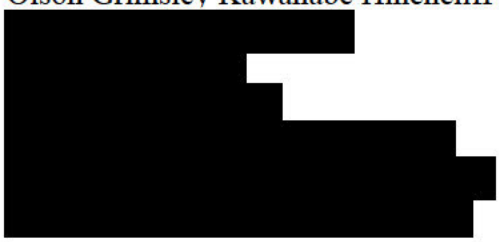
DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203	
Petitioners: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN, v. **Respondents:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP, and **Intervenors:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, and DONALD J. TRUMP.	▲ COURT USE ONLY ▲
Attorneys for Petitioners: Mario Nicolais, Atty. Reg. # 38589 KBN Law, LLC [redacted] Martha M. Tierney, Atty. Reg. # 27521 Tierney Lawrence Stiles LLC [redacted] Eric Olson, Atty. Reg. # 36414 Sean Grimsley, Atty. Reg. # 36422 Jason Murray, Atty. Reg. # 43652	Case Number: 2023CV032577 Division/Courtroom: 209

Olson Grimsley Kawanabe Hinchcliff & Murray LLC  Donald Sherman* Nikhel Sus* Jonathan Maier* Citizens for Responsibility and Ethics in Washington  **Pro hac vice* admission pending	

PETITIONERS' OPPOSITION TO INTERVENOR TRUMP'S THIRD MOTION TO DISMISS

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INTRODUCTION

Petitioners challenge Intervenor Donald Trump's constitutional eligibility to serve as President and appear on Colorado's ballots. This Court has the power and duty to hear Petitioners' claim under Colorado law. In arguing otherwise, Trump asserts an array of dubious propositions that, if accepted, could allow disqualified candidates to wreak havoc on states' election processes. Nothing in the Constitution of the United States supports that absurd result. To the contrary, the Constitution *empowers* the states to run presidential elections and to police their ballots of unqualified federal candidates. And the Constitution's Supremacy Clause expressly mandates that the "Judges in every State" apply the Constitution, U.S. Const. art. VI, cl. 2—including Section 3 of the Fourteenth Amendment—where state law procedures allow. Finally, ample authority demonstrates that Trump became subject to Section 3 upon swearing an oath to the Constitution as President of the United States, and that he violated that oath by engaging in insurrection. Trump's third motion to dismiss should be denied.

BACKGROUND

Collectively, Intervenors Trump and Colorado Republican State Central Committee ("Colorado GOP") have now filed four motions to dismiss the Petition. The Colorado GOP has filed a motion for judgment on the pleadings, and Petitioners filed a single motion to dismiss one count of the Colorado GOP's complaint. Because these motions raise often overlapping and repetitive arguments, and given the Court's order on October 2, 2023, regarding Petitioners' response to duplicate arguments, Petitioners identify below where the Court should look to find Petitioners' complete response to each of the various arguments presented by Intervenors:

- This Response to Trump's Third Motion to Dismiss: Responses to Trump's legal arguments against application of the Fourteenth Amendment; responses to Trump's arguments regarding the legal standard for "engaged in" and "insurrection" and the

sufficiency of the Petition's allegations; response to Trump's *forum non conveniens* argument.

- Response to Trump's Special Anti-SLAPP Motion to Dismiss (9/29/2023): Showing that anti-SLAPP statute does not apply; laying out the evidence establishing Petitioners' *prima facie* case; response to Trump's First Amendment argument.

- Corrected Response to Trump's First Motion to Dismiss (10/3/2023):[1] Response to Intervenors' argument that the Petition is not a proper § 1-1-113 action, that Colorado law does not allow challenges to federal candidate qualifications, and that Petitioners' claims are not ripe.

- Petitioners' Motion to Dismiss Colorado GOP's Count 1 (9/22/2023): Moving to dismiss the Colorado GOP's First Amendment claim because it cannot be raised under § 1-1-113's procedures.

- Response to Colorado GOP's Motion to Dismiss (9/29/2023): Response to the Colorado GOP's First Amendment challenge.

- Response to Colorado GOP's Motion for Judgment on the Pleadings / As a Matter of Law (10/6/2023): Response to the Colorado GOP's motion under C.R.C.P. 12 and 56.

ARGUMENT

I. The Political Question Doctrine Does Not Apply To Pre-Election Ballot Access Challenges To Presidential Candidate Qualifications

A. Petitioners' Claim Is Justiciable

Trump wrongly argues that Petitioners' claim challenging his qualifications for office under a Colorado ballot access law presents a nonjusticiable political question. Mot. at 2–8. "A controversy 'involves a political question ... where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012). Neither condition is met here. *See Elliott v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016), *aff'd*, 635 Pa. 212 (2016) (challenge to presidential primary

[1] Petitioners originally filed this response on September 29, 2023, but had to correct the caption and re-file on October 3, 2023.

candidate Ted Cruz's eligibility did not present a political question).

First, nothing in the Constitution "commits to Congress and the Electoral College [the] exclusive power to determine presidential qualifications." *Cf.* Mot. at 2. To the contrary, "the Constitution does not vest the Electoral College with power to determine the eligibility of a Presidential candidate"; it only charges the "Electoral College [with] select[ing] a candidate for President and then transmit[ting] their votes to the nation's 'seat of government.'" *Elliot*, 137 A.3d at 650–51 (quoting U.S. Const. amend. XII). Nor does the Constitution give Congress any "control over the process by which the President and Vice President are normally chosen," *id.* at 651; it merely tasks Congress with the duty to "count[]" the votes of the electors, U.S. Const. amend XII. This stands in contrast to the constitutional provision governing the eligibility of members of Congress, which provides that "[e]ach House [of Congress] *shall be the Judge* of … Qualifications of its own Members." U.S. Const. art. I, § 5, cl. 1 (emphasis added). "Significantly, no Constitutional provision places such power in Congress to determine Presidential eligibility." *Elliot*, 137 A.3d at 651. That the Constitution specifies no "Judge" of presidential qualifications reinforces that the "determination of the eligibility of a person to serve as President has not been textually committed to Congress." *Id.* at 651.

Moreover, the Constitution vests *state legislatures*, not Congress, with the power to "direct" the "manner" of appointing presidential electors. U.S. Const. art. II, § 1, cl. 3. This clause gives the states "far-reaching authority" to run presidential elections, "absent some other constitutional constraint." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020). In keeping with this constitutional authority and the states' power to regulate congressional elections, *see* U.S. Const. art. I, § 4, cl. 1, states have "typically enjoyed broad powers to regulate *candidates*" for federal office, including through ballot access laws enabling enforcement of federal

qualifications for office. *Cawthorn v. Amalfi*, 35 F.4th 245, 262 (4th Cir. 2022) (Wynn, J., concurring). This power poses no conflict with the federal government's authority, as the Constitution commits to no federal entity the power to evaluate *candidate* qualifications. *See id.* at 262–63 (noting that while the Constitution vests Congress with the authority to judge the qualifications "'*of its own Members*, … [n]othing in the text of that clause says anything about 'candidates,' 'prospective Members,' 'would-be [M]embers,' and the like").

The mere possibility that Congress *could theoretically* "remove" Trump's Section 3 disqualification (Mot. at 7–8) does not render the states powerless to enforce his *existing* disqualification. Any constitutional qualification (including those based on age, citizenship, and residency) could theoretically be changed by amending the Constitution under the Article V amendment process; that does not render the qualification *unenforceable* prior to election day. Nor does Trump's argument have any factual basis: he points to nothing suggesting any prospect of supermajorities of both houses of Congress voting to grant him or any other January 6th participant Section 3 amnesty.[2]

This Court's enforcement of Trump's existing disqualification would not, as Trump claims, "strip Congress" of its Section 3 amnesty power. Mot. 8. Even if Petitioners prevail, Congress could still remove Trump's disability by a two-thirds vote. *See* Ex. 1, Magliocca Rep. at 11 (noting Congress's passage of Section 3 amnesty legislation in 1872, which applied to ex-Confederates previously disqualified by courts). Petitioners' requested relief would do nothing to prevent that. But Colorado has an election to run, and a legitimate interest in protecting the

[2] Trump identifies no proposed amnesty legislation or even any pending amnesty request to Congress. *Cf.* Ex. 1, Magliocca Rep. at 10–11 (noting that "after the Fourteenth Amendment's ratification, thousands of ex-Confederates flooded Congress with amnesty requests to 'remove' their Section 3 disqualification, demonstrating that they understood themselves to be disqualified even without a formal adjudication").

integrity of the state's ballots and election processes. *See infra* Part I.C. Trump has no right to override that weighty state interest now based on unsupported speculation that a supermajority of Congress *might* remove his Section 3 disqualification; indeed, even if Congress promised to grant him amnesty *later* (which it has not), that would not remove his *present* constitutional disability or vitiate the state's interest in enforcing it.

Nor is the second political question condition met, as there are plainly "judicially discoverable and manageable standards for resolving the issue." *Elliott*, 137 A.3d at 652; *see Zivotofsky*, 566 U.S. at 201 ("Resolution of [Petitioner's] claim demands careful examination of the textual, structural, and historical evidence put forward by the parties ... This is what courts do."). Indeed, courts have previously applied Section 3 with no difficulty and in doing so have expounded on the meaning of the "oath," "insurrection," and "engagement" elements of Section 3. *See* Ex. 1, Magliocca Rep. at 17–18, 23–26. Trump does not argue otherwise.

B. State Courts Have Adjudicated Presidential Qualifications Challenges On The Merits

State courts have reached the merits of challenges to presidential candidate qualifications before—contrary to Trump's claim that state courts have "uniformly" deemed such claims nonjusticiable, Mot. at 2.[3] *See, e.g.*, *Elliott*, 137 A.3d at 652 (rejecting political question argument and reaching merits of state statutory challenge to presidential primary candidate Ted Cruz's eligibility); *Ankeny v. Governor of Ind.*, 916 N.E.2d 678 (Ind. Ct. App. 2009) (reaching merits of state law eligibility challenge to Obama and McCain); *Purpura v. Obama*, 2012 WL

[3] This error and others suggest Trump did not closely read the Petition before moving to dismiss it. *See, e.g.*, Pet. ¶ 81 (citing *Elliot* and *Ankeny*); Mot. at 2 (wrongly claiming state courts have "uniformly" deemed cases like this one nonjusticiable); Pet. ¶¶ 369–77 (defining the meaning of "insurrection" as used in Section 3); Mot. at 21 (wrongly claiming that "any definition or legal standard for what constitutes an 'insurrection' under Section 3" is "[c]onspicuously absent from the Petition").

