DATE FILED: November 27, 2023 1:13 PM
FILING ID: 5DE684C1AED0C
CASE NUMBER: 2023SA300

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80202	
Original Proceeding District Court, City and County of Denver, Colorado, Case No. 2023CV32577	
In Re: **Petitioners-Appellees/Cross-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, v. **Intervenor-Appellee:** **COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,** an unincorporated association, **Intervenor-Appellant/Cross-Appellee:** and **DONALD J. TRUMP.**	▲ ▲ **COURT USE ONLY**
Attorneys for Amicus Curiae Professor Seth Barrett Tillman: THE REISCH LAW FIRM, LLC R. Scott Reisch, #26892 Jessica L. Hays, #53905 1490 W. 121st Avenue, Suite 202 Denver, CO 80234 (303) 291-0555 Josh Blackman (*pro hac vice forthcoming)* Josh Blackman LLC 1303 San Jacinto Street Houston, TX 77002 (202) 294-9003 Josh@JoshBlackman.com	Supreme Court Case No: 2023SA00300
BRIEF SUBMITTED BY PROFESSOR SETH BARRETT TILLMAN AS *AMICUS CURIAE* IN SUPPORT OF INTERVENOR-APPELLANT/CROSS-APPELLEE DONALD J. TRUMP	

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 4,740.

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INTEREST OF *AMICUS CURIAE*

Professor Seth Barrett Tillman, an American national, is a member of the regular full-time faculty in the Maynooth University School of Law and Criminology, Ireland / Scoil an Dlí agus na Coireolaíochta Ollscoil Mhá Nuad. Professor Tillman's Statement of Interest is stated more fully in the accompanying Motion for Leave to file this brief.

No party participated in preparing this brief.

INTRODUCTION

The District Court below made two threshold rulings. First, the District Court held that Colorado law provided a cause of action to enforce Section 3 of the Fourteenth Amendment. Second, the District Court held that because the presidency was not an "Officer of the United States," Donald J. Trump was not covered by Section 3. But for the second ruling, the District Court would have ordered the removal of Trump from the presidential ballot. The latter holding is correct, but the former holding is in error.

In an omnibus ruling, the District Court deemed it "irrelevant" whether Section 3 is self-executing, because the court found that the Colorado Election Code provided a sufficient cause of action. However, the District Court failed to address a landmark ruling on Section 3: Chief Justice Salmon P. Chase's ruling in *Griffin's Case*. 11 F. Cas. 7 (C.C.D. Va. 1869). This decision, rendered within a year of Section 3's ratification, held that Section 3 is *not* self-executing, and that Section 3's enforcement requires a federal statute. Under Chase's opinion, state law is insufficient to enforce the disqualification provision. Moreover, *Griffin's Case*, and subsequent authorities, liquidated the meaning of Section 3. And *Griffin's Case* is consistent with a core premise of Reconstruction: *Section 3 empowered the federal government to control state elections and office-holding, and not the other way around*. On appeal, this Court should follow *Griffin's Case*.

The second threshold question is whether the President is an "Officer of the United States." The answer to this question was *no* in 1788, was *no* in 1868, and is *no* today. In the Constitution of 1788, the phrase "Officers of the United States" was used in the Appointments Clause, the Commissions Clause, the Oath or Affirmation Clause, and the Impeachment Clause. In none of these clauses is the President an

"Officer of the United States." The President does not appoint himself, does not commission himself, and takes his own presidential oath. Moreover, the Impeachment Clause expressly distinguishes between the President and the "Officers of the United States."

Justice Joseph Story's celebrated *Commentaries on the Constitution* in 1833 reaffirmed that the President is not an "Officer of the United States." Between 1866 and 1868, there were voluminous debates in Congress and in the States about Section 3 of the Fourteenth Amendment. To date, no one has located any record of anyone stating that the President is an "Officer of the United States" for purposes of Section 3. None. But there is contemporaneous evidence saying the opposite.

In the years, decades, and sesquicentennial following 1868, there has been a constant stream of authorities—Supreme Court decisions, Attorney General opinions, scholarship, and more—that support the same conclusion: the President is not an "Officer of the United States."

Petitioners and their *Amici* do not meaningfully attempt to rebut this 150+ years of history. Rather, they make three interpretive moves. First, they insist that the actual language used in the Constitution is irrelevant, and there is no difference between an "office," an "officer," an "officer of the United States" and an "office . . . under the United States." *Potato, potahto, tomato, tomahto, let's call the whole thing off*. And nearly all of their arguments flow from this flawed assumption. Second, petitioners disregard evidence from 1788 through 1866, and from 1868 through the present day, as if the continuous tradition of meaning that came before and after the 39th Congress is irrelevant. And third, petitioners hyper-focus on the intentions and expected applications of members of Congress at the time Section 3 was enacted, even though those framers had no reason to be concerned with a future

insurrection involving a former President who had only taken one oath of office—the presidential oath of office—and attempted to run for re-election.

