No. 23-719

IN THE
Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, AND CHRISTOPHER CASTILIAN,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

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 an interest in ensuring that constitutional provisions are understood in accordance with their text and history and thus has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

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 Civil War, 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 Three 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

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[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

the United States," and that it covers 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 clause," Cong. Globe, 39th Cong., 1st Sess. 3146 (1866), applies to former President Donald Trump because the presidency is an "office ... under the United States" and Trump took an "oath ... as an officer of the United States."

First, Section Three applies to both the presidency and presidents because that interpretation is the only one consistent with the ordinary public meaning of the phrases "office ... under the United States" and "officer of the United States" at the time the Fourteenth Amendment was drafted and ratified. *Cf. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2119 (2022) ("'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)) (emphasis added)).

Petitioner does not meaningfully argue that the presidency is not an "office ... under the United States," *see* Pet'r Br. 25-26, and for good reason. 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 the presidency was frequently described as an office under the United States by presidents, lawmakers, and members of the public, *see, e.g.*, Cong. Globe, 37th Cong., 2d Sess. 2694 (1862) ("the office of President ... is an office under the government of the United States"); *Who Shall Succeed Mr. Johnson—Mr. Wade Not Entitled*, Cincinnati Enquirer, Apr. 13,

1868, at 2 ("[t]he Presidency is an office under the United States").

Just as the presidency was an "office ... under the United States," the president was an "officer of the United States." At the time of the Fourteenth Amendment's drafting and ratification, an officer was an individual who undertook a public duty, *Officer*, An American Dictionary of the English Language by Noah Webster 769 (Chauncey Goodrich ed., 1857), and an officer "of the United States" was one who undertook that duty to support the federal government, *see* U.S. Const. amend. XIV, § 1 (distinguishing between citizenship "of the United States and of [a] State"). Lawmakers, jurists, and executive branch officials regularly referred to the president as an "officer" of the federal government. *See, e.g.*, Cong. Globe, 39th Cong., 2d Sess. 1505 (1867); *see also* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. ___, 110-11 (forthcoming 2024) (Section Three's Framers often referred to the president as holding an "office" and serving as an "officer"). As one newspaper editor put it at the time, it was "accepted doctrine[]" that "the President of the United States is an officer of the United States." *A Raking Shot at Some Accepted Doctrines*, Louisville Daily J. (Louisville, Ky.), Apr. 15, 1868, at 1.

Essentially ignoring the plain meaning of Section Three at the time of its ratification, Petitioner and his *amici* argue that this Court should focus instead on the meaning of these phrases in other parts of the Constitution—ones that were ratified eighty years earlier. *See* Pet'r Br. 23-24; *see also* Tillman Br. 2. But Petitioner and his *amici* do not—and cannot—show that these phrases were used in such a limited sense when the Constitution was first ratified or, even more

importantly, that the people who framed and ratified Section Three embraced the cramped reading of the original Constitution that Petitioner and his *amici* advance. To the contrary, the drafters and ratifiers of Section Three preferred to read such terms in an "enlarged and general sense," Cong. Globe, 39th Cong., 1st Sess. 3940 (1866) (referring to the term "officer of the United States"), and accepted the "doctrine" that the president was an officer of the United States, *A Raking Shot*, *supra*, at 1.

Second, the Framers' use of broad language to include the president and the presidency makes sense given their plan for Section Three. The legislators who drafted that provision envisioned that it 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). It would be "rather strange," to put it mildly, if Section Three 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). Indeed, the American public understood that Section Three would prevent Jefferson Davis from "be[ing] rendered eligible to the Presidency." *Shall We Have a Southern Ireland?*, Milwaukee Daily Sentinel, July 3, 1867.

Significantly, the debates during the drafting of Section Three 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 Three 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). As Section Three's Framers knew, the president—then as now—takes exactly such an oath. Moreover, the Framers continually highlighted the application of the provision to former governors and other elected officials, belying Petitioner's suggestion that they sought to disqualify "only appointed and not elected officials," Pet'r Br. 22.

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). It did that 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). Interpreting Section Three to exempt the presidency and presidents would depart from the provision's clear text and be at odds with its history.

ARGUMENT

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

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

When the Fourteenth Amendment was framed and ratified, an "office ... under the United States" was a public trust and responsibility derived from the federal government. The presidency was thus an "office ... under the United States."