1949041 (N.J. Super. Ct. App. Div. May 31, 2012) (same, affirming administrative law judge's decision on the merits of Obama's eligibility); *see also* Ex. 2, *Williams v. Cruz*, OAL Dkt. No. STE 5016-16 (N.J. Off. of Admin. Law Apr. 12, 2016), https://perma.cc/7G6F-AL3J (rejecting political question argument and reaching merits of Cruz's eligibility).

The cases cited by Trump are readily distinguishable. *See* Mot. at 4–7. In none of those cases did the plaintiffs bring a *pre-election* suit in state court under a state law authorizing ballot access challenges to presidential primary candidates. Rather, Trump's cases involve *post-election* challenges seeking to annul the results of a presidential election.[4] Here, the Colorado General Assembly has exercised its constitutional power to authorize pre-election eligibility challenges. *See* § 1-4-1204(4), § 1-1-113, C.R.S. (2023). Trump's cited cases do not address this scenario.

C. Deeming States Powerless To Exclude Constitutionally Ineligible Presidential Candidates From Their Ballots Would Trample States' Rights And Have Absurd Results

Trump also wholly disregards the states' weighty "interest in protecting the integrity … of their ballots and election processes." *Utah Republican Party v. Cox*, 892 F.3d 1066, 1084 (10th Cir. 2018) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)).

[4] *See Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009) (plaintiff brought post-election suit, with no discernible cause action, to enjoin the Electoral College and Congress from formalizing the election results based on President Obama's alleged ineligibility); *Grinols v. Electoral Coll.*, 2013 WL 2294885, at *1 (E.D. Cal. May 23, 2013) (similar suit, but plaintiff sought to annul the election results post-inauguration), *aff'd*, 622 F. App'x 624 (9th Cir. 2015); *Strunk v. N.Y. State Bd. of Elections*, 950 N.Y.S.2d 722 (Sup. Ct. 2012) (same); *Taitz v. Democrat Party of Mississippi*, 2015 WL 11017373 (S.D. Miss. Mar. 31, 2015) (similar suit, but plaintiff sought to annul presidential primary results); *Kerchner v. Obama*, 669 F. Supp. 2d 477, 479–80 (D.N.J. 2009) (similar suit, but plaintiff sought to remove President Obama from office). Other cases cited by Trump did not even apply the political question doctrine. *See Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008) (not addressing political question doctrine and instead finding that judicial review of John McCain's constitutional eligibility, if any, "should occur only after the electoral and Congressional processes have run their course"); *Keyes v. Bowen*, 189 Cal. App. 4th 647, 659–61 (2010) (not addressing political question doctrine and dismissing suit on state law grounds).

This interest forms the "very backbone of our constitutional scheme—the right of the people to cast a meaningful ballot." *Id.* And the "state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot [presidential] candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding exclusion of a naturalized citizen from presidential primary ballot); *Hassan v. New Hampshire*, No. 11-cv-552, 2012 WL 405620 at *1, 4 (D.N.H. Feb. 8, 2012) (same); *Lindsay v. Bowen*, 750 F.3d 1061, 1063–65 (9th Cir. 2014) (upholding exclusion of a 27-year-old from presidential primary ballot); *see also Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1319 (N.D. Ga. 2022) (recognizing, in Section 3 context, the states' "legitimate interest" in "enforcing existing constitutional requirements to ensure that candidates meet the threshold requirements for office and will therefore not be subsequently disqualified, thereby causing the need for new elections"); *Louisiana ex rel. Sandlin v. Watkins*, 21 La.Ann. 631, 632 (1869) ("the State has obviously a great interest in" enforcing Section 3 "and a clear right to" do so).

Counsel for Trump embraced this view when he was Colorado's Secretary of State. In 2012, then-Secretary Gessler insisted "any candidate who does not meet the minimum Constitutional requirements for the office of the Presidency *may not be placed on the ballot for that office*." Ex. 3, Answer ¶ 27, *Hassan v. Colorado,* No. 11-cv-3116, ECF No. 27 (D. Colo. Apr. 24, 2012) (emphasis added). His office further stated: "The Secretary of State is responsible for ensuring that only eligible candidates are placed on the ballot, and *must give effect to* … the qualifications for the office of President as outlined in the U.S. Constitution[.]" Ex. 4, Letter from Colorado Secretary of State to Abdul K. Hassan (Aug. 12, 2011) (emphasis added).

Indeed, the states' interest in policing their ballots is at its peak in presidential elections.

A state must ensure its electoral votes are not wasted on an unqualified candidate. If the state's electoral votes are later discarded in Congress, then the state's citizens will be deprived of the opportunity for their voices to be heard, and the state will be deprived of its right to participate in the Electoral College. Yet if Trump's view were correct, "every 'state would be powerless to prevent' 'fraudulent or unqualified candidates such as minors, out-of-state residents, or foreign nationals'" from running for President. *Cawthorn*, 35 F.4th at 265 (Wynn, J., concurring) (quoting *Greene*, 599 F. Supp. 3d at 1319). "It is hard to believe the State legislatures that ratified the Constitution signed up for such a charade." *Id.*

Trump's position also has calamitous prospects: only Congress could disqualify an ineligible President-Elect during its January 6th Joint Session, *after millions of voters chose that candidate in the general election. See* Mot. at 7. Common sense and the events of January 6, 2021, teach that this is a recipe for disaster. It would lead to precisely "the sort of electoral 'chaos' that the Supreme Court has repeatedly held States are constitutionally empowered to mitigate" by policing their ballots of unqualified candidates *before* any votes are cast. *Cawthorn*, 35 F.4th at 266 n.4 (Wynn, J., concurring) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). And, because a federal question is involved here, the U.S. Supreme Court will have the opportunity to resolve any conflicts between states.

II. Section 3 Of The Fourteenth Amendment Is Enforceable In State Courts Through State Law, Without Any Federal Legislation

Trump's argument that Section 3 of the Fourteenth Amendment is not "self-executing" Mot. at 8–11, is both irrelevant and wrong. It is irrelevant because Petitioners do not seek to enforce Section 3 standing alone; they proceed under a cause of action created by *Colorado law* to enforce qualifications for office. And it is wrong because Section 3 is "self-executing"—at least insofar as the Supreme Court has used that term. Trump's contrary reading is refuted by

Section 3's text, the Constitution's Supremacy Clause, the history of state court enforcement of Section 3, and Supreme Court precedent on the Fourteenth Amendment.

A. Under The Supremacy Clause, State Courts Must Enforce Section 3 Where State Law Allows And, Historically, State Courts Have Done Exactly That

Trump provides no argument why Section 3 cannot be "executed" by *state statutes* that provide a cause of action to enforce federal qualifications against candidates. State courts, of course, have an affirmative duty to adjudicate constitutional questions where state law allows, even absent federal legislation. The U.S. Constitution's Supremacy Clause provides that "[t]his Constitution … shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*." U.S. Const. art. VI, cl. 2. (emphasis added). The Clause explicitly "'charges state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure' . . . unless Congress dictates otherwise." *Consumer Crusade, Inc. v. Affordable Health Care Sols., Inc.*, 121 P.3d 350, 353 (Colo. App. 2005) (quoting *Howlett v. Rose*, 496 U.S. 356, 367 (1990), and *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990)). "[T]he Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Howlett*, 496 U.S. at 367. And "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Haywood v. Drown*, 556 U.S. 729, 735-36 (2009).

In keeping with these bedrock principles of federalism, state courts have historically enforced Section 3 pursuant to *state* statutes and procedural rules, even without federal enforcement legislation in effect. *See, e.g.*, *New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, at 27, 2022 WL 4295619 (N.M. Dist. Ct. Sep. 6, 2022) (adjudicating Section 3 challenge under state quo warranto law); *Worthy v. Barrett*, 63 N.C. 199, 202 (1869) (mandamus), *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869); *In re Tate*, 63

N.C. 308 (mandamus); *Sandlin*, 21 La.Ann. 631 (quo warranto); Ex. 1, Magliocca Rep. at 35 (discussing cases); *see also* Ex. 5, *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Off Admin. Hr'gs May 6, 2022), https://perma.cc/M93H-LA7X (state administrative Section 3 challenge).

Colorado law provides Petitioners a cause of action to prevent the Secretary from granting ballot access to a constitutionally ineligible presidential primary candidate. *See* Petitioners' Response to Respondent Trump's Motion to Dismiss at 14–16 (filed Sept. 29, 2023); Sec. of State's Omnibus Response to Motions to Dismiss at 3–8 (filed Sept. 29, 2023); *see also* C.R.S. §§ 1-4-1204(4), 1-1-113. Thus, to overcome the Supremacy Clause's presumption of state court reviewability, Trump must show both that Section 3 is not "self-executing" *and* that these Colorado statutes are somehow *unconstitutional and unenforceable*. Such a claim is absurd and nothing in the Constitution or case law remotely supports it.[5]

Trump fails to address any of the state court cases enforcing Section 3 of the Fourteenth Amendment under state law (many of which are cited in the Petition, *see* Pet. ¶ 344). Instead, he relies on a paper by two law professors. Those professors—whose views Trump recently dismissed in other court filings as "idiosyncratic" and "of limited use," *infra* Part IV.F—claim that "to sue the federal government or its officers, a private individual litigant must invoke a federal statutory cause of action," such as 42 U.S.C. § 1983. Mot. at 9 (quoting Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3: A Response to William Baude and Michael Stokes Paulsen*, 28 Tex. Rev. L. & Pol. (forthcoming 2023-24), at 12). That claim is wrong: the Supreme Court has squarely held that *state law* can provide a cause of action

[5] Nor would such a claim be proper in a § 1-1-113 proceeding in any event. *See* Petitioners' Motion to Dismiss Intervenor's First Claim at 5–8 (filed Sept. 29, 2023); Sec. of State's Omnibus Response to Motions to Dismiss at 6–7 (filed Sept. 29, 2023).

to enforce the U.S. Constitution, regardless of any federal cause of action. *See Health and Hospital Corp. v. Talevski*, 599 U.S. 166, 177 (2023) ("[T]he § 1983 remedy ... is, in all events, *supplementary to any remedy any State might have*." (emphasis added)). And Petitioners here seek to compel a *state official* to enforce a constitutional qualification under *a state ballot access law*; they have not sued "the federal government or its officers," Mot. at 9. States "have great latitude to establish the structure and jurisdiction of their own courts," and federal law "may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Howlett*, 496 U.S. at 372–73.[6]

B. The Fourteenth Amendment's Text And Supreme Court Precedent Confirm Section 3 Is "Self-Executing" And Can Be Enforced Without Federal Legislation

Section 3 requires no federal legislation to take effect. It imposes a clear command with independent legal force: "No person *shall*" hold public office if the disqualifying conditions are met. U.S. Const. amend. XIV, § 3 (emphasis added). Its mandatory language mirrors other self-executing constitutional qualifications. *See, e.g.*, *id.* art. I, § 2, cl.2 ("No Person shall be a Representative who shall not…"); art. I, § 3, cl.3 ("No Person shall be a Senator who shall not…"); art. II, § 1, cl. 5 ("No Person … shall be eligible to the Office of President … who shall not…"); amend. XXII ("No person shall be elected to the office of the President more than twice…"). Section 3 also echoes other substantive provisions of the Fourteenth Amendment, *see, e.g.*, *id.* amend. XIV, § 1 ("No State shall …"), § 4 ("[N]either the United States nor any State shall…"); and provisions of the Constitution's other Reconstruction Amendments, *see* U.S.