The District Court was correct to reject each of these arguments. And this Court should affirm the District Court's ruling based on the text, history, and tradition of Section 3.

I. Petitioners' Requested Relief is Barred by *Griffin's Case* (1869)

The District Court's October 25, 2023 omnibus order explained that: "whether Section 3 is self-executing is *irrelevant* because Petitioners are proceeding under Colorado's Election Code which provides it a cause of action." Omnibus Order at 19. This was legal error.

In *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869), Chief Justice Chase held that Section 3 is *not* self-executing. Moreover, Chase held that Section 3 could *only* be put into effect on behalf of a party seeking affirmative relief against the government, e.g., a party seeking habeas relief, if that relief was authorized by a federal statute.[1] Under *Griffin's Case*, the relief sought by Petitioners is barred precisely because Petitioners are seeking affirmative relief against the government to enforce Section 3 absent federal enforcement legislation. The District Court's contrary assertion that a state statute could supply an alternative means to put Section 3 into effect cannot be harmonized with the Chief Justice's 1869 holding. On appeal, this Court should follow *Griffin's Case*. This decision, and subsequent authorities, liquidated the meaning of Section 3. Moreover, post-2020 critical commentary about

[1] *Griffin's Case*, and the doctrine of self-execution, is discussed in some detail in Parts I and II of Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. (forth. 2024), https://ssrn.com/abstract=4568771 (hereinafter "*Sweeping and Forcing*").

Griffin's Case is deeply flawed. *Griffin's Case* is consistent with a core premise of Reconstruction: Congress, and not the distrusted states, were empowered to enforce Section 3.

A. *Griffin's Case*, and Subsequent Authority, Liquidated the Meaning of Section 3

The Chief Justice of the United States supported *Griffin's Case*. So did *all* his colleagues on the Supreme Court. *Griffin's Case*, 11 F. Cas. 27 ("I am authorized to say that they unanimously concur in the opinion . . . ."). A generation later, in *Ex parte Ward*, 173 U.S. 452, 454–55 (1899), Chief Justice Fuller, for a unanimous Court, cited *Griffin's Case* favorably, on-point, and as good law. There is no hint in *Ward* that *Griffin's Case* is anything but settled law.

Lower federal courts, state courts, and executive branch opinions have expressly adopted *Griffin's Case* as mandating federal legislation in order to enforce the Fourteenth Amendment.[2] There is no hint that any court thought *Griffin's Case*'s central holding was anything but settled law. Likewise, after 1869, courts, domestic and foreign, continued to cite *Griffin's Case* favorably for other propositions of law.[3]

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[2] *See Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978); *State v. Buckley*, 54 Ala. 599, 616 (1875); Va. Op. Att'y Gen. No. 21-003, at 3 (2021).

[3] *Commonwealth v. Chalkley*, 20 Gratt. 404, 409 (Va. 1871); *In re Sheehan*, 122 Mass. 445, 449 (1877); *Sartain v. State*, 10 Tex. Ct. App. 651, 654 (1881); *Head-Money Cases*, 18 F. 135, 143 n.26 (C.C.E.D. N.Y. 1883); *Daniels v. Towers*, 7 S.E. 120, 121–22 (Ga. 1887); *Brooke v. Turner*, 30 S.E. 55, 56 (Va. 1898); *Coyle v. Smith*, 113 P. 944, 948 (Okla. 1911); *Re Toronto R. Co.* (1918) 46 D.L.R. 547 (Ontario C.A.); Ex parte *Klune*, 240 P. 286, 287 (Mont. 1925); *Duane v. Philadelphia*, 185 A. 401, 403 (Pa. 1936); *Calcutt v. FDIC*, 37 F.4th 293, 343 (6th Cir. 2022) (Murphy, J., dissenting), *rev'd on other grounds*, 598 U.S. 623 (2023).