To start, in the mid-nineteenth century, an "office" was a "particular duty, charge or trust, conferred by public authority and for a public purpose," and

"undertaken by ... authority from government or those who administer it." *Office*, Webster's Dictionary, *supra*, at 769; *Office*, Dictionary of the English Language 987 (J.E. Worcester ed., 1860) ("a public charge or employment"); *see Maurice*, 26 F. Cas. at 1214 ("[a]n office is defined to be 'a public charge or employment'").

Under this definition, the presidency was an "office." Indeed, the Constitution itself explicitly referred to the presidency as an "office" in numerous places. *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"); *see also* Baude & Paulsen, *supra*, at 108 ("At the risk of belaboring the obvious: Article II refers to the 'office' of President innumerable times.").

Members of the 39th Congress, who drafted and approved Section Three, 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) (mentioning "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) (referring to the oath of 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").

And the presidency was not just an "office." It was an office "under the United States" because it derived

from the federal government, rather than from "any state." U.S. Const. amend. XIV, § 3; Prakash, *supra*, at 40 ("[t]he Constitution uses the phrase 'Office under the United States' or its equivalents multiple times to distinguish federal officers from officers under the authority of a state"); *see The Reconstruction Acts*, 12 U.S. Op. Att'ys Gen. 141, 149 (1867) (considering statute replicating the text of Section Three, and noting that "federal officers and State officers are classified separately in the clauses of the act under consideration"); *cf.* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 451 (2018) (noting, regarding the Appointments Clause, that "[t]he qualifier 'of the United States' clarifies that Article II refers to federal officers rather than state or local governmental actors" (internal footnote omitted)).

Significantly, lawmakers used the exact phrase "office under the United States" to refer to the presidency in the years before the Fourteenth Amendment was drafted and ratified. *See, e.g.*, 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" (emphasis added)). Indeed, because the phrase "office under the United States" was understood to include the president, Congress deemed it necessary to exempt the president from a federal law 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 an 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)); Cong. Globe, 37th Cong., 2d Sess. 2694 (1862) (noting in debate about the Oath Act that "the office of President ... is an office under the government of the United States").

Presidents and the public repeatedly made clear that they 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. And this understanding of the term "office under the United States" is reflected in public writings and statements from the time. *See, e.g.*, *Impeachment*, Chi. Trib., Oct. 22, 1866, at 2 (referring to the president as "one holding an office under the United States"); *Who Shall Succeed Mr. Johnson*, *supra*, at 2 ("[t]he Presidency is an office under the United States").

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

If the presidency was an "office ... under the United States" at the time the Fourteenth Amendment was ratified, as Petitioner does not meaningfully dispute, *see* Pet'r Br. 25-26, it follows that the president was an "officer of the United States," *see United States v. Germaine*, 99 U.S. 508, 509-10 (1878) (equating "hold[ing] an office under the government" with "becoming its officer[]"); Cong. Globe, 39th Cong., 1st Sess. 3939 (1866) (report of Select Committee noting that "'officers of' and 'officers under' the United States are ... indiscriminately used in the Constitution" when interpreting a statutory reference to "office under the government of the United States"). That interpretation is consistent with the ordinary public meaning of the phrase in 1868, and none of Petitioner's arguments about the meaning of the phrase at the Founding compel an alternative interpretation.

1. In the mid-nineteenth century, as today, the president fell within the ordinary meaning of the phrase "officer of the United States." An officer was someone "commissioned or authorized to perform any public duty," *see Officer*, Webster's Dictionary, *supra*, at 769. And the president clearly undertook "official duties." *State of Mississippi v. Johnson*, 71 U.S. 475, 499-501 (1866) (referring to the "duty of the President"); *Summary of Events*, 2 Am. L. Rev. 747, 755 (1868) (describing "the great and difficult public duties enjoined on the President by the Constitution and laws of the United States").

Dictionaries of the time make clear that presidents were considered officers. A "president" was "the chief officer or magistrate of a republic." *President*, Dictionary of the English Language, *supra*,

at 1124 (providing "[t]he *president* of the United States" as an example of a president). A magistrate, in turn, was "[a] public civil officer invested with authority, as a *president*, a governor, or a justice of the peace." *Id.* at 868 (emphasis added); *see also President*, Webster's Dictionary, *supra*, at 863 ("The *president* of the United States is the chief executive magistrate.").