[6] Trump incorrectly claims that Blackman and Tillman's paper caused Baude and Paulsen to "substantially modify" their analysis regarding Trump's Section 3 disqualification. Mot. at 9. The redline attached to his motion shows otherwise. *See* Mot., Ex. B (showing mostly non-substantive changes and responses to additional arguments).

Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude … shall exist…"); *id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged…"). Each of the Reconstruction Amendments include materially identical sections authorizing Congress to enact legislation enforcing the Amendments' substantive provisions. *See* U.S. Const. amend. XIII, § 2; *id*. amend. XIV, § 5; *id.* amend. XV § 2.

Like other substantive provisions of the Fourteenth Amendment and other constitutional qualifications, Section 3 "directly adopts a constitutional rule of disqualification from office" that requires no federal legislation to take effect. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev. (forthcoming 2024), at 18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751. As a federal appeals court has said, Section 3's authorization of Congress to "remove such disabilit[ies]" by a two-thirds vote "connotes taking away something which has already come into being." *Cawthorn*, 35 F.4th at 248, 260; *see also* Ex. 1, Magliocca Rep. at 10–11. Section 3 itself therefore creates the disability. Similarly, under the *expressio unius* canon, Section 3's inclusion of an explicit congressional role in *removing* disqualifications, but omission of any role in *imposing* them, supports a "sensible inference" that no congressional action is required to activate Section 3. *See N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 302 (2017); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995) (applying canon in construing Article I's Qualifications Clauses).

Critically, the Supreme Court has expressly held that Section 1 of the Fourteenth Amendment *is* "self-executing," just like the "first eight Amendments to the Constitution." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). The *Boerne* Court made clear that Section 5 merely grants Congress the "remedial power" to adopt legislation implementing each section of

the Fourteenth Amendment; it does not *condition* the Amendment's operation on congressional action. Rather, the "power to interpret the Constitution in a case or controversy remains in the Judiciary." *Boerne*, 521 U.S. at 524–29*; see also Civil Rights Cases*, 109 U.S. 3, 20 (1883) (the Fourteenth Amendment "is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances").[7]

The Supreme Court's rationale applies equally to Section 3. Congress's Section 5 power to legislate for Section 3, like its power to legislate for Section 1, is necessarily limited by the *judiciary's* interpretation of the Constitution. Otherwise, "it is difficult to conceive of a principle that would limit congressional power" as to Section 3. *Boerne*, 521 U.S. at 529; *cf. Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) (contrasting the Copyright Clause, which "empowers Congress to *define* the scope of the substantive right," and Section 5, which "authorizes Congress to *enforce* commands" of the Fourteenth Amendment).

Trump relies on Blackman and Tillman's distinction between using the Constitution as a "sword" (seeking affirmative relief) or a "shield" (defense to prosecution), claiming that "[c]onstitutional provisions are not automatically self-executing" when used affirmatively. Mot. at 9 (quoting Blackman & Tillman, *supra*, at 12). In addition to ignoring the Fourteenth Amendment's text and history of enforcement, this argument confuses a provision's substantive scope with its remedy. Of course a litigant would need a cause of action to get into court and obtain affirmative relief. But that in no way undermines the judiciary's "power to interpret the

[7] The Supreme Court has further held that the Thirteenth and Fifteenth Amendments, both of which include enforcement clauses like the Fourteenth Amendment, are likewise "self-executing." *Civil Rights Cases*, 109 U.S. at 20; *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009). And state courts routinely adjudicate other Fourteenth Amendment claims brought directly under the Constitution. *See, e.g.*, *Town of Dillon v. Yacht Club Condos. Home Owners Ass'n,* 2014 CO 37 (Due Process Clause claim); *San Isabel Elec. Ass'n v. Pub. Utils. Comm'n*, 2021 CO 36 (same).

Constitution in a case or controversy," *Boerne*, 521 U.S. at 524, once the question of constitutional interpretation properly gets before a court. Here, Petitioners challenge Trump's candidate qualifications under a state law cause of action, and the task of interpreting Section 3 of the Fourteenth Amendment is properly before this Court. This Court must "say what the law is." *Id.* at 536 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

C. Trump's Contrary Authority Is Neither Binding Nor Persuasive

Despite claiming "[a]mple precedent" supports his position, Trump cites only a single, non-binding case that is both unpersuasive and inapplicable: *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869). *See* Mot. at 10. There, Chief Justice Salmon Chase, while sitting as a circuit judge in post-Civil War Virginia, held that an Act of Congress was required to permit a federal court to grant habeas corpus relief to a defendant convicted in a trial presided over by a state judge presumably disqualified under Section 3. *In re Griffin*, 11 F. Cas. at 26. That case, however, arose from a unique historical context with no applicability to the modern day: in 1869, Virginia was an "unreconstructed" territory under federal military control, *id.* at 11, and it lacked any operative state law that could have enabled enforcement of Section 3, *id.* at 14. Thus, Chase had no occasion to address whether a functional state like Colorado could pass its own legislation providing procedures for enforcing constitutional qualifications like Section 3. *See* Ex. 1, Magliocca Rep. at 36–38; *see also Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 170 (2004) ("Questions … neither brought to the attention of the court nor ruled upon … are not to be considered as having been so decided as to constitute precedents.").

Moreover, Chief Justice Chase reversed his position on Section 3 in the treason prosecution of Jefferson Davis, where he agreed (again as a circuit judge) with Davis that Section 3 "executes itself" and "needs no legislation on the part of congress to give it effect." *In*

re Davis, 7. F. Cas. 63, 90, 102 (C.C.D. Va. 1871). Neither *Griffin* nor *Davis* are binding precedent since Chase was merely "acting as a circuit judge," and Chase's "contradictory holdings … draw both cases into question and make it hard to trust [his] interpretation." *Cawthorn*, 35 F.4th at 278 n.16 (Richardson, J., concurring in the judgment). And to the extent that *Griffin* could be read to apply outside of its unique historical context, its reasoning cannot be squared with modern Supreme Court precedent. *See supra* Part II.B; *see also* Baude & Paulsen, *supra*, at 35–49 (explaining why Chase's reasoning is atextual, ahistorical, and illogical).

Trump argues that the lack of federal Section 3 enforcement legislation will lead to a "patchwork" of inconsistent rulings on Trump's eligibility. Mot. at 11. Not so. As noted above, the U.S. Supreme Court will have the opportunity to resolve any conflicting rulings on Trump's disqualification.

III. Congress Has Not Preempted The States From Evaluating Presidential Candidate Qualifications

Trump's cursory "field preemption" argument is far off the mark. *See* Mot. at 11–13. Under the field preemption doctrine, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its *exclusive* governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (emphasis added). A congressional "intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive … that Congress left no room for the States to supplement it' or where there is a 'federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.*

Here, Congress hasn't even entered the field, let alone "occupied" it. Trump points to no federal law—not one—governing ballot access for presidential primary candidates. *See* Mot. at 11–13. That is not surprising because ballot access is a matter of *state law*. As explained above,

the Constitution charges the *states*, not Congress, with running federal elections and, pursuant to that authority, the states have historically wielded broad powers to regulate candidates through ballot access laws incorporating federal constitutional qualifications. *See supra* Part I; U.S. Const. art. II, § 1, cl. 3; art. I, § 4, cl. 1; *see also* Ex. 4, Letter from Colorado Secretary of State to Abdul K. Hassan (Aug. 12, 2011) ("The Secretary of State is responsible for ensuring that only eligible candidates are placed on the ballot, and must give effect to … the qualifications for the office of President as outlined in the U.S. Constitution[.]").[8]

Trump cites (Mot at. 12) constitutional and statutory provisions governing two *post-election* scenarios: (1) when Congress counts electoral votes on January 6th, *see* U.S. Const. amend. XII; 3 U.S.C. § 15, and (2) when "the *President elect* shall have failed to qualify" before his term begins, U.S. Const. amend. XX (emphasis added). Yet the Colorado laws Petitioners invoke concern an entirely different, *pre-election* function: the evaluation of candidate qualifications for ballot access in a state-run primary. Because Trump identifies *no* federal law regulating this subject, his field preemption argument fails out of the gate. *Cf. Fuentes-Espinoza v. People*, 2017 CO 98, ¶¶ 1–2 (holding that Colorado statute was preempted by "a comprehensive [federal] framework" evincing a "congressional intent to occupy the field").

Nor does Trump find support in *Thornton*. *See* Mot. at 12–13. The Court there invalidated a state constitutional amendment that impermissibly imposed an "additional qualification" for congressional candidates beyond those in the Constitution. *Thornton*, 514 U.S. at 835–36. The Court made clear it was *not* opining on the states' ability to enforce qualifications *in* the Constitution, including Section 3 of the Fourteenth Amendment. *See id.* at 787 n.2;

[8] Moreover, while the Fourteenth Amendment grants Congress authority to pass legislation enforcing Section 3, Trump points to no federal law enacted under this authority—let alone one that so occupies the field as to displace state enforcement.