Post-1869 scholarly commentary has consistently described *Griffin's Case* as established law, absent any criticism, if not putting forth substantial praise.[4]

What is the significance of such near-universal acceptance over the course of 150 years? In *The Federalist No. 37*, James Madison explained "All new laws . . . are considered as more or less obscure and equivocal, until their meaning be *liquidated* and ascertained by a series of particular discussions and adjudications." Professor Baude explains that Madisonian "Liquidation was a specific way of looking at post-Founding practice to settle constitutional disputes . . . ." William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 4 (2019); *see also* Abraham Lincoln, *Speech on Dred Scott Decision* (1857). This principle applies to the Constitution of 1788, as well as to the Reconstruction Amendments. The meaning of Section 3 was liquidated by *Griffin's Case* and by a long history of precedent and other authorities citing *Griffin's Case* favorably—all absent any indication that the law remained unclear or, even, unsettled. *Griffin's Case* is not, as Professors Baude and Paulsen wrote, an "appalling" decision that is comparable to *Dred Scott*. *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024). *Griffin's Case* is the fountainhead of Section 3 jurisprudence and ought to control this case.

B. The Most Significant Post-2020 Commentary Criticizing *Griffin's Case* is Deeply Flawed

In the wake of Chief Justice Chase's decision, we have found no opposition to *Griffin's Case* from members of Congress—even among the Radical Republicans that sought vigorous enforcement of Section 3. Even if there were a few members of

[4] Charles Fairman, Reconstruction and Reunion 1864–1868, at 602–07 (1971).

Congress or Section 3 ratifiers who had previously contended that Section 3 did not require federal enforcement legislation, Chief Justice Chase's decision promptly settled the matter.[5]

About one year after *Griffin's Case*, Congress enacted the Enforcement Act of 1870, ch. 114, 16 Stat. 140, 141. This statute created a *quo warranto* mechanism whereby *federal* prosecutors in *federal* courts could remove Section-3-listed office-holders following a defined procedure to determine if such defendants were disqualified by Section 3. We have found no public debates suggesting that those who framed the Enforcement Act of 1870 thought Chief Justice Chase's decision was *wrong*. To the contrary, Congress took the precise action that would be expected by those who believed that Chase decided the self-execution issue *correctly*: the establishment of federal enforcement legislation to remove disqualified individuals. Moreover, Northern and Southern newspapers alike praised Chase's decision.[6] To be sure, there may have been some critical press accounts, but in rapid order *Griffin's Case* became the definitive understanding of Section 3.

It was not until circa 2020 that jurists and commentators discovered that *Griffin's Case* was deeply flawed. Advocates now argue that *Griffin's Case* cannot be reconciled with Chase's earlier decision in the *Case of Jefferson Davis*: a federal treason prosecution.[7] Indeed, critics charge that Chief Justice Chase was ruling in a

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[5] *State* ex rel. *Sandlin v. Watkins* is an example of one of a few post-*Griffin's Case* decisions, which suggested that Section 3 may be self-executing. 21 La. Ann. 631 (1869). However, in this case and others, the court did not distinguish or explain *Griffin's Case*. The court may have been unaware of the decision, which was only a few months old. In any event, *Sandlin* relied on an alternative rationale based on an extant *federal* enforcement statute, so it does not squarely support the Section-3-is-self-executing position. *Id*. at 633–34.

[6] *Sweeping and Forcing*, *supra*, at Part II.B.6.d.

[7] *Griffin's Case* is discussed at length in Part III of *Sweeping and Forcing, supra*.

partisan fashion to pave the way for a future presidential run. This is not usually how courts view decisions written by Supreme Court justices. If psychological projection is now the standard, there are many other decisions that could be tossed onto the Article III ash heap.

More importantly, there is a simple way to reconcile these cases. Griffin, the habeas applicant, sought to use Section 3 as a *sword*—i.e., *offensively as a cause of action supporting affirmative relief*, but he could not do so without enforcement legislation. By contrast, Davis sought to use Section 3 as a *shield*—i.e., as a defense in a criminal prosecution, and he could do so without enforcement legislation. *Cale v. Covington*, decided by the Fourth Circuit Court of Appeals more than a century later, explained this understanding of *Griffin's Case*. The court held "that the Congress and Supreme Court of the time were in agreement [with Chief Justice Chase] that *affirmative relief* under [Section 3 of] the amendment should come from Congress." *Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978) (emphasis added). By contrast, the court observed, the "Fourteenth Amendment provide[s] of its own force as a *shield* under the doctrine of judicial review." *Id.* (emphasis added).[8] The sword-shield distinction is well established in the case law. *See Mich. Corr. Org. v. Mich. Dep't. of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014) (Sutton, J.). Petitioners have no answer for *Cale v. Covington* and related cases.

[8] A recent Fourth Circuit concurrence criticized Chase, but did not acknowledge this circuit precedent. *Cawthorn v. Amalfi*, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring).

C. