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<tr><td>SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
<hr>Appeal Pursuant to § 1-1-113(3), C.R.S.
District Court, City and County of Denver, Case No. 2023CV32577
Honorable Sarah B. Wallace, Judge
<hr>Petitioners-Appellants:
NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN,
v.
Respondent-Appellee:
JENA GRISWOLD, in her official capacity as Colorado Secretary of State
and
Intervenors-Appellees:
COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, and DONALD J. TRUMP.</td><td>▲ ▲
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<tr><td colspan="2">BRIEF SUBMITTED BY CONSTITUTIONAL ACCOUNTABILITY CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONERS</td></tr>
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CERTIFICATE OF COMPLIANCE

In accordance with Colorado Appellate Rule ("C.A.R.") 28(a)(1), the undersigned hereby certifies that this amicus brief complies with all requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32. This brief was prepared using Microsoft Word and uses a proportionally spaced face (Times New Roman, 14-Point). The total number of words, as measured by the word count of the word-processing system used to prepare the brief, is 4,744.

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INTEREST OF *AMICUS CURIAE*

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has a strong interest in ensuring that constitutional provisions are understood in accordance with their text and history and accordingly has an interest in this case.

INTRODUCTION

Ratified in the wake of the Civil War, the third section of the Fourteenth Amendment disqualifies from holding any state or federal office those who, "having previously taken an oath . . . to support the Constitution of the United States," then "engaged in insurrection or rebellion against the same, or g[ave] aid or comfort to enemies thereof." U.S. Const. amend. XIV, § 3.

In the aftermath of the Confederate rebellion, the Fourteenth Amendment's Framers saw this provision as essential to "securing key results of the Civil War in the Constitution" and ensuring that the formerly disloyal states would elect leaders who would "respect equality of rights." Eric Foner, *The Second Founding* 84-89 (2019).

By its terms, Section 3 states that covered individuals shall not "be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States," and that it applies to any

individual who has "previously taken an oath, as a member of Congress, or as an officer of the United States . . . to support the Constitution of the United States." U.S. Const. amend. XIV, § 3. This "sweeping" provision, Cong. Globe, 39th Cong., 1st Sess. 3146 (1866) (Rep. Finck), applies to former President Donald J. Trump because the presidency is an "office . . . under the United States" and former President Trump took an "oath . . . as an officer of the United States."

First, the plain text of Section 3 applies both to presidents and to the presidency. When the Fourteenth Amendment was ratified, the phrase "office . . . under the United States" referred to a federal duty or "public charge," *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (Marshall, C.J.), and was often used to describe the presidency, *see infra* at 4-7; *see also New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2119 (2022) ("[W]hen it comes to interpreting the Constitution, not all history is created equal. 'Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.'" (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)). Relatedly, the phrase "officer of the United States" referred to an individual who undertook a public duty and swore an oath under the Constitution. Lawmakers, jurists, and executive branch officials regularly referred to the president as an "officer of the Government." *See, e.g.*, Cong. Globe, 39th Cong., 2d Sess. 1505 (1867) (Sen. Dixon); *see also* William Baude & Michael

Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. ___, 110-11 (forthcoming 2024) (Section 3's Framers often referred to the president as holding an "office" and serving as an "officer").

Second, the Framers' decision to choose broad language that would include the president and the presidency makes sense given their plan for the Amendment. The legislators who drafted Section 3 envisioned a comprehensive provision that would prohibit individuals who "betrayed their country" while under oath from being "again intrusted with the political power of the State." Cong. Globe, 39th Cong., 1st Sess. 2918 (1866) (Sen. Willey) (spelling as in original). It would be "rather strange," to put it mildly, if Section 3 applied to "former confederates serving as postmasters or corporals," but not "when a turncoat wished to serve as President." Saikrishna B. Prakash, *Why the Incompatibility Clause Applies to the Office of President*, 4 Duke J. Const. L. & Pub. Pol'y 35, 43 (2008).

Along the same lines, the debates about Section 3 make clear that the provision was understood to disqualify all officers who had taken an oath to support the Constitution and subsequently engaged in insurrection—including presidents. Those debates repeatedly emphasized that Section 3 applied to anyone who "violated not only the letter but the spirit of the oath of office they took . . . to support the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866) (Sen. Sherman). As

the Fourteenth Amendment's Framers knew, the president—then as now—takes exactly such an oath.