Cawthorn, 35 F.4th at 264 (Wynn, J., concurring).

IV. Section 3 Of The Fourteenth Amendment Applies To Former President Trump

Trump argues Section 3 does not apply to him because the only oath he has taken to the Constitution was as President of the United States. This theory—that Section 3 exempts insurrectionist or rebel ex-Presidents, while covering virtually *every other federal or state officer in the country*—is facially implausible. And any notion that Section 3 includes a presidential loophole is foreclosed by the Constitution's plain text, Section 3's original public meaning and legislative history, U.S. Attorney General opinions, judicial precedent, and Trump's own arguments in other litigation. The President is indeed an "officer of the United States" within the meaning of the Fourteenth Amendment and Trump is subject to Section 3 disqualification.

A. The Constitution's Text

Trump advances a series of hyper-technical arguments in an effort to show that the President is not an "officer of" the United States and does not take an oath to "support" the Constitution. These arguments miss both the forest and the trees. When interpreting the Constitution's text, courts are "guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)); *see also* Baude & Paulsen, *supra*, at 105. "The simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." *Whitman v. National Bank of Oxford*, 176 U.S. 559, 563 (1900). Nobody reading the Constitution without legalistic contortion would say that Trump holds an "office" but isn't an "officer," or that an oath to "preserve, protect and defend" the Constitution is somehow not an oath to "support" it.

Section 3 applies to presidents because they are "officer[s] of," and hold "office under," the United States. U.S. Const. amend. XIV, § 3. The Constitution refers to the President holding an "Office" 25 times, including in the Oath of Office Clause. *See* U.S. Const. art. II, § 1 ("[The President] shall hold his Office during the Term of four Years … No Person except a natural born Citizen … shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."); *see also* art. I, § 3; art. II, § 4; amends XII, XXII, XV. Because the President's "Office" is within the federal executive branch, it is necessarily an office "of the United States." *See* U.S. Const. art. I, § 3, cl. 5 (President holds an office "of the United States"); *id.* art. II, § 1, cl. 8 (same). And one who holds an "office" is an "officer," as Section 3's framers clearly understood. *See infra* Part IV.B.

Article II prescribes a special oath for the President: he must swear to "faithfully execute the office of President of the United States" and "preserve, protect, and defend the Constitution of the United States." Given Section 3's focus on constitutional oaths, it would make no sense to *exempt* from disqualification the only officer whose oath is spelled out in the Constitution's text. *See Mapp v. Ohio*, 367 U.S. 643, 657 (1961) ("There is no war between the Constitution and common sense."). And the congressional record indicates Section 3's framers understood that the President's oath would trigger Section 3. *See infra* Part IV.B.

Trump counterintuitively argues that the President's greater and more demanding oath *exempts* him from Section 3's reach, because the oath does not contain the magic words "to support" the Constitution. Mot. at 17–19. This reading fails as a matter of linguistics. The President's greater duty to "preserve, protect and defend the Constitution" necessarily includes the lesser duty to "support" it. By definition, one who "defends" something "supports" it. *See* Ex.

6, Samuel Johnson, A Dictionary of the English Language (4th ed. 1773)[9] (defining "[d]efend" as "[t]o stand in defence of; to protect; *to support*") (emphasis added); Ex. 7, Samuel Johnson, 1 A Dictionary of the English Language (6th ed. 1785) (same); Ex. 8, Samuel Johnson, A Dictionary of the English Language (10th ed. 1792) (same); Ex. 9, "Defend," Merriam-Webster (2023), https://www.merriam-webster.com/dictionary/defend (defining "[d]efend" as "to maintain *or support* in the face of argument or hostile criticism") (emphasis added). Moreover, Section 3 refers to "an" oath to support the Constitution, not *the specific oath* set out in Article VI, Clause 3, as Trump wrongly argues. *See* Mot. at 16–17. Trump's claim that the President's oath doesn't count as one to "support" the Constitution is atextual and absurd.

B. Original Public Meaning And Legislative History

The Constitution's plain text is bolstered by the original public meaning of the phrase "officer of the United States" at the time the Fourteenth Amendment was adopted, as leading scholars have confirmed.[10] Section 3's framers, President Andrew Johnson and other presidents, and ordinary citizens in the nineteenth-century widely understood the President to be an "officer of the United States." *See Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (looking to provision's "plain meaning at the time of enactment").

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[9] The Supreme Court frequently cites Samuel Johnson's Dictionary in construing constitutional terms. *See, e.g.*, *Heller*, 554 U.S. at 581; *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021).

[10] *E.g.*, Baude & Paulsen, *supra*, at 107–11; Gerard N. Magliocca, *Background as Foreground: Section 3 of the Fourteenth Amendment and January 6th*, J. Con. L., Vol. 25:5, at n.48, Feb., 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4306094; Mark A. Graber, *Disqualification From Office: Donald Trump v. the 39th Congress*, Lawfare, Feb. 23, 2023, https://www.lawfaremedia.org/article/disqualification-office-donald-trump-v-39th-congress; Ilya Somin, *Why President Trump is an "Officer" who Can be Disqualified From Holding Public Office Under Section 3 of the 14th Amendment*, The Volokh Conspiracy, Sept. 16, 2023, https://reason.com/volokh/2023/09/16/why-president-trump-is-an-officer-who-can-be-disqualified-from-holding-public-office-under-section-3-of-the-14th-amendment/; John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming 2023), at 13–22 https://ssrn.com/abstract=4440157.

Contemporaneous dictionaries defined an "office" as a public duty conferred by a government's authority, which certainly would include a president, whose duties are set out in Article II.[11] And before Section 3 was adopted, the American people were told that *any official* who broke his oath to uphold the Constitution under that provision was excluded from *any position* in national or state government unless Congress granted a waiver. Ex. 12, Speech of Hon. John A. Bingham, *N.H. Statesman*, Aug. 24, 1866, at 1 (Section 3 means that "no man who broke his official oath with the nation or State, and rendered service in this rebellion shall, except by the grace of the American people, be again permitted to hold a position, either in the National or State Government.").

As Fourteenth Amendment historian Mark Graber notes, "Republicans in the Thirty-Ninth Congress repeatedly referred to the President as an officer."[12] Representative Rufus Spalding of Ohio spoke of the presidency as "this high officer of the Government." Ex. 13, Cong. Globe, 39th Cong., 1st Sess. 132 (1866) (statement of Rep. Spalding). Representative John Holmes of Massachusetts declared the president was "the chief executive officer of the United States." Ex. 14, *id.* 1318 (statement of Rep. Holmes (quoting President Johnson)). Senator James Dixon referred to the president as an "officer of the Government." Ex. 15, Cong. Globe, 39th Cong., 2d Sess. 1505 (1867). Senator Benjamin Wade of Ohio noted that "[t]he President is a mere executive officer." Ex. 16, Cong. Globe, 39th Cong., 1st Sess. 1800 (1867).

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[11] *See* Ex. 10, *Office*, An American Dictionary of the English Language by Noah Webster 769 (Chauncey Goodrich ed., 1858) ("particular duty, charge or trust conferred by public authority, for a public purpose," and "undertaken by . . . authority from government or those who administer it."); Ex. 11, *Office*, A Phonographic Pronouncing Dictionary of the English Language by William Bolles 332 (1846) ("a public charge or employment; magistracy").

[12] Mark Graber, *Their Fourteenth Amendment, Section 3 and Ours*, Just Security (Feb. 16, 2021), https://www.justsecurity.org/74739/their-fourteenth-amendment-section-3-and-ours/.

President Andrew Johnson repeatedly referred to himself as the "chief civil executive officer of the United States."[13] Presidents James Buchanan and Benjamin Harrison also referred to themselves as the "chief executive officer of the United States."[14] And George Washington used the phrase "President and other public Officers." Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 Duke J. Const. L. & Pub. Pol'y 35, 39 (2009).

The congressional debates over Section 3 reflect a conscious decision to cover the President and the Presidency. *See* Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 Const. Comm. 87, 94 n.32 (2021). In the Senate debate, Senator Reverdy Johnson of Maryland asked why former officials who were Confederates "may be elected President and Vice-President of the United States, and why did you omit to exclude them? I do not understand them to be excluded from the privilege of holding the two highest offices in the gift of the nation." Ex. 20, Cong. Globe, 39th Cong, 1st Sess. 2898 (1866) (statement of Sen. Johnson). Senator Lot Morrill of Maine responded: "*Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States*.'" *Id.* (statement of Sen. Morrill) (emphasis added). Senator Johnson replied: "Perhaps I am wrong as to the exclusion from the presidency; *no doubt I am*." *Id.* (statement of Sen. Johnson) (emphasis added). Senator

[13] *See* Ex. 17, President Andrew Johnson's Proclamations Reorganizing the Governments of North Carolina (May 29, 1865), Mississippi (June 13, 1865), Georgia (June 17, 1865), Texas (June 17, 1865), Alabama (June 21, 1865), South Carolina (Jun 30, 1865), and Florida (July 17, 1865), 6 A Compilation of the Messages and Papers of the Presidents, 312–31 (James D. Richardson ed., 1897) (President Johnson referring to himself as the "chief civil executive officer of the United States").

[14] *See* Ex. 18, The President's Message, W. Res. Chron. (Warren, Ohio), Jan. 16, 1861, at 2 (Buchanan); Ex. 19, *By the President of the United States of America: A Proclamation*, 9 A Compilation of the Messages and Papers of the Presidents, 288 (James D. Richardson ed., 1898) (Harrison).

Howard of Michigan described the proposal's application to "the election of the next or any future President of the United States." Ex. 21, *id.* at 2768 (statement of Sen. Howard). And Senator John Henderson of Missouri added that Section 3 "strikes at those who have heretofore held high official position, and who therefore may be presumed to have acted intelligently." Ex. 22, *id.* at 3036 (statement of Sen. Henderson).

In the House, Representative Thaddius Stevens, who introduced the first draft of what became Section 3, argued that the Fourteenth Amendment should be carried out "both in reference to the presidential and all other elections." Ex. 23, *id.* at 2544. And congressmen identified Aaron Burr as the type of target intended by the provision—Burr was the Vice President at the time of his conspiracy and thus not among those offices expressly enumerated in Section 3. Ex. 24, *id.* at 2534–35 (statement of Rep. Eckley).