Members of the 39th Congress repeatedly referred to the president as an officer. 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 presidential proclamation); *id.* at 915 (referring to the president as "the chief executive officer of the country"); *id.* at 2914 (referring to the President as the "chief executive officer of the Government"); *id.* at app. 151 (1866) (same); *id.* at app. 231; *see also* Cong. Globe, 39th Cong., 2d Sess. 1505 (1867) ("officer of the General Government"); *id.* at 1158 ("officer of the Government"); *id.* at 1800 (noting that "[t]he President is a mere executive officer").

Courts, too, referred to the president as an officer. In an 1868 case, this 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 United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 752 (C.C.D.C. 1837) ("[t]he 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) (referring to "[a]ll the officers of the government, except the President of the United States"); *Duffield v. Smith*, 3 Serge. & Rawle 590, 600 (1818) (referring to the "president, or any other officer of the United States").

Similarly, many prominent treatise-writers of the era referred to the president as an "officer." 2 Joseph Story, *Commentaries on the Constitution of the United States* 101-02 (1833) (referring to the president and vice president as "officers [who] owe their existence and functions to the united voice of the whole ... people" and describing the president as "an officer of the Union"); 1 James Kent, *Commentaries on American Law* *281 (4th ed. 1840) (including the president among "the executive and judicial officers"); George Washington Paschal, *The Constitution of the United States* liii (2d ed. 1876) (the president "in common with all other officers" took an "oath to support" the Constitution); 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"); John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 469 (1868) ("great executive officer").

Significantly, nineteenth-century Americans often used the phrase "officer of the United States"—the exact phrase used in Section Three—to describe the president. Indeed, in an 1868 article on the impeachment of President Johnson, the editors of the *Louisville Daily Journal* opined that it was "accepted doctrine[]" that "the President of the United States is an officer of the United States." *See A Raking Shot, supra,* at 1. When the editors took a "raking shot" at this doctrine—positing that the president was not an officer of the United States and thus an impeachment judgment could not "disqualify him from holding the Presidency if re-elected," *see id.*—other news outlets promptly rejected this conclusion as "absurd," Cincinnati Commercial, Apr. 18, 1868, at 4; *Mr. Wade and the Succession*, New Orleans Times-Picayune, May 1, 1868, at 4. In other articles discussing the

Impeachment Clause, newspapers repeatedly reiterated the "accepted view," *id.*, that the president was an "officer of the United States." *See, e.g.*, *Fortieth Congress*, Daily Milwaukee News, Feb. 25, 1868, at 2; *Impeachment of Andrew Johnson*, The Telegraph-Courier (Kenosha, Wis.), Nov. 28, 1867, at 2 (describing "the effect of impeachment ... on the President and other officers o[f] the United States"); *Impeachment Not Now Possible*, Leavenworth Times (Leavenworth, Kan.), Mar. 7, 1876, at 2 ("From this clause it appears that the power of impeachment does not extend to any but civil officers of the United States, including the President and Vice-President."); *What is the Union?*, Mountain Democrat (Placerville, Cal.), Nov. 21, 1863, at 2, ("[g]reat power is confided to the President, Vice President, and oth[e]r civil officers of the United States"); *see generally Small Salary*, Idaho Tri-Weekly Statesman, May 12, 1868, at 3 (naming the president among "officers of the United States"); *Who Shall Vote for President*, The Tennessean, July 28, 1868, at 2 ("[T]he President is an officer of the United States.").

Officials in every branch of government referred to the president as an officer of the United States. 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'ys Gen.

182, 196 (1867); *Claims for the Use of Turnpikes in Time of War*, 13 U.S. Op. Att'ys Gen. 106, 109 (1869); *Compromise of Internal-Revenue Cases*, 13 U.S. Op. Att'ys Gen. 479, 480 (1871), and so did courts, *see Kendall*, 26 F. Cas. at 752; *Duffield*, 3 Serge. & Rawle at 600.