In sum, in ratifying the Fourteenth Amendment, the nation added to the Constitution a provision that would "strike[] at those who have heretofore held high official position" and later participated in an insurrection, with the aim of stopping "any rebellion hereafter to come," Cong. Globe, 39th Cong., 1st Sess. 3035-36 (1866) (Sen. Henderson), by preventing insurrectionists from "be[ing] declared eligible and worthy to fill any office up to the Presidency of the United States," 4 Cong. Rec. 325 (Jan. 10, 1876) (Rep. Blaine). Interpreting Section 3 to exempt presidents and the presidency would depart from the provision's clear text and be at odds with its history.

ARGUMENT

I. The Broad Text of Section 3 Applies to Presidents and the Presidency.

A. The Presidency Is an "office . . . under the United States."

When the Fourteenth Amendment was framed and ratified, the presidency was understood to be an "office . . . under the United States." In the mid-nineteenth century, an "office" was a "particular duty, charge or trust conferred by public authority, for a public purpose," and "undertaken by . . . authority from government or those who administer it." *Office*, An American Dictionary of the English Language by Noah Webster 689 (Chauncey Goodrich ed., 1853); *Office*, Johnson's

English Dictionary 646 (J.E. Worcester ed., 1859) ("a publick charge or employment; magistracy"); *see Maurice*, 26 F. Cas. at 1214 ("An office is defined to be 'a public charge or employment[.]'"); *Shelby v. Alcorn*, 36 Miss. 273, 275 (Miss. Err. & App. 1858) ("The whole body of laws on the subject, contemplates the performance of duties for the public, for a stated compensation, and the nature of which are prescribed by law. All these stamp the place with the unmistakable character of an office.").

Indeed, the Constitution itself explicitly referred to the presidency as an "office." *See, e.g.*, U.S. Const. art. I, § 3, cl. 5 ("Office of the President of the United States"); U.S. Const. art. II, § 1, cl. 1 ("[the President] shall hold his Office during the term of four Years"); U.S. Const. art. II, § 1, cl. 5 ("[n]o person except . . . a Citizen of the United States . . . shall be eligible to the Office of the President"); *see also* Baude & Paulsen, *supra*, at 108 ("At the risk of belaboring the obvious: Article II refers to the 'office' of President innumerable times.").

Nineteenth-century Americans understood the presidency to be an office under the United States. For example, many antebellum presidents acknowledged that they were covered by the Constitution's Foreign Emoluments Clause, which applies to persons "holding any Office of Profit or Trust under" the United States. U.S. Const. art. I, § 9, cl. 8; *see, e.g.*, H. Rep. No. 23-302, at 2 (1834); 14 *Abridgment of the Debates of Congress from 1789 to 1856*, at 141 (Thomas Hart Benton ed.,

1860); An Act to authorize the sale of two Arabian horses, received as a present by the Consul of the United States at Zanzibar, from the Imaum of Muscat, Mar. 1, 1845, 5 Stat. 730; Joint Resolution No. 20, *A Resolution providing for the Custody of the Letter and Gifts from the King of Siam*, Mar. 15, 1862, 12 Stat. 616.

Members of the 39th Congress, who drafted and approved Section 3, frequently referred to the presidency as an "office." Cong. Globe, 39th Cong., 1st Sess. 905 (1866) (referring to the "very title under which the President now holds his office"); Cong. Globe, 39th Cong., 2d Sess. 1505 (1867) (asking colleagues to "take the case of the highest officer of the Government, the President of the United States . . . [who] holds that office . . . [and] has a right to the salary so long as he holds the office"); Cong. Globe, 39th Cong., 1st Sess. App. 233 (1866) (describing the president's oath to "faithfully execute the office of President"); Cong. Globe, 39th Cong., 2d Sess. 384 (1867) (describing the "exalted office of the President of the United States, the Chief Magistrate of the nation"); *id.* at 518 (describing the "office of the President" and referring to the presidency as an "executive office").

Lawmakers also referred to the presidency as an office "under the United States." This is why they deemed it necessary to explicitly exempt the president from a provision that applied broadly to those holding "any office of honor or profit under the government of the United States." *See* Act of July 2, 1862, ch. 128, 12 Stat. 502 (repealed 1868) (requiring a loyalty oath from anyone holding "any office

of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, *excepting the President of the United States*" (emphasis added)); *see also* Cong. Globe, 39th Cong., 1st Sess. 3940 (1866) (Select Committee report noting that the Appointments Clause "covers every possible office under or in the Government . . . [a]side from the President, Vice President, and members of Congress").