Contrary to Trump's claim that the President's oath does not trigger Section 3, "[n]o member of the Congress that drafted the 14th Amendment distinguished between the presidential oath mandated by Article II and the oath of office for other federal and state officers mandated by Article VI. Both were oaths to support the Constitution." Graber, Lawfare, *supra*. Senator Garrett Davis of Kentucky saw no legal difference between the constitutional requirement that "all officers, both Federal and State, should take an oath to support" the Constitution and the constitutional requirement that the president "take an oath, to the best of his ability to preserve, protect, and defend the Constitution." Ex. 25, Cong. Globe, 39th Cong, 1st Sess. App. 234 (1866) (statement of Sen. Davis). And Senator James Doolittle of Wisconsin stated that Congress need not pass laws requiring presidents to swear to support the Constitution because the President's "oath is specified in the constitution." Ex. 26, Cong. Globe, 39th Cong, 1st Sess. 2915 (1866) (statement of Sen. Doolittle).

What mattered to members of the 39th Congress were past oaths to the Constitution, not linguistic technicalities over the oath or the offices covered. "[A]ll of us understand the meaning of the third section," Sen. Sherman stated, "those men who have once taken an oath of office to support the Constitution of the United States and have violated that oath" must be "deprived for a time at least of holding office." Ex. 27, Cong. Globe, 39th Cong., 1st Sess. 2899 (1866). Sen. Thomas Hendricks of Indiana, who opposed the Fourteenth Amendment, agreed that "the theory" of Section 3 was "that persons who have violated the oath to support the Constitution of the United States ought not to be allowed to hold any office." Ex. 28, *id.* at 2898; *see also* Ex. 1, Magliocca Rep. at 20 (compiling similar statements).

Contemporaneous sources also show a clear consensus that Section 3 disqualified Jefferson Davis from holding the Presidency. *See id.* at 29–30. Congress denied Section 3 amnesty to Davis in part because Republicans in Congress were outraged at the thought that Davis could be eligible for the presidency. *See* Ex. 29, 4 Cong. Rec. 325 (1876) (statement of Rep. Blaine) (rejecting Section 3 amnesty for Davis because that would mean that he would "be declared eligible and worthy to fill any office up to the Presidency of the United States").

C. Attorney General Opinions

Section 3's application to the President is further supported by two opinions of Attorney General Henry Stanbery interpreting federal statutes enforcing Section 3 prior to its ratification. In one opinion, the Attorney General called the President "simply an executive officer." Ex. 30, *The Reconstruction Acts*, 12 U.S. Op. Att'y Gen. 182, 196 (1867). He then construed "officers of the United States" broadly to cover "without limitation" anyone who "held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States." *Id.* at 203. In another opinion, the Attorney General stated: "Here the term officer

is used in its most general sense, and without any qualification. … [T]he reason is apparent for including all officers of the United States, and for making the disfranchisement more general and comprehensive as to them, standing, as they do, in … direct relation and trust to the United States." Ex. 31, *The Reconstruction Acts*, 12 U.S. Op. Atty. Gen. 141, 158 (1867); *see also* Ex. 32, *Claims for the Use of Turnpikes in Time of War*, 13 U.S. Op. Att'y Gen. 106, 109 (1869) (calling the President the "ultimate superior officer"); Ex. 33, *Compromise of Internal-Revenue Cases*, 13 U.S. Op. Atty. Gen. 479, 480 (1871) (referring to "any officer but the President").

Modern opinions of the Department of Justice's Office of Legal Counsel continue to recognize that the President holds an "office." Ex. 34, *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 78 (2007) ("The text and structure of the Constitution reveal that officers are persons to whom the powers 'delegated to the United States by the Constitution,' U.S. Const. amend. X, are in turn delegated in order to be carried out. The President himself is said to 'hold [an] Office,' and the Constitution provides that '[t]he executive Power shall be vested in' that office. *Id.* art. II, § 1, cl. 1.").

D. Judicial Decisions

No court has specifically addressed whether the President qualifies as an "officer of the United States" under Section 3 of the Fourteenth Amendment. But a contemporaneous Supreme Court case referred to the President as an "officer," stating "[w]e have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." *The Floyd Acceptances*, 74 U.S. 666, 676–77 (1868).

Lower courts likewise referred to the President as an officer, including in one case affirmed by the Supreme Court. *See, e.g.*, *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702,

752 (C.C.D.D.C. 1837) ("The president himself . . . is but an officer of the United States…"), *aff'd*, 37 U.S. 524 (1838); *Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (calling the President "that high officer"). The Supreme Court also drew parallels between the "chief executive officer of a State" and the federal government's chief executive. *See Ex parte Wells*, 59 U.S. 307, 318 (1855) (using the power of state governors to interpret the president's constitutional pardon power). Justice Joseph Story and legal treatises referred to the President as an "officer." Ex. 35, 1 Joseph Story, *Commentaries on the Constitution of the United States* 435 (1833); Ex. 36, Anson Willis, Our Rulers and Our Rights: or, Outlines of the United States Government 30 (1870) ("highest officer in the government").

State supreme courts construing Section 3 adopted expansive definitions of "officers." In *Worthy*, the North Carolina Supreme Court drew "the distinction between an officer and a mere placeman . . . by making his oath the test. Every officer is required to take not only an oath of office, but an oath to support the Constitution . . . of the United states. . . . [T]he oath to support the Constitution is the test." *Worthy*, 63 N.C. at 202, 204. Similarly, the Florida Supreme Court in an opinion construing Section 3 as incorporated through the Florida Constitution defined "[a]n officer of the State" as "a person in a public charge or employment, commissioned or authorized to perform any public duty, under an oath to support the Constitution and Government, and to perform the duty faithfully." *In the Matter of the Executive Communication of the 14th October, 1868*, 12 Fla. 651, 651–62 (1868).

The Supreme Court has construed similar "officer" language in the Constitution's Appointments Clause.[15] Because that Clause concerns *the President's* power to appoint "other

[15] *See* U.S. Const. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments

Officers of the United States," and because the President does not appoint himself, these cases naturally do not address whether the President is such an officer. *See infra* Part IV.F. But the cases do establish a general test: to be an officer of the United States, an "individual must occupy a 'continuing' position established by law," and must "exercis[e] significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2047 (2018). The President indisputably satisfies both requirements: the Presidency is a "continuing" position established and limited by the Constitution, *see, e.g.*, U.S. Const. art. II; *id.* amend. XII; *id.* amend. XXII, and the President not only exercises "significant authority pursuant to the laws of the United States"—the "*entire* 'executive Power' belongs to the President alone" and his "subordinate officers" merely "wield executive power on [the President's] behalf." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (emphasis added).

E. Reading "Officer" To Exclude The President Would Have Absurd Results

Reading "officer of the United States" to exclude the President would have absurd results incompatible with Section 3's purposes. *See Alden v. Maine*, 527 U.S. 706, 724 (1999) (considering absurd results in construing the Eleventh Amendment). An ex-President who leads a violent rebellion against the United States could hold the Presidency again, but a state legislator who was a mere footsoldier for the rebel ex-President would be forever barred from even low-level state office. Such a result disregards Section 3's historical focus on ex-Confederate *leaders*, such as Jefferson Davis, Zebulon Vance, and others. While "faithful readings of the Constitution sometimes yield counterintuitive outcomes," that "does not mean we should close our eyes to

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are not herein otherwise provided for, and which shall be established by Law: but Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

plausibility and common sense, *especially* when the proposed textual reading is such a stretch." Baude & Paulsen, *supra*, at 108 & n.395.

F. Trump Has Repeatedly Argued In Court That The President Is An "Officer of the United States" And Has Rejected The Contrary Views Of Blackman And Tillman

Trump himself has repeatedly asserted in court filings that the "[t]he President of the United States" is an "officer … of the United States" in seeking to remove cases under the federal officer removal statute, 28 U.S.C. 1442,[16] sometimes successfully.[17]

Just four months ago, Trump argued to a federal court that he is a former "officer of the United States" and disputed at length the contrary views of Josh Blackman and Seth Barrett Tillman—whose views he now embraces. *See* Ex. 38, *New York v. Trump* Remand Opp. at 2–9. There, Trump correctly argued that Tillman and Blackman's position that "elected officials, including the President, are not 'officers of the United States'" has "never been accepted by any court" and is refuted by "contrary precedent." *Id.* at 2–3. Trump aptly distinguished *Free Enterprise Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010), a case concerning the Appointments Clause, by explaining the "Supreme Court was not deciding that meaning of 'officer of the United States' as used in every clause in the Constitution," but rather was only describing the meaning of "other officers of the United States" as used in the Appointments Clause. Ex. 38, *New York v. Trump* Remand Opp. at 4. He added: "*Free Enterprise Fund* says nothing about the meaning of 'officer of the United States' in other

[16] *See* Ex. 37, Donald J. Trump's Notice of Removal, *New York v. Trump*, 1:23-cr-3773-AKH, ECF No. 1 (S.D.N.Y., filed May 4, 2023); Ex. 38, President Donald J. Trump's Mem. of Law. in Opp. to Mot. to Remand, *New York v. Trump*, 1:23-cv-3773-AKH, ECF No. 34, at 2–10 (S.D.N.Y., filed June 15, 2023) ("*New York v. Trump* Remand Opp.").

[17] Ex. 39, Notice of Removal, *K&D LLC v. Trump Old Post Off. LLC*, 17-cv-731, ECF No. 1 (D.D.C. Apr. 19, 2017); *K&D LLC v. Trump Old Post Off. LLC*, 951 F.3d 503 (D.C. Cir. 2020) (upholding Trump's removal as "an officer of the United States").

contexts[.]" *Id.*; *cf.* Mot. at 14–15 (now taking the opposite position on the same case). This same reasoning distinguishes other Appointments Clause cases cited by Blackman and Tillman (and, now, Trump). *See* Mot. at 14–15 (citing *Seila Law*, 140 S. Ct. at 2183 n.3).