Members of Congress also used the phrase "officer of the United States" to describe the president, *see* Cong. Globe, 39th Cong., 1st Sess. 1318 (1866) (quoting Presidential Proclamation); *id.* at 335 ("chief executive officer of the United States"); Cong. Globe, 33rd Cong., 2d Sess. 566 (1855) (referring to "any officer of the United States, excepting the President"), including in a speech that was widely reprinted, *see The Regeneration of the Nation*, Chi. Trib., Jan. 14, 1864, at 3 (the President is "an officer of the United States" who is duty bound to "to suppress rebellion" (reprinting speech of Rep. I.N. Arnold)); *The Powers of the Government Over Rebellious States*, Buffalo Commercial, Jan. 15, 1864, at 4 (same); *see also* James Heilpern & Michael T. Worley, *Evidence that the President is an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment* 51-55 (Jan. 1, 2024) (unpublished draft), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4681108 (citing references to the president as an "Officer of the United States" from the impeachment trial of Andrew Johnson); *see also Kendall*, 26 F. Cas. at 752. Others called the president an "officer of" the government, Cong. Globe, 39th Cong., 1st Sess. 1158 (1866); *see supra* at 10, paraphrasing Section Three's exact language.[2]

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[2] Petitioner and his *amici* rely on *Blount's Case* to support the argument that the president is not an "officer ... of the United

This understanding made sense. The president was an officer "of the United States," just as the presidency was an office "under the United States," because the president's duties derived from the federal government rather than a state government. *See supra* at 6-7; *see also* U.S. Const. amend. XIV, § 1 (ensuring a person's citizenship "of the United States and of the State wherein they reside"); *see generally id.* art. II, § 2, cl. 1 (referring to the president as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States"); *id.* art. IV, § 3, cl. 2 (protecting "Claims of the United States, or of any particular State").

States," *see* Pet'r Br. 24 n.27; Lash Br. 10-11; Meese Br. 10, but that case focused on whether legislators, not presidents, were "officers," and in any event, the historical record is unclear about why the Senate voted in the way that it did, making it a very thin reed on which to rest any conclusions about ordinary public meaning—especially of a provision drafted decades later. *See, e.g.*, David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, at 280-81 (1997) (observing that although the case is commonly cited "for better or worse" for the proposition that "that members of Congress are not 'officers of the United States,'" "the public record does not reveal how many Senators were persuaded by each of [Blount's] arguments"); 2 Story, *supra*, at 259 ("[t]he reasoning, by which it was sustained in the senate, does not appear, their deliberations having been in private," and then noting that it was "probably" held that Senators were not civil officers). Moreover, officials arguing both for and against Blount's impeachment stated that the president *was* an officer of the United States, *see* 8 Annals of Cong. 2257 (1799) (Impeachment Manager Rep. Bayard) ("[i]t is clearly not true that [the president] commissions *all officers* of the United States. He is an officer himself" (emphasis in original)); *id.* at 2272 (Defense Counsel A.J. Dallas) (referring to the president and vice president as "expressly denominated officers"). And to the extent that Petitioner's *amici* rely on Sen. Johnson's invocation of Rep. Bayard's statements as House Impeachment Manager in 1864 debates about the Oath Act, *see* Lash Br. 10-11; Meese Br. 10, those statements, too, focused on legislators, not presidents.

2. Perhaps recognizing that the ordinary understanding of "officer of the United States" at the time of the Fourteenth Amendment's drafting and ratification encompassed the president, Petitioner and his *amici* argue that "officer of the United States" is a term of art transplanted from the original Constitution. *See* Pet'r Br. 21-33 (relying on the Appointments, Impeachment, and Commissions Clauses); Tillman Br. 2 (focusing on the Oaths Clause). Because the president is not covered by these provisions, they say, the president is not an "officer of the United States" under Section Three. *See id*. at 28; Pet'r Br. 21. This argument is wrong for two reasons.

First, Petitioner and his *amici* provide virtually no support for the claim that when Section Three's drafters used the phrase "officer of the United States," they intended to incorporate a particular part of the original Constitution or to otherwise define the phrase any more narrowly than its ordinary public meaning at the time. The only support they provide for that contention is a single treatise written by George Washington Paschal, *see* Tillman Br. 27, who did not even participate in the drafting of Section Three. Absent evidence that "officer of the United States" is indeed a distinct "term of art," *id*. at 10, or "phrase" borrowed from other constitutional provisions, Pet'r Br. 20, the term must be given the meaning it had "when the people adopted" it, *Heller*, 554 U.S. at 35.