B. The President Is an "officer of the United States."

In the mid-nineteenth century, as today, the president fell within the ordinary meaning of the phrase "officer of the United States." In that era, the word "officer" referred to a "man employed by the publick," *see Officer*, Johnson's English Dictionary 646 (J.E. Worcester ed., 1859), or "[a] person commissioned or authorized to perform any public duty," *see Officer*, An American Dictionary of the English Language by Noah Webster 689 (Chauncey Goodrich ed., 1853).

Courts and commentators often referred to the president's official or public duties. *See State of Mississippi v. Johnson*, 71 U.S. 475, 499 (1866) (the "duty of the President in the exercise of the power to see that the laws are faithfully executed"); *id.* at 501 (the president's "official duties"); *Washington News & Gossip*, Evening Star 2, Aug. 22, 1856 (the president had a "great public duty to perform"); *Summary of Events*, 2 Am. L. Rev. 747, 755 (1868) ("the great and difficult public duties enjoined on the President by the Constitution and laws of the United States");

see generally Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153, 162 (2021) (applying a "functionalist test" and noting that "the President quite clearly is legally delegated a portion of the sovereign powers of the United States for continuous exercise").

Indeed, mid-nineteenth-century Americans, including officials in every branch of government, frequently referred to the president as an officer of the U.S. government. Presidents James Buchanan and Andrew Johnson both referred to themselves as the "chief executive officer of the United States," echoing a term that had been used to describe the president since "as early as 1794." *See* John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. 1, 17-18 (2023) (citing references to presidents Washington, Jefferson, Jackson, Van Buren, Harrison, Polk, Taylor, Fillmore, Buchanan, Lincoln, Johnson, Grant, and Garfield). Executive agencies referred to the president as an "officer," as well. *See The Reconstruction Acts*, 12 U.S. Op. Att'y Gen. 182, 196 (1867); *Claims for the Use of Turnpikes in Time of War*, 13 U.S. Op. Att'y Gen. 106, 109 (1869); *Compromise of Internal-Revenue Cases*, 13 U.S. Op. Att'y Gen. 479, 480 (1871).

Members of the 39th Congress repeatedly referred to the president as an officer as well. The president was a "high officer of the Government," Cong. Globe,

39th Cong., 1st Sess. 132 (1866), and the "chief executive officer of the United States," *id.* at 1318 (quoting a proclamation from the President); *id*. at 915 (referring to the president as "the chief executive officer of the country"); *id.* at 2914 (1866) (referring to "the President as the chief executive officer of the Government"); Cong. Globe, 39th Cong., 2d Sess. 1505 (1867) (remarking that "I know that not a single officer of the General Government from the President down can receive his salary without an appropriation from Congress"); *id*. at 1158 (describing acts "of any President or other officer of the Government"); *id*. at 1800 (noting that "[t]he President is a mere executive officer").

And, significantly, lawmakers understood that Section 3 would apply to vice presidents even though they, like presidents, are not explicitly mentioned in the text of the provision. In the debate over the Fourteenth Amendment's ratification, lawmakers raised Vice President Aaron Burr's armed expedition to gain power in the western territories as an example of the type of treason that should lead to disqualification from office. *See* Cong. Globe, 39th Cong., 1st Sess. 2535 (1866).

Lawmakers similarly referred to the president as an officer of the government or an officer of the United States in the decades before the Amendment's ratification. *See, e.g.*, Cong. Globe, 36th Cong., 1st Sess. 997 (1860) (referring to an investigation of "whether the President of the United States, or any other officer of the Government, has . . . sought to influence the action of Congress"); Cong. Globe,

33rd Cong., 2d Sess. 566 (1855) (referring to "any officer of the United States, excepting the President"); Cong. Globe, 35th Cong., 1st Sess. 1713 (1858) (noting that "[t]he President of the United States is the officer that exercises this authority"); Cong. Globe, 38th Cong., 2d. Sess. 648 (1865) (explaining that "neither the Secretary of War, nor the President, nor any other officer of the Government, shall appropriate money to uses which are prohibited by law").

Courts, too, referred to the President as an officer. In an 1868 case, the Supreme Court observed that "[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); *see also Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (ordering clerk to send a copy of court proceedings "under seal, to the president of the United States," and observing that "[i]t will then remain for that high officer . . . to determine what measures he will take"). On several occasions, courts specifically referred to the president as an "officer of the United States." *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 752 (C.C.D.C. 1837) ("The president himself . . . is but an officer of the United States . . . ."), *aff'd* 37 U.S. 524 (1838); *Hawkins v. Governor*, 1 Ark. 570, 587 (1839) ("[a]ll the officers of the government, except the President of the United States, and the Executives of the States, are liable to have their acts examined in a court of justice").