In his June filing, Trump also correctly distinguished *United States v. Mouat*, 124 U.S. 303 (1888), noting that case "addressed not whether the President (or members of Congress) are ever 'officers of the United States,' but when a government official is, in the modern parlance, a mere employee and not someone 'holding employment or appointment under the United States.'" Ex. 38, *New York v. Trump* Remand Opp. at 4 (quoting *Mouat*, 124 U.S. at 305).

Trump ultimately dismissed Blackman and Tillman's views as "idiosyncratic," in conflict with the "views of numerous scholars," and "of limited use to this Court." *Id.* at 3 n.1. Trump was right on this point in June; he is wrong now.[18]

G. Blackman And Tillman's Interpretation Is Atextual, Ahistorical, And, By Their Own Admission, "Counterintuitive"

Blackman and Tillman dispute the President is an "officer of the United States" under Section 3,[19] just as they wrongly disputed that the President holds an "Office … under [the United States]" within the meaning of the Constitution's Foreign Emoluments Clause.[20] They

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[18] The court in *New York v. Trump* rejected Trump's removal on other grounds, but in dictum noted its belief that "the President should qualify as a 'federal officer' under the removal statute." *New York v. Trump*, 2023 WL 4614689, at *5 (S.D.N.Y. July 19, 2023).

[19] *See* Josh Blackman and Seth Barrett Tillman, *Is the President an 'officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment*, 15(1) N.Y.U. J.L. & Liberty 1 (2021).

[20] *See* Josh Blackman and Seth Barrett Tillman, *The Emoluments Clauses litigation, Part 1: The Constitution's taxonomy of officers and office*, The Volokh Conspiracy, Sept. 25, 2017, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/25/the-emoluments-clauses-litigation-part-1-the-constitutions-taxonomy-of-officers-and-offices/. The only court to address the question held the "text, history, and purpose of the Foreign Emoluments Clause, as well as executive precedent interpreting it, overwhelmingly" refuted Tillman's theory. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 883–85 (D. Md. 2018), *vacated as moot*, 141 S. Ct. 1262 (2021).

claim "officer of the United States" is a constitutional term of art. Because provisions of the Constitution of 1787 use that term in contexts that plainly exclude the President, Blackman and Tillman argue that—under the so-called "default presumption … of linguistic stability"—the same meaning should be engrafted onto Section 3 of the Fourteenth Amendment. Blackman and Tillman cite no historical evidence or statements from Section 3's framers supporting their conclusions.[21]

Fourteenth Amendment experts have rightly rejected this view.[22] And even Blackman and Tillman concede it is "counterintuitive." Blackman and Tillman, *supra* note 20. Blackman and Tillman ignore the Constitution's numerous references to the President holding an "Office," as well as Section 3's original public meaning, purpose, and context. And their view is distinctly non-originalist: "[s]tandard originalist theory holds that the relevant original meaning is that understood at the *time the provision in question was enacted*." Somin, *supra* note 10 (emphasis added). Here that would be 1866, when the Fourteenth Amendment was adopted—nearly 80 years after the original Constitution. That is plenty of time for any technical distinction between "officer" and "office" that might have once existed to fall into disuse.

Nor can it be right that Section 3 "officers" excludes "elected positions." *Cf.* Mot. at 14. Section 3 expressly covers numerous elected positions: "member[s] of Congress," "member[s] of any State legislature," and "executive [and] judicial officer[s] of any State." U.S. Const. amend.

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[21] In fact, not even statements by the framers of the 1787 Constitution support their conclusions. *See, e.g.*, Ex. 40, The Federalist No. 69 (1788) (Alexander Hamilton) ("The President of the United States would be an officer elected by the people[.]").

[22] *E.g.*, Baude & Paulsen, *supra*, at 108–12; Ex. 1, Magliocca Rep. at 28–34; Graber, Just Security, *supra*; Ex. 42, Adam Liptak, *An About-Face on Whether the 14th Amendment Bars Trump From Office*, New York Times, Sept. 18, 2023, https://www.nytimes.com/2023/09/18/us/politics/trump-calabresi-14th-amendment.html (quoting Professor Akhil Reed Amar as stating: "This is a genuinely stupid argument.").

XIV, § 3. In one of his 1867 opinions, Attorney General Stanbery declared that a state's "governor" qualifies as a covered "executive … officer[] of a State." Ex. 31, 12 U.S. Op. Atty. Gen. at 152. Governors are, of course, *elected* chief executive officers of a state, analogous to the President. And framers of the 1787 Constitution referred to the President as being "appointed indirectly … by the people" through the Electoral College, Ex. 41, The Federalist No. 39 (1788) (James Madison), so it is hardly clear that the President would not qualify as an "appointed" officer even under Blackman and Tillman's 1787-centric interpretation.

Blackman and Tillman also wrongly presume that Section 3 and the provisions of the Constitution of 1787 mentioning "officers of the United States" are textually identical. They are not. For instance:

- The Appointments Clause refers to "*all other* Officers of the United States," which logically excludes the President because he is the official charged with *appointing* those "other" officers. U.S. Const. art II, § 2, cl. 2. And the use of "other" here is consistent with the President himself being an officer. *See also supra* Part IV.F (discussing Trump's prior agreement with this point).
- The Impeachment Clause specifies that it applies to "*civil* Officers of the United States" to make clear that *military* officers are not subject to impeachment. U.S. Const. art. II, § 4 (emphasis added). This language excludes the President since he is the commander-in-chief of the military, and thus holds an office that is neither exclusively civil, nor exclusively military, but includes both characteristics. Section 3, by contrast, contains no "civil" qualifier.
- The Commissions Clause provides that the President "shall Commission all the Officers of the United States," U.S. Const. art. II, § 4, but this means only that the President *alone* "has the power to commission" officers. Ex. 43, Edward S. Corwin, The President: Office and Powers 78 (4th ed. 1957). No authority indicates the Clause serves to *exclude* the President from the class of Officers of the United States. In any event, the President "'commission[s]' himself … by taking the oath of office required by the Constitution. Without that, he cannot take office." Somin, *supra* note 10.

In short, nothing in the Constitution suggests any fixed definition of "officer of the United States" that categorically excludes the President. Rather, as Trump argued in June, the meaning of "officer" must be determined "contextually" in light of the *specific provision* at

issue. Ex. 38, *New York v. Trump* Remand Opp. at 5–6. And here, Section 3's text, purpose, and history overwhelmingly support the conclusion that the President is a covered "officer." *Cf. Trump*, 315 F. Supp. 3d at 883–84 (holding that "the text, history, and purpose of the Foreign Emoluments Clause, as well as executive branch precedent interpreting it, overwhelmingly support the conclusion that the President holds an 'Office of Profit or Trust under [the United States]' within the meaning of the Foreign Emoluments Clause" and rejecting Tillman's contrary view).

V. The January 6, 2021 Attack On The Capitol And Surrounding Events Were An "Insurrection Against the Constitution"

A. An "Insurrection Against the Constitution" Is A Group Of People Acting In Forcible Opposition To The Constitution

Trump falsely claims that "[c]onspicuously absent from the Petition is any definition or legal standard for what constitutes an 'insurrection' under Section 3." Mot. at 21. Eight paragraphs in the Petition lay out exactly that. Pet. ¶¶ 369–76. "The phrase 'insurrection . . . against the [Constitution],' as used in Section 3 of the Fourteenth Amendment, refers to (1) an assemblage of persons, (2) acting with the purpose to oppose the continuing authority of the Constitution of the United States, (3) by force." *Id.* ¶ 369. This definition "derive[s] from Section 3's text and original public meaning, historical context, case law, and leading dictionary definitions of "insurrection." *Id.* & n.197 (citing sources); *id.* ¶¶ 370–76 (same). Contemporary scholarship has coalesced around this definition.[23]

[23] Baude and Paulsen define "insurrection" as "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect." Baude & Paulsen, *supra*, at 64. Similarly, Gerard Magliocca—a constitutional historian who is an expert on the Fourteenth Amendment and on Section 3 in particular—identifies the historical meaning of "insurrection" against the Constitution of the United States as "a public effort by a group of people to use or threaten violence" to "prevent or hinder the execution of the United States Constitution." Ex. 1, Magliocca Rep. ¶¶ 1–2.

Start with Section 3's text. It distinguishes between "insurrection" and "rebellion," clarifying that those are distinct (if overlapping) concepts. U.S. Const. amend. XIV, § 3. As the Supreme Court declared during the Civil War, "[i]nsurrection against a government may or may not culminate in an organized rebellion, but a civil war always *begins* by insurrection against the lawful authority of the Government." *The Amy Warwick*, 67 U.S. 635, 666 (1862) (emphasis added). In other words, "insurrection" may—but need not—mature into full-scale rebellion.

Famous examples of "insurrection" in early American history involved forcible opposition to law without rising to the level of military conflict. The Whiskey Insurrection and the Fries Insurrection were both anti-tax revolts involving "concerted acts of forcible interference with federal officials' ability to perform their duties under law." Baude & Paulsen, *supra*, at 88–89; *see also Case of Fries*, 9 F. Cas. 924 (C.C.D. Pa. 1800) (Chase, J.). Neither involved a "war" in the contemporary sense of the word, nor did they involve an effort to overthrow the entire government. Ex. 1, Magliocca Rep. at 15–18. In fact, in Fries Insurrection, no actual blood was spilled; it was enough that several hundred farmers took up arms and sought to achieve their ends against the government by intimidation. *Id.* at 16. These pre-Civil War insurrections provided the historical context for that term during the legislative debates over Section 3. *E.g.*, Ex. 24, Cong. Globe, 39th Cong. 1st Sess. 2534 (May 10, 1866) (statement of Sen. Eckley) (discussing the "whiskey insurrection"); Baude & Paulsen, *supra*, at 88.

Dictionary definitions at the time agree. Webster's Dictionary defined "insurrection" as a "rising against civil or political authority; the open and active opposition of a number of persons to the execution of a law in a city or state. It is equivalent to sedition, except that sedition expresses a less extensive rising of citizens. *It differs from rebellion, for the latter expresses a revolt, or an attempt to overthrow the government*, to establish a different one or to place the

country under another jurisdiction." Ex. 44, 1 Noah Webster, American Dictionary of the English Language 111 (1828) (emphasis added); Ex. 45, 1 John Boag, A Popular and Complete English Dictionary 727 (1850) (using virtually identical language).