And, tellingly, Section Three's Framers used a variety of terms to describe the officers covered by that Section, belying the suggestion that they viewed the phrase "Officer of the United States" to be a precise "term of art" derived from other provisions of the Constitution. *See* Cong. Globe, 39th Cong., 1st Sess. 2898 (1866) ("all who ... held any office under the United States"); *id.* ("any one who has ever held an

office under the national Government"); Cong. Globe, 39th Cong., 2d Sess. 1641 (1867) (describing those covered merely as "officers"); *see also* Cong. Globe, 39th Cong., 1st Sess. 2901 (1866) ("a person holding office"). Notably, lawmakers often abandoned the term "officer" entirely, stating that Section Three would apply to "those men who have ever taken an oath to support the Constitution," *id.*; *id.* at 2899, 2989, 4003, a view that would include governors and other elected officers who do not fall under Petitioner's definition of "officers of the United States," Pet'r Br. 21. Furthermore, in an 1866 report, a House Committee investigating whether an 1852 statute applicable to anyone holding an "office under the government of the United States" applied to a representative-elect, observed that the president was an "officer[] of the Government," Cong. Globe, 39th Cong., 1st Sess. 3939 (1866) (Select Committee Report), and then went on to note that the Constitution defined the terms "officer 'of' or 'under' the United States" in an "enlarged and general sense," *id.* at 3940.

Second, there is no reason to read the original Constitution in the manner that Petitioner and his *amici* advance. Petitioner and his *amici* point to four clauses that, they assert, used the term "[o]fficer[] of the United States" in a manner that excluded the President, but they cannot establish that any of those clauses clearly exclude the President from the category of "[o]fficers," let alone that all of them do.

The Impeachment Clause, for example, refers to "[t]he President, Vice President and all civil Officers of the United States." U.S. Const. art. II, § 4. But this does not necessarily mean that the president and vice president are not "civil Officers"; it simply recognizes that the president and vice president are the most

important categories of civil officers. *See* Heilpern & Worley, *supra*, at 31-33 ("In English, this grammatical construction is often used to highlight the most important or most famous member of a broader group."); *see also* Samuel Bray, *"Officer of the United States" in Context*, Reason, https://reason.com/volokh/2024/01/22/officer-of-the-united-states-in-context/ (Jan. 22, 2024) (the president and vice president are "spelled out specifically" to "make clear" that they may be impeached, "no small point against the background of royal prerogative power in England"). In the 1860s, public commentators reiterated this understanding of the Clause. As one newspaper explained, "it is written in the constitution that the president, the vice president, *and every other officer of the United States* shall be removed from office on impeachment." *Fortieth Congress*, *supra*, at 2 (emphasis added); *supra* at 11-12.[3]

The Appointments Clause gives the president the power to appoint "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for." U.S. Const. art. II, § 2, cl. 2. But, again, that does not necessarily mean that the president is not an officer. The president's power to appoint "Officers of the

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[3] Petitioner and his *amici* point to Justice Story's *Commentaries on the Constitution* as evidence that the Impeachment Clause supports the view that the president and vice president were distinguished from "rather than as included in the description of, civil officers of the United States." Tillman Br. 22 (citing 2 Joseph Story, *Commentaries on the Constitution of the United States* 260 (1833)); Pet'r Br. 22. But not three sections earlier, Story explained that the applicability of the Impeachment Clause "is strictly confined to civil officers of the United States, *including the president and vice-president*." 2 Story, *supra*, at 255-56 (emphasis added).

United States" only extends to those officers whose appointment is not "otherwise provided for" in the Constitution. *Id.*; *NLRB v. Noel Canning*, 573 U.S. 513, 569 (2014) (Scalia, J., concurring) ("Except where the Constitution or a valid federal law provides otherwise, all 'Officers of the United States' must be appointed by the President 'by and with the Advice and Consent of the Senate.'"). Because the Constitution provides for the selection of the president, *see* U.S. Const. art. II, § 1; *see* Heilpern & Worley, *supra*, at 30 (noting that Founding-era sources "used the terms 'appoint' and 'elect' interchangeably"), the president does not need to be appointed under the Appointments Clause.