Similarly, many prominent treatise-writers referred to the president as an "officer." 2 Joseph Story, *Commentaries on the Constitution of the United States* 102, (1833) (referring to the president and vice president as "officers [who] owe their existence and functions to the united voice of the whole, not of a portion, of the people"); 1 James Kent *Commentaries on American Law* *281 (4th ed. 1840) (noting, when describing the president's salary, that the "legislature [does not] possess[] a discretionary control over the salaries of the executive and judicial officers"); Henry Flanders, *Exposition of the Constitution of the United States* 180 (1860) (observing that "[t]he President . . . may delegate his right to *another* officer" (emphasis added)); Anson Willis, *Our Rulers and Our Rights: or, Outlines of the United States Government* 23 (1868) (referring to the president as the "highest officer in the government").

II. Excluding Presidents and the Presidency Would Defeat the Section's Purpose.

Exempting presidents and the presidency from the strictures of Section 3 would seriously undermine its ability to serve its purpose: to prevent another rebellion by excluding from "positions of public trust . . . those whose crimes have proved them to be enemies to the Union, and unworthy of public confidence." *Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess. (1866), at xviii; *see id.* at xvi (describing a desire to prevent "leading rebels" from resuming "power under that Constitution which they still claim the right to repudiate").

A. Section 3 Applies to the Presidency.

The Amendment's Framers sought to withhold the presidency, as well as many other offices, from "leading rebels," *Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess. (1866), at xvi, ensuring that when the former Confederate states "were restored to full participation in the Union," they could not undo the hard-fought gains of the Civil War, Foner, *supra*, at 89. The first draft of what became Section 3 was introduced in the House by Rep. Thaddeus Stevens, on behalf of the Joint Committee on Reconstruction, as part of a five-section proto-Fourteenth Amendment. *See* Cong. Globe, 39th Cong., 1st Sess., 2286-87 (1866). The original version disenfranchised all persons who "voluntarily adhered to the late insurrection [or] g[ave] it aid and comfort." *Id.* Rep. Stevens and the other members of the Joint Committee sensed that "[l]eading traitors" held "nearly all the places of power and profit in the South" and could easily become federal representatives, senators, and even president. *Id.* at 2285; *see* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 91 (2021).

There is no doubt that lawmakers' interest in protecting federal offices from the dominant "political class" of the Confederacy extended to the office of the presidency. *See id.* at 93-94 ("Practically speaking, Congress did not intend (nor would the public have understood) that Jefferson Davis could not be a Representative or a Senator but could be President."); Prakash, *supra*, at 43. In the

House, Rep. Stevens argued that the Fourteenth Amendment would protect the presidency from former secessionists because it would be enforced "in reference to the presidential and all other elections." Cong. Globe, 39th Cong., 1st Sess. 2544 (1866). Other lawmakers described the proposal's application to "the election of the next or any future President of the United States." *See id.* at 2768 (1866) (Sen. Howard).

Legislators also sought to protect presidential elections from former Confederates when they revised the text of Section 3. Responding to concerns that the original draft would be difficult to enforce, lawmakers proposed a new version that would prevent any person from becoming "a Senator or Representative in Congress, or an elector of President and Vice President, or hold[ing] any office, civil or military, under the United States, or under any State, who having previously taken an oath . . . or as an officer of the United States . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same." *Id.* at 2869 (Sen. Howard). When the new version was introduced in the Senate, Sen. Reverdy Johnson suggested that the text did not go far enough because it did not bar ex-Confederates from the presidency and vice presidency. *Id.* at 2899. Another Senator corrected him, calling attention to the words "or hold any office, civil or military, under the United States." *Id.* (Sen. Morrill). Sen. Johnson acknowledged his mistake, explaining that he was "misled" by the specific reference to Senators

and Representatives. *Id.* ("Perhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives."). The Senate voted to adopt Section 3 of the draft Fourteenth Amendment the day after this exchange. *Id.* at 2921.[1]

Public commentary on the proposed amendment buttresses this view. When it was proposed, one newspaper noted that it would disqualify "all noted rebels from holding positions of trust and profit under the Government," and that failing to pass the amendment would leave "Robert E. Lee . . . as eligible to the Presidency as Lieut. General Grant." *See Democratic Duplicity*, Indianapolis Daily J., July 12, 1866, at 2, quoted in Vlahoplus, *supra*, at 7 n.37; *see also* Gallipolis J. (Gallipolis, Ohio),