Contemporary judicial decisions and legal authorities used similar definitions. For example, in 1861 Justice John Catron charged a grand jury that an insurrection "must be to effect something of a public nature concerning the United States," such as acts "'to nullify and totally hinder the execution of some U.S. law or the U.S. Constitution,' or some part thereof; or to compel its abrogation, repeal, modification or change, by a resort to violence." Ex. 46, John Catron, Robert W. Wells & Samuel Treat, Charge to the Grand Jury by the Court, July 10, 1861 (1861). Other courts issued nearly identical jury charges defining insurrection. *United States v. Hanway*, 26 F. Cas. 105, 127–28 (C.C.E.D. Pa. 1851) (No. 15,299); *Case of Fries*, 9 F. Cas. 924 (C.C.D. Pa. 1800). General Order No. 100, issued in 1863 to the Union Army, similarly defined insurrection as "the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government." Ex. 47, Francis Lieber, Instructions for the Government of Armies of the United States in the Field 42 (1863).

B. January 6 Was An Insurrection Against The Constitution

The violent attack on the United States Capitol on January 6, 2021, was plainly an "insurrection against the Constitution" under the definition above. Pet. ¶¶ 359–68, 377–91. There was an assemblage of persons numbering in the thousands, which used violent force to stop the constitutionally-mandated transfer of Presidential power. *Id.* Trump does not dispute these facts—nor could he at the pleading stage, where Petitioners' alleged facts are assumed true. For that reason, Petitioners do not here repeat the detailed evidentiary showing they made regarding

the existence of an insurrection in response to Trump's Anti-SLAPP motion to dismiss. *See* Petrs' Opp. to Anti-SLAPP Mot., at 9–13.

C. Trump's Alternative Definition Is Baseless

Trump offers his own definition of "insurrection," equating it with "the taking up of arms and waging war upon the United States."[24] Mot. at 24. Trump does not define "waging war," or cite any case law defining it. And he ignores the Petition's detailed allegations about the barbaric violence deployed on January 6, the firearms and other weapons attackers brought with them, the substantial injuries and deaths incurred, and the massive law enforcement response required to put down the attack. *See* Pet. ¶¶ 265–74, 285–99, 308–14, 336–40. Trump implies it was not violent enough, and that the violence must instead rise to the level of the "civil war in which over 600,000 combatants died." Mot. at 24. But Trump does not confront the wall of historical evidence cited above and in the Petition that refutes Trump's unduly narrow legal standard—nor does he acknowledge the contemporaneous bipartisan recognition that January 6 was an "insurrection," including by Trump's own impeachment counsel. *See* Pet. ¶¶ 361–65. And the few historical sources Trump *does* cite provide no support for his interpretation.

First, Trump cites congressional debates that use the phrases "insurrection" and "rebellion" to describe the Civil War. *See, e.g.*, Ex. 48, Cong. Globe, 37th Cong., 2d Sess. 2173, 2189 (1862). Of course they did—the Civil War was a clear case of rebellion. That in no way implies that *only* events rising to the level of violence of the Civil War could be an "insurrection or rebellion."

[24] It is not clear why Trump believes this definition helps him. Had the attackers been members of a foreign military, there is no doubt Trump (rightly) would have said those countries had "taken up arms" and "waged war" against the United States, even if the number and competence of the attackers had been the same.

Second, Trump cites a case and a dictionary definition equating "insurrection or rebellion" with "treason"—and specifically, with the act of "levying war" for purposes of the Treason Clause. Mot. at 23–24. The trouble is, Trump then ignores the large body of case law defining the phrase "levying war." The settled understanding of "levying war" prior to the adoption of the Fourteenth Amendment included "insurrection"—and defined "insurrection" exactly as Petitioners do. To give just a few examples:

- "[A]ny insurrection or rising of any body of the people, within the United States, to attain or effect by force or violence any object of a great public nature, or of public and general (or national) concern, is a levying of war against the United States, within the contemplation and construction of the constitution. *Case of Fries*, 9 F. Cas. 924, 930 (1800).

- "This settled interpretation is, that the words 'levying war,' include not only the act of making war for the purpose of entirely overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law in pursuance of such combination." *In re Charge to Grand Jury - Neutrality L. and Treason*, 30 F. Cas. 1024, 1025 (D. Mass. 1851).

- "By the English authorities, it is uniformly and clearly declared, that raising a body of men to obtain, by intimidation or violence, the repeal of a law, or to oppose and prevent by force and terror, the execution of a law, is an act of levying war. Again; an insurrection with an avowed design to suppress public offices, is an act of levying war[.]" *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 349 (C.C.D. Pa. 1795) (Marshall, C.J.).

These cases and others make clear that the force needed to constitute "insurrection" (and therefore to "levying war") need not rise to the level of military conflict. "It is not necessary that there should be any military array, or weapons, nor that any personal injury should be inflicted on the officers of the law"; it is enough that "a combination formed to oppose the execution of a law by force." *In re Charge to Grand Jury*, 30 F. Cas. at 1025–26; *see also Case of Fries*, 9 F. Cas. at 930 ("[M]ilitary weapons (as guns and swords, mentioned in the indictment) are not necessary to make such insurrection or rising amount to a levying war, because numbers may supply the want of military weapons, and other instruments may effect the intended mischief.");

Hanway, 26 F. Cas. at 128 ("[T]he 'levying of war' against the United States, is not necessarily to be judged of alone by the number or array of troop," but by whether there was "a conspiracy to resist by force, and an actual resistance by force of arms or intimidation by numbers"). The sole case cited by Trump says the same: "levying war" is whenever "a body of men be actually assembled for the purpose of effecting by force a treasonable purpose." *United States v. Greathouse*, 26 F. Cas. 18, 26 (C.C.N.D. Cal. 1863).[25]

VI. Trump Engaged In Insurrection

A. "Engaged in" Insurrection Includes Any Voluntary Act In Support Of An Insurrection

Trump also argues that he did not "engage" in insurrection. Mot. at 26. While Trump does not define "engaged in insurrection," he argues that speech can *never* count. *Id.* That is absurd. Had Trump commanded his supporters "Attack the Capitol!" he would not dare make that argument. That he used different words to convey the same command does not change the analysis. In any event, Trump's motion is once again devoid of supporting authority. Robust historical evidence establishes that "engaging" in insurrection includes *any* voluntary act—including speech—that aided the insurrection. Ex. 1, Magliocca Rep. at 20–28; *see also* Baude & Paulsen, *supra*, at 67 ("engaged in" means one was "actively involved in the planning or execution of intentional acts" of insurrection, or "knowingly provided active, meaningful, voluntary, direct support for, material assistance to, or specific encouragements of such actions"). While mere abstract opinion is not engagement, words that coordinate, incite, or otherwise assist an insurrection against the Constitution fall squarely within Section 3.

[25] Trump mischaracterizes the *Greathouse* case in other ways, too, including by claiming it was written by Chief Justice Chase. In fact, it was written by Justice Field.

i. Attorney General Opinions

In the same opinions described above interpreting federal statutes implementing Section 3 before its ratification, U.S. Attorney General Henry Stanbery made clear the breadth of "engagement." To have "engaged in rebellion" required only "some direct overt act, done with the intent to further the rebellion." Ex. 31, 12 Op. Att'y Gen. 141, 164 (1867). He added that "persons may have engaged in rebellion without having actually levied war or taken arms," and that "wherever an act is done voluntarily in aid of the rebel cause . . . it must work disqualification under this law." *Id.* at 161, 165. A second opinion clarified that while "[d]isloyal sentiments, opinions, or sympathies would not disqualify . . . when a person has, ***by speech or by writing, incited others to engage in rebellion***, [h]e must come under the disqualification." Ex. 30, 12 U.S. Op. Att'y Gen. 182, 205 (1867) (emphasis added).

President Andrew Johnson and his Cabinet expressly adopted these formulations and directed the Southern military districts to follow them. *See* Ex. 49, 6 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 528–31 (1897) ("In Cabinet," June 18, 1867, summary item 16); *id*. at 552–56 ("War Dep't, Adjutant-General's Office, Washington," June 20, 1867).[26] This is powerful contemporaneous historical evidence of what the term meant.

ii. Judicial Decisions

Judicial decisions around the time of the Fourteenth Amendment's adoption confirm this broad definition of engagement. In 1869, the North Carolina Supreme Court upheld a Section 3 disqualification and defined "engaged in insurrection" as "[v]oluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of anything that was useful or

[26] Neither Johnson nor his Attorney General were supporters of the Fourteenth Amendment—in fact, they had opposed it. Ex. 1, Magliocca Rep. at 22. But they nonetheless sought to give it its reasonable meaning.

necessary." *Worthy*, 63 N.C. at 203. Similarly, a federal circuit court charged a jury that to have "engaged" in insurrection or rebellion included any "voluntary effort to assist the Insurrection or Rebellion, and to bring it to a successful termination." *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D. N.C. 1871).

While Trump analogizes Section 3 to the Constituiton's Treason Clause, case law on treason similarly makes clear that those who instigated or encouraged treason were deemed to have committed it. "They who have the wickedness to plan and incite and aid, and who perform any part however minute, are justly deemed guilty of this offense, though they are not present at the immediate scene of violence." *In re Charge to Grand Jury*, 30 F. Cas. at 1026. Thus, treason by "levying war" includes "inciting and encouraging others to engage in or aid the traitors in any way." *In re Charge to Grand Jury*, 30 F. Cas. 1032, 1033–34 (C.C.S.D.N.Y. 1861); *see also In re Charge to Grand Jury-Treason*, 30 F. Cas. 1047, 1048–49 (C.C.E.D. Pa. 1851) ("If it has been thought safe, to counsel and instigate others to acts of forcible oppugnation to the provisions of a statute . . . the mistake has been a grievous one. . . . [S]uccessfully to instigate treason, is to commit it."); *Ex parte Bollman*, 8 U.S. 75, 126 (1807) (Marshall, C.J.) ("[I]f a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.").

iii. Congressional Precedents

Trump's argument that speech cannot be a basis for disqualification relies on a selective and misleading reading of certain cases of exclusion of elected congressional representatives. And several legislative cases interpreting the Ironclad Oaths, which contained similar language to Section 3, make clear the breadth of conduct seen as disqualifying at the time—indeed, they

covered a broader swath of conduct and speech than likely would have been deemed "engagement" by the case law and the Attorney General opinion cited above. Though the Court need not embrace the ultimate outcome in each of these Congressional cases, they emphatically refute Trump's suggestion that nothing short of taking up arms could be disqualifying.