The Commissions Clause requires the president to "Commission all the Officers of the United States." U.S. Const. art. II, § 3. Because the president does not "commission himself," Petitioner argues, the phrase "Officer[] of the United States" in this Clause cannot encompass the president. Pet'r Br. 20. *But see* Prakash, *supra*, at 39 (opining that early presidents may have commissioned themselves). But by giving the president the power and duty to issue commissions to officers, the Commissions Clause does not necessarily imply that an official without a presidential commission is not an officer. Indeed, the president may be an officer whose commission is simply not addressed by the Clause. *See* 8 Annals of Cong. 2272 (A.J. Dallas) (suggesting that the president's commission derives from "the constitution itself"); Akhil Reed Amar, *America's Unwritten Constitution* 575-76 n.14 (2012) (arguing that the president's status is confirmed by congressional certification, a "commission-equivalent").

Finally, the Oaths Clause provides that "Officers, both of the United States and of the several States,"

must take an oath to support the Constitution. U.S. Const. art. VI, cl. 3. According to Petitioner's *amici*, because the president's oath is described in a separate part of the Constitution, the president does not take the oath required of "[O]fficers … of the United States." Tillman Br. 24.

But nothing in the Oaths Clause specifies the precise language the oath to support the Constitution must take, or suggests that the oath required of the President—one to "preserve, protect, and defend the Constitution," U.S. Const. art. II, § 1 cl. 8—should not qualify. The President, like all other "officers of the United States," takes an oath to support the Constitution, and the generation of Americans that ratified Section Three would have understood the Constitution in this way. As described below, these Americans saw the president's oath as an "oath to support the Constitution," Cong. Globe, 37th Cong., 2d Sess. 1803 (1862), that is, "an amplification of … the equally solemn promise in general 'to support' it," Pomeroy, *supra*, at 443.

* * *

Petitioner advances a cramped understanding of Section Three that depends on his contention that there was a fixed meaning of "officer of the United States" in the eighteenth century and that Section Three's ratifiers adopted this meaning nearly a century later. Petitioner cannot establish either proposition, let alone both.

The Fourteenth Amendment was "written to be understood by the voters" who enacted it. *Heller*, 554 U.S. at 576. Nineteenth-century Americans understood that the presidency was an "office under the United States" and the president was an "officer of the United States." Furthermore, the "normal and

ordinary," *id.*, reading of those phrases advances Section Three's purpose, as the next Section explains.

II. Excluding the Presidency and Presidents Would Be at Odds with Section Three's Purpose.

Exempting the presidency and presidents from the strictures of Section Three 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. xviii (1866); *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 Three Applies to the Presidency.

The Amendment's Framers sought to exclude "leading rebels" from the presidency as well as many other offices, *id.*, 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 Three 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 those 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.

Legislators also sought to protect presidential elections from former Confederates when they revised Section Three's text. Responding to concerns that the original draft was overly punitive and 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 ... 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. 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. 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 Three the day after this exchange. *Id.* at 2921.[4]

Public commentary on the proposed amendment buttresses this view. When it was proposed, one

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[4] 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); Lash Br. 22. As an initial matter, it was essential for McKee to list presidents specifically because his proposal covered offices "under appointment from the President," Cong. Globe, 39th Cong., 1st Sess. 919 (1866), so would not have otherwise included the presidency as an office. Further, 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 reviewed by the Joint Committee on Reconstruction, which drafted the initial version of Section Three. When lawmakers reconsidered the idea of disqualifying insurrectionists from office—after rejecting the Joint Committee's proposal to disenfranchise insurrectionists—McKee proposed his amendment again using more generic language to refer to the presidency. *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").

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 Rebels and Federal Officers*, Gallipolis J., Feb. 21, 1867, at 2 (noting that a counterproposal would "render Jefferson Davis eligible to the Presidency of the United States"); *Shall We Have a Southern Ireland?*, Milwaukee Daily Sentinel, July 3, 1867 (Section Three was modest because "[e]ven Jefferson Davis ... may be rendered eligible to the Presidency by a two-thirds vote of Congress"); *On the Eve of Battle*, Montpellier Daily J., Oct. 18, 1868 (Section Three "excludes leading rebels from holding offices ... from the Presidency downward").