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[1] To be sure, one representative had proposed an amendment that prohibited insurrectionists from holding certain officers and specifically referenced "the office of President or Vice President of the United States." Cong. Globe, 39th Cong., 1st Sess. 919 (1866) (Rep. McKee); Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment* 10 (Oct. 28, 2023) (unpublished draft). But there is no evidence that lawmakers rejected that proposal because of the inclusion of "the office of President," or that they even considered it at all. The proposal led to no debate in Congress, and there is no evidence that it was considered by the Joint Committee on Reconstruction, which drafted the initial version of Section 3. When lawmakers reconsidered the idea of disqualifying insurrectionists from office—after rejecting the Joint Committee's proposal to disenfranchise insurrectionists—that representative proposed his amendment again using more generic language. *See* Cong. Globe, 39th Cong., 1st Sess. 2504 (1866) (disqualifying insurrectionists from holding any "office of trust or profit under the United States"); *see also* Mark Graber, *The President Is an Officer of the United States*, Balkinization, https://balkin.blogspot.com/2023/11/researching-whether-persons-responsible.html (Nov. 18, 2023) (representative's remarks "make clear [he] took for granted presidents and the presidency were covered by both his proposed versions").

Feb. 21, 1867, at 2 (noting that a counterproposal would "render Jefferson Davis eligible to the Presidency of the United States"). In the 1870s, when Congress considered proposals that would grant "amnesty" to former Confederates, critics noted that the proposals would make former officials "eligible to the Presidency of the United States." *Address of Senator Morton*, Phila. Inquirer, June 5, 1872, at 8; *see* Vlahoplus, *supra*, at 7-8 (collecting sources). Rep. James Blaine, who had served in the House that passed the Amendment, lamented that the amnesty proposal would allow "Mr. [Jefferson] Davis . . . be declared eligible and worthy to fill any office up to the Presidency of the United States." 4 Cong. Rec. 325 (Jan. 10, 1876).

B. Section 3 Applies to Presidents.

In addition to prohibiting insurrectionists from serving as president, the Fourteenth Amendment's Framers also sought to disqualify a variety of individuals, including presidents, from holding office if they had violated an "oath of office to support the Constitution" by engaging in insurrection. *See* Cong. Globe, 39th Cong., 1st Sess. 2899 (1866) (noting that covered individuals who "violated that oath in spirit by taking up arms against the Government of the United States are to be deprived for a time at least of holding office"); *see id.* at 2898 (describing as the "theory" of the Section "that persons who have violated the oath to support the Constitution of the United States ought not to be allowed to hold any office"); *see also* Magliocca, *supra*, at 93 n.31 (citing 1866 speech of Hon. John A. Bingham

stating that Section 3 meant broadly that "no man who broke his official oath with the nation or State . . . be again permitted to hold a position, either in the National or State Government"). As one lawmaker put it, the Fourteenth Amendment targeted "those men who committed the unpardonable political sin of having sworn to support the Constitution of the United States and then conspired against it," ensuring that these men "may not again be intrusted with power." Cong. Globe, 40th Cong., 2d Sess. App. 117 (1868); Cong. Globe, 39th Cong., 1st Sess. 2899 (1866) (describing the "purpose" of Section 3 "to be to exclude the men who violated their oath of office"). For the Framers, the oath—not the office—was important.

And those Framers repeatedly noted that the president swore an oath to support the Constitution. Cong. Globe, 39th Cong., 1st Sess. App. 234 (1866) (noting that "the President, before entering upon the execution of his office, should take an oath"). Moreover, lawmakers made no distinction between the presidential oath mandated by Article II and the oath of office for other federal and state officers. *See* Cong. Globe, 39th Cong., 1st Sess. 2901 (1866) (the president "is responsible to the Constitution and the law, and so is the most inferior postmaster in the land"); Cong. Globe, 40th Cong., 2d Sess. 1811 (1868) (noting that the "Rump Congress, illegally in session," was "acting outside of the Constitution they in common with the President took [an] oath to protect"); *see also* Cong. Globe, 37th Cong., 3d Sess. 89 (1862) (noting that "the language in [the President's] oath of office . . . makes his

obligation more emphatic and more obligatory, if possible, than ours"). Indeed, during debate on Section 3, Sen. Doolittle argued that Congress should not pass the provision because federal officers were already required by statute to take an oath supporting the Constitution, which was enough to protect against future rebellion. Cong. Globe, 39th Cong., 1st Sess. 2900 (1866). When defending his position, he specifically noted that the president was already required to take the "oath . . . specified in the Constitution." *Id*. at 2915.