One such case was the 1868 case of John Young Brown, a member-elect from Kentucky. The House excluded him for having "voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the United States." *See* Ex. 50, 1 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States*, ch. 14, 445–49 (1907). Brown wrote a "Letter to the Editor" of a local newspaper in 1861 stating: "Not one man or one dollar will Kentucky furnish *Lincoln* to aid *him* in his *unholy war against the South.* If this *northern army* shall attempt to cross our borders, *we will resist it unto the death*; and if one man shall be found in our Commonwealth to volunteer to join them *he ought* and I believe will be *shot down before he leaves the State.*" *Id.* at 445. Based solely on this editorial, the House concluded that Brown gave "aid, countenance, counsel, and encouragement" to the Confederacy and would not be seated. *Id.* at 446.

Then there was the 1867 case of Philip Thomas, who was elected senator from Maryland. *Id.* at 466. Mr. Thomas was not alleged to have taken up arms against the Union. The allegation was instead that he "allowed his minor son to leave the parental house to serve as a rebel soldier, and gave him at the time $100 in money, all of which was 'aid,' 'countenance,' or 'encouragement' to the rebellion." *Id.* 469–70. The Senate agreed that Mr. Thomas had "voluntarily given aid, countenance, and encouragement" to rebellion and was ineligible to take his seat. *Id.* at 470. While the case did not involve speech, it does illustrate the understanding that disqualifying conduct extends far beyond taking up arms.

The legislative cases Trump cites are not to the contrary. First, he cites the case of John M. Rice who had, before the Civil War, voted for a resolution to "resist [any] invasion of the soil of the South at all hazards." A majority of the House Committee found that this conduct *was disqualifying* under Section 3. *Id.* at 473. The outcome of the case in the full House, which was "somewhat inconclusive," appeared to hinge on the fact that Rice had already taken office and that the candidate who lost the vote to Rice had no legitimate claim to take office in his stead. *Id.* at 472–73. In the other case Trump cites, the House determined that the challenged House member had, since the outset of the war, been "an outspoken Union man" who yielded "no support" to the rebellion. *Id.* at 477.

iv. The Second Confiscation Act

Trump argues that the explicit inclusion of "incite" in the language of the 1862 Second Confiscation Act, but not in the language of Section 3 (adopted four years later in 1866), somehow implies that "incitement" was excluded from Section 3. There are a number of problems with this argument. First, as set out above, the phrase "engaged in" insurrection was understood to be broad and to encompass incitement—so including that language in Section 3 would have been redundant. Second, there is no historical evidence that the language of the Second Confiscation Act played a role in the debates over the Fourteenth Amendment or that its framers deliberately sought to exclude "incitement." Ex. 1, Magliocca Rep. at 27–28. Third, constitutional provisions rarely speak with the precision of statutory code; the fact that they do not include the kitchen-sink language of a statute is not probative of their meaning. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (admonishing that "we must never forget that it is *a Constitution* we are expounding" and that the Constitution speaks in "great outlines" without "the prolixity of a legal code").

B. Trump Spearheaded The Insurrection

Trump also contends that his conduct was not engagement in insurrection because he did nothing more than issue "calls for peace and patriotism." Mot. 28-32. This is pure fiction. Trump was the ringleader of the January 6 insurrection, and the Petition pleads more than sufficient facts to show his "engagement." *See* Pet. ¶¶ 48–340, 392–429.

Because Petitioners have already laid out the evidence of Trump's engagement in great detail in making out their *prima facie* case, they do not repeat all of that evidence here. The following facts, which are pleaded in detail in the Petition and which must be assumed true at this stage, more than satisfy the definition of "engagement" in insurrection:

- For years, Trump knowingly encouraged political violence among right-wing extremists, conditioning them to interpret his words as a call to violence. Pet. ¶¶ 48–70, 403.
- Trump manufactured claims of voter fraud, repeated these lies with inflammatory language over a months-long period, and used them to motivate extremist groups to gather at the Capitol. Trump aided the insurrection by organizing the mob around a single date (January 6, 2021), and by giving the mob a common purpose to disrupt certification of the election by preventing Vice President Pence and members of Congress from doing their constitutionally-mandated jobs. Pet. ¶¶ 71–236, 401, 407.
- In his speech on the Ellipse on January 6, Trump incited the mob: he repeated lies that the election was stolen, repeatedly directed their anger toward government officials including Vice President Pence, used the word "fight" and variants thereof 20 times, and continually told the crowd that "we" (including the mob) "can't let" the election certification happen. *Id.* ¶ 409. He then instructed his supporters to march on the Capitol, despite knowing that many were armed and dangerous. *Id.* ¶¶ 265-284, 410-415.
- Knowing that the attack was underway, Trump sent a tweet at 2:24 p.m. that targeted Vice President Pence for lacking the "courage" to overturn the election results and sanctioning the attack on the Capitol by declaring "USA demands the truth!" *Id.* ¶¶ 300-307, 416–19. This tweet had both the purpose and effect of inciting the mob to further violence. *Id.*
- Knowing that the insurrection was underway, Trump attempted to leverage the violence to pressure members of Congress to overturn the election results. *Id.* ¶¶ 420–21.

- Despite a constitutional duty to "preserve, protect, and defend" the Constitution, and despite having ample means at his disposal, Trump refused for nearly three hours to authorize or deploy a federal response to the insurrection and refused to call his supporters to leave the Capitol. *Id.* ¶¶ 422–29.

Trump thus took many "voluntary acts" in furtherance of the insurrection, including summoning the mob from across the country, organizing them around a common purpose, inciting them to violence both before and during the insurrection, and defanging any federal response to the insurrection. The insurrection would not have occurred but for Trump's actions. In the face of these detailed factual allegations, Trump offers little more than mischaracterization (*e.g.* by claiming that Trump's "only explicit instructions" called for peacefulness despite the violent rhetoric of his speech and his exhortation for his armed supporters to march on the Capitol) and omission (*e.g.,* omitting any mention of Trump's dereliction of duty or his 2:24 p.m. tweet inciting violence against the Vice President). Mot. 28–32. Trump is, of course, free to dispute Petitioners' factual allegations—but a motion to dismiss is not the place to do so.

Trump also recycles arguments from his anti-SLAPP motion, claiming that his conduct does not meet the First Amendment standard for incitement to violence. This argument faces a host of problems, as Petitioners explained at length in their response to Trump's anti-SLAPP motion. First, Petitioners do not claim only incitement; Petitioners also show engagement in insurrection through Trump's effort to summon and organize the mob and his dereliction of his constitutional duty during the insurrection. *Id.* ¶¶ 420–29. Second, the First Amendment does not displace application of the Fourteenth Amendment, and in any event Trump's conduct fits within other First Amendment exceptions, including for speech incident to criminal conduct. *See* Petr's Opp. to Anti-SLAPP Mot., at 40-46. Finally, even if the First Amendment's incitement standard somehow limited application of Section 3, Trump's conduct falls squarely within the test for "incitement." *Id.* at 46-48.

VII. This Case Belongs In Colorado

Trump's *forum non conveniens* argument is frivolous. This case belongs in Colorado: Petitioners are Colorado voters who have brought claims under Colorado law to enjoin the Colorado Secretary of State from placing an ineligible candidate on Colorado ballots. Colorado law sets out five requirements which *all* must be met to dismiss on *forum non conveniens*. § 13-20-1004, C.R.S. (2023). Trump's motion fails to satisfy at least four of these five requirements:[27]

"The claimant or claimants" are "not residents of the state of Colorado[.]" Strike one. All six Petitioners are Colorado residents. Pet. ¶¶ 35–40. Trump responds that Petitioners are all "nominal parties." Mot. at 33–34. Setting aside that the statute makes no exception for "nominal parties," how could Petitioners possibly be nominal? They are "eligible electors" filing suit under a statute that gives "eligible electors" of this State a cause of action. *See* C.R.S. § 1-1-113. This is not a case in which Petitioners are bringing suit on behalf of someone else who is the real party in interest. The cause of action belongs to Petitioners alone.

"An alternative forum exists." Strike two. Trump suggests that petitioning Congress, or seeking a criminal prosecution of Trump, might be an "alternative forum." But the statute says otherwise: an "'alternative forum' means a functioning governmental division with judicial powers . . . that may exercise jurisdiction over the parties." § 13-20-1003(1)(a), C.R.S. (2023). Congress has no "judicial" powers, and a hypothetical criminal case against Trump has no "jurisdiction over" Petitioners. Trump also volunteers that *maybe* Petitioners could go to federal court in D.C., "if they can overcome their problems with standing." Mot. 35. But Petitioners have no Article III standing in federal court—a point Trump conceded in agreeing to Petitioners'

[27] The only requirement arguably satisfied here is that "a substantial portion of the witnesses and evidence is outside of the state of Colorado[.]" However, Trump fails to identify any particular evidence or witnesses he would need for his defense and that he is unable to obtain here.

motion to remand this case. *See* Response to Petitioners' Unopposed Motion to Remand at 3, *Anderson v. Griswold*, No. 23-cv-2291 (D. Colo. Sept. 12, 2023)

"The injury or damage alleged to have been suffered occurred outside of the state of Colorado." Strike three. Petitioners seek to avert "injury" they would suffer from the placement of an ineligible candidate on Colorado ballots. *See* Pet. Prayer for Relief ¶¶ 2–4. That injury will occur in Colorado.

"There is a significant possibility that Colorado law will not apply to some or all of the claims." Strike four. Other than Colorado, no state's law could possibly direct the Colorado Secretary of State to exclude a candidate from Colorado's ballots. And Trump's pending motion to dismiss on issues of Colorado law belies his claim that "the only contested and substantive issues" in this case involve federal law. Mot. at 35.

CONCLUSION

This Court has the power and duty to adjudicate Petitioners' claim under state law challenging Trump's constitutional eligibility to serve as President and appear on Colorado's ballots. Because none of Trump's asserted grounds for dismissal have merit, his motion should be denied.

Date: October 6, 2023 Respectfully submitted,

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