Id.* at 477-78. By contrast, the House *did* disqualify a candidate who "had acted as colonel in the rebel army" and "as governor of the rebel State of North Carolina." *Id.* at 481, 486. Plaintiff's allegations fall well short of how Congress has understood and applied Section Three in practice.

Petitioners argue in passing that "[e]ngagement" in insurrection "can include incitement." (Br. at 48.) They cite only three sources to support this assertion—and none of them do. Two of Petitioners' sources establish only that *members of a rebel government or military* can engage in insurrection through their words. For instance, Petitioners partially quote a 19th-century Attorney General (*id.*) who, in context, was discussing incitement ***by Confederate government officials:***

> [O]fficers who, during the rebellion, discharged official duties not incident to war, but only such duties as belong to a state of peace, and were necessary to the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion or disqualified. Disloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion he must come under the disqualification.

12 Op. of the Attorney Gen. at 205. Similarly, Petitioners observe that rebel military commanders may engage in insurrection by giving "marching orders or instructions to capture a particular objective." (Br. at 49.) Neither of these examples remotely considers a stand-alone example of incitement. Petitioners' only other authority is 1894 jury instructions interpreting a statute that expressly prohibited incitement. *In re Charge to Grand Jury*, 62 F.828, 829-30 (N.D. Ill. 1894). That obviously sheds no light on whether incitement is covered by a provision that, like Section Three, omits that word.

C. Petitioners Allege No Actions or Words by President Trump Comprising Engaging in Insurrection.

Ultimately, however, there is no need for the Court to wade into these details, because this case can be resolved by construing Section Three at a more general level. The only conduct that Petitioners allege by President Trump is (i) making unsuccessful factual and legal arguments that the announced result of the election

was incorrect and should be changed, (ii) giving a speech on January 6 that repeated those arguments and asked the crowd to "peacefully and patriotically make your voices heard," and (iii) watching television reports of the ongoing crimes at the Capitol before repeatedly asking the crowds for "peace" and to "go home." Whatever else Section Three may or may not mean, there can be no question that "engag[ing] in insurrection" does not include that.

1. "Engag[ing] in insurrection" does not include contesting an election outcome.

As this Court is well aware, disputes over election outcomes are not new in our democracy. Every such dispute necessarily involves a winner and a loser. But it is not in our constitutional tradition to treat the losers of those disputes as insurrectionists.

That is the case with President Trump. As is widely known, after now-President Biden was announced as the winner of the 2020 election, President Trump made a series of public statements, and took a series of public actions, challenging the correctness of that outcome and arguing in favor of various remedial actions. In particular, President Trump argued that Vice President Pence had authority under the Constitution to take certain actions that would result in President Trump being certified as the winner of the election. These arguments and efforts were unsuccessful, and Congress certified now-President Biden as the winner. Although President Trump continued to disagree with that result, he promptly

promised—and delivered—an "orderly transition" of power to President Biden.[28]

This by itself cannot implicate Section Three. Whatever else might qualify as "engag[ing] in insurrection," contesting an election outcome certainly does not. Petitioners offer no authority or argument to the contrary.

This is confirmed by the fact that First Amendment principles should inform the interpretation of Section Three. "If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition." *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 191 (2014) (citing *Texas v. Johnson*, 491 U.S. 397 (1989)); *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977) (*per curiam*). "Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco City Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). Speech on matters of public concern—even controversial or objectionable speech on matters of public concern—is protected by the First Amendment. *See, e.g., Snyder v. Phelps*, 562 U.S. 443 (2011).

2. "Engag[ing] in insurrection" does not include giving a speech asking supporters to protest "peacefully and patriotically."

Second, Petitioners allege that on January 6, President Trump gave an impassioned speech to a large crowd gathered in Washington in support of his arguments that he should be certified the election winner. Petitioners' theory,

[28] Statement of President Donald Trump, https://x.com/DanScavino/status/1347103015493361664?s=20; *see Trump agrees to 'orderly transition' of power*, Politico, Jan. 7, 2021, *available at* https://www.politico.com/news/2021/01/07/trump-transition-of-power-455721#:~:text=%E2%80%9CEven%20though%20I%20totally%20disagree,Trump%20said%20in%20a%20statement.

apparently, is that this speech amounted to some sort of instruction to engage in violence or crimes. The problem with that theory is that it is completely unsupported by the facts.

The courts have clearly defined incitement in the First Amendment context—and the threshold is very high. Even "advocacy of the use of force or of law violation" or of "'the duty, necessity, or propriety' of violence" falls short of that threshold. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969). The "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002); *Nwanguma v. Trump*, 903 F.3d 604, 610 (6th Cir. 2018). "What is required, to forfeit constitutional protection," is speech that (1) "specifically advocates for listeners to take unlawful action" and (2) is likely to produce "*imminent* disorder"—not merely "illegal action at some indefinite future time. *Nwanguma*, 903 F.3d at 610 (cleaned up); *Hess v. Ind.*, 414 U.S. 105, 108-09 (1973) (emphasis added). And, as the Court recently underscored in *Counterman v. Colorado*, it requires a showing of "specific intent … equivalent to purpose or knowledge." 600 U.S. 66, 81 (2023) (citing *Hess v. Ind.*, 414 U.S. 105, 109 (1973)).