The fact that presidents are elected—and not appointed—does not affect the Section's application. When debating Section 3, the provision's Framers explicitly remarked that it would apply to former governors, who owed their office to election, rather than appointment. Cong. Globe, 39th Cong., 1st Sess. App. 257 (1866); Cong. Globe, 39th Cong., 1st Sess. 782 (1866) .

This approach is consistent with two opinions of then-Attorney General Henry Stanbery interpreting the meaning of "officer" in federal statutes that implemented Section 3 pending its ratification. Stanbery—despite being "dedicated" to doing "everything in his power to resist congressional Reconstruction," Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 Wm. & Mary L. Rev. 2001, 2077 (2005)—determined that "executive or judicial officers of a state" clearly included elected governors. *The Reconstruction Acts*, 12 U.S. Op. Att'y Gen. 141, 152

(1867); *see also id.* at 190. Stanbery observed that "the term officer is used in its most general sense, and without any qualification," and was "intended to comprehend" any violator of the "official trust" of the United States. *Id.* at 158. Indeed, he explained, the provision was even more appropriately applicable to federal officials, who stood "in more direct relation and trust to the United States than the officers of a State." *Id.*

III. Judicial Interpretations of Section 3 Support Its Application to Presidents and the Presidency.

In the decades following the Civil War, "political pressure for sectional reconciliation" led Congress to remove Section 3 disabilities for most former officers. Magliocca, *supra*, at 89. Many courts, however, considered the definitions of "office" and "officer" while the Section was being enforced, *id.* at 93, and these courts echoed the common-sense, public understanding of the terms. An officer was "commissioned or authorized to perform any public duty." *In the Matter of Exec. Commc'n of the 14th Oct. 1868*, 12 Fla. 651, 652 (Fla. 1868); *Worthy v. Barrett*, 63 N.C. 199, 199 (1869). In *Worthy*, the North Carolina Supreme Court considered whether a former sheriff was an "officer" for the purposes of Section 3. *Id.* at 202. The court reasoned that "[a]n office is a right to exercise a public or private employment, . . . and to which there are annexed duties." *Id.*; *see also In re Tate*, 63 N.C. 308, 309 (1869) (extending *Worthy*'s reasoning to "the office of Solicitor for the State"). Furthermore, courts made clear that the definition of "officer" was to be

broadly construed. *United States v. Powell*, 27 F. Cas. 605, 606 (C.C.D.N.C. 1871) (noting in jury charge that "[t]he words of the statute . . . are broad enough to embrace every officer in the state").[2]

Echoing the Amendment's Framers, these courts emphasized that the requirement of an oath was an important factor in identifying whether a certain position or person was an "office" or "officer." For the *Worthy* court, an officer was someone "required to take . . . an oath to support the Constitution of the State and of the United States." *Worthy*, 63 N.C. at 202; *see id.* ("I do not know how better to draw the distinction between an *officer* and a mere *placeman*, than by making his oath the test."). Because state law required sheriffs to take an oath to support the U.S. Constitution, *id.* at 202-03, the court reasoned that they were "officers" for the purposes of Section 3, *id.* at 205; *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 633 (1869) (Section 3 disqualified the defendant from being a state judge because "before the late rebellion, [he] held an office for the discharge of the duties of which he took an oath to support the Constitution of the United States"); *see generally Bunn v. People ex rel. Laflin*, 45 Ill. 397, 411 (1867) (state agents were not officers because

[2] These cases also clarify that contemporary jurists saw Section 3 as applying to elected officers. *See generally Powell*, 27 F. Cas. at 606 (applying statute implementing Section 3 to an elected sheriff); *Worthy*, 63 N.C. at 199 (same); *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (describing Section 3's application to "persons in office by lawful appointment or *election* before the promulgation of the fourteenth amendment" (emphasis added)).

"[n]o franchise is conferred upon them, nor are they required, as they would have been if the law makers supposed they were officers, to take an oath to support the Constitution of the United States or of this State"); *Shelby*, 36 Miss. at 277 (an individual is an "officer . . . [i]f the duties had been prescribed by law, and the party required to take an oath to perform them").

CONCLUSION

For the foregoing reasons, this Court should conclude that Section 3 of the Fourteenth Amendment applies to presidents and the presidency.

Dated: November 20, 2023

Respectfully submitted,

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