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; *Amnesty*, Chi. Trib., May 24, 1872, at 4 (same); *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 Three 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) (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 Section Three "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 Three 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 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 Three "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. *Id.* at app. 234 ("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 officers. *See id.* at 2901 (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)

(Congress "in common with the President took [an] oath to protect" the Constitution). Indeed, during the debates on Section Three, Sen. Doolittle argued that Congress should not pass the provision because federal officers were already required by the Oath Act to swear to "support and defend" the Constitution. Cong. Globe, 39th Cong., 1st Sess. 2900 (1866). When defending his position, he specifically noted that the president was also required to take this type of oath—the one "specified in the Constitution." *Id*. at 2915.

Section Three's use of the language "support" when referring to the oath an officer takes does not exclude the president from Section Three's scope. While the Article VI oath uses the word "support," the president's oath to "preserve, protect, and defend the Constitution," U.S. Const. art. I, § 3, cl. 8, is clearly one to support the Constitution. *E.g.*, *Griffin v. Wilcox*, 21 Ind. 370, 383 (1863) (the president's oath is one to "support, protect, and defend the Constitution"); Cong. Globe, 37th Cong., 2d Sess. 1803 (1862) ("The President's oath to support the Constitution of the United States is no more than his oath to support it by the exercise of all legal and constitutional powers that have been conferred upon him."); Pomeroy, *supra*, at 443 ("The President's oath is but an amplification of [the Article VI oath]; it enters into more detail, but does not add another compulsive clause."); *see generally* Letter from Thomas Jefferson to John Marshall, Mar. 2, 1801, *Founders Online*, National Archives, https://founders.
archives.gov/documents/Jefferson/01-33-02-0102 (the presidential oath "seems to comprehend the substance" of the oath for federal officers). To some, the president's Article II oath represented an even stronger commitment to support the Constitution than the one taken by other federal officials. *See* Cong.

Globe, 37th Cong., 3d Sess. 89 (1862) ("the language in [the President's] oath of office ... makes his obligation more emphatic and more obligatory, if possible, than ours").

The history of Section Three's passage is also at odds with Petitioner's argument that "the 'officers of the United States' include only appointed and not elected officials." Pet'r Br. 22. When debating Section Three, 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); *id.* at 782. And the legislators regularly mentioned "voting" for "officers." *E.g.*, *id.* at 2964 (insurrectionists retained "the right of voting for all officers, both State and national"); *id.* at 2463 (a rejected proposition did not permanently prevent insurrectionists from "voting for a United States officer"); *id.* at 2509 (voters participate in "the election of Federal officers"); *see generally* Heilpern & Worley, *supra*, at 41-50 (citing evidence from the legislative and ratification debates emphasizing Section Three's application to elected officers).

This approach is consistent with two opinions of then-Attorney General Henry Stanbery interpreting the meaning of "officer" in federal statutes that implemented Section Three 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*, *supra*, at 152; *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.*

Contemporary jurists viewed Section Three as applicable to elected officers as well. While judicial interpretations of Section Three are scarce, as "political pressure for sectional reconciliation" led Congress to remove Section Three disabilities for most former officers not long after the provision's passage, Magliocca, *supra*, at 89, courts that considered Section Three readily applied it to elected officials. *See generally United States v. Powell*, 27 F. Cas. 605, 606 (C.C.D.N.C. 1871) (applying statute implementing Section Three to an elected sheriff); *Worthy v. Barrett*, 63 N.C. 199, 199 (1869) (same); *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 633 (1869) (elected judge); *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (describing Section Three's application to "persons in office by lawful appointment or election before the promulgation of the fourteenth amendment"). These judges emphasized the "broad language" of Section Three, *Powell*, 27 F. Cas. at 607 (charging jury), making clear that it could include officers ranging from the "Governor" to the "Inspectors of flour," *Worthy,* 63 N.C. at 203; *see also* Graber, *supra* (quoting Judge Hall Emmons's jury charge: "Without perplexing you with the difficult classifications or nice distinctions between political, judicial, or executive officers, I charge you that it includes *all* officers." (emphasis in original)).

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The Framers of Section Three sought to ensure that federal officials who swore to support the Constitution and "violated that oath in spirit by taking up arms against the Government of the United States [would] be deprived ... of holding office." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866). This goal would be undermined if Section Three of the Fourteenth Amendment did not apply to the presidency and the president, as its plain text demands.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Colorado Supreme Court.

Respectfully submitted,

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