It would be strange if "engage[ment] in insurrection" under Section Three somehow involved *less* than "incitement of insurrection" under the First Amendment. But the Court need not definitively decide that issue. Under any sensible understanding of the word, President Trump's January 6 speech was not "incitement" of, let alone "engagement" in, an insurrection.

The Court doubtless will read the entire transcript of President Trump's January 6 speech.[29] The core of the speech gave detailed instructions to the assembled crowd:

> [W]e're going to walk down to the Capitol, and we're going to cheer on our brave senators and congressmen and -women, and we're probably not going to be cheering so much for some of them because you'll never take back our country with weakness. You have to show strength and you have to be strong. We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated. I know that everyone here will soon be marching over to the Capitol building to *peacefully and patriotically* make your voices heard.

(emphasis added). At the conclusion of the speech, President Trump instructed the crowd similarly:

> [W]e're going to walk down Pennsylvania Avenue, I love Pennsylvania Avenue, and we're going to the Capitol and we're going to try and give—the Democrats are hopeless. They're never voting for anything, not even one vote. But we're going to try and give our Republicans, the weak ones, because the strong ones don't need any of our help, we're going to try and give them the kind of pride and boldness that they need to take back our country. So let's walk down Pennsylvania Avenue. I want to thank you all. God bless you and God bless America. Thank you all for being here. This is incredible. Thank you very much. Thank you.

These remarks clearly contemplated that Congress would complete its certification of the election results. No part of the President's speech included any call for violence or criminal activity. As a D.C. Circuit judge remarked at argument last year, "the President didn't say break in, didn't say assault members of Congress, assault

[29] *E.g.*, https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6.

Capitol Police, or anything like that." *Blassingame v. Trump*, No. 22-5069 (DC. Cir. Dec. 7, 2022) argument transcr. at 74:21-25 (Rogers, J.). Reading the transcript of the speech confirms this. The President asked the crowd to be "strong," and remarked that "Republicans are constantly fighting like a boxer with his hands tied behind his back." But he said nothing to contradict or qualify his express instructions that the crowd protest "peacefully and patriotically."

This cannot possibly have been incitement to, let alone "engagement" in, an alleged insurrection. Petitioners apparently are building their case on an allegation of *implicit* encouragement—combined with explicit discouragement—of an alleged insurrection. But they cite no authority suggesting that this could come within the meaning of Section Three.

President Trump instructed the crowd to protest "peacefully" while advocating for specific Congressional action. Whatever else might qualify as "engag[ing] in insurrection" under Section Three, that does not.

3. "Engag[ing] in insurrection" does not include asking rioters to "go home" and to be "peaceful."

While the January 6 rioters were in the Capitol, Petitioners do not allege that President Trump did anything to help the rioters.

For a short while after his speech, President Trump continued to articulate his criticisms of the announced election result and his arguments for changing it. But within minutes of Congress going into recess, President Trump tweeted that protesters should "support our Capitol Police and Law Enforcement" and "Stay peaceful!"[30] The President's public statements were then exclusively calls for peace

[30] @realDonaldTrump, TWITTER, (Jan. 6, 2021, 2:38pm), https://twitter.com/real-DonaldTrump/status/1346904110969315332.

and an end to the riot. Shortly thereafter, the President tweeted again, "asking for everyone at the U.S. Capitol to remain peaceful" and to "respect the Law and our great men and women in Blue," and calling for "No violence!"[31] The President then summoned videography personnel to the White House Rose Garden and recorded a minute-long video. In this video, the President repeated his position that the announced election result was wrong but stated:

> [Y]ou have to go home now. We have to have peace. We have to have law and order, we have to respect our great people in law and order. We don't want anybody hurt…. This was a fraudulent election, but we can't play into the hands of these people. We have to have peace. So go home…. I know how you feel. But go home, and go home in peace.[32]

Later that evening, the President again tweeted that the rioters should "[g]o home with love & in peace." (Ptn. ¶ 237.) About two hours after that, Congress re-convened to certify now-President Biden as the winner of the election.

Petitioners obviously believe that President Trump was too slow in pivoting from calling for a change in the announced election result to calling for a stop to the crimes being committed at the Capitol. But that simply does not make out a violation of Section Three. Again, whatever "engag[ing] in insurrection" means, it does not include watching an alleged insurrection on television and then calling for it to end.

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[31] @realDonaldTrump, TWITTER (Jan. 6, 2021, 3:13pm), https://twitter.com/real-DonaldTrump/status/1346912780700577792.

[32] *President Trump Video Statement on Capitol Protesters*, https://www.c-span.org/video/?507774-1/president-trump-video-statement-capitol-protesters. Transcript available at: https://www.presidency.ucsb.edu/documents/videotaped-remarks-during-the-insurrection-the-united-states-capitol.

President Trump contested an election outcome. He gave a speech to a crowd that repeated his arguments and called for peaceful protest. And when there was violence, he repeatedly called for it to stop. This course of conduct is not included within any reasonable interpretation of the phrase "engag[ing] in insurrection." The Petition therefore is meritless.

CONCLUSION

The Court should dismiss the Petition for lack of jurisdiction. Alternatively, the Court should dismiss the Petition on the merits as a matter of law.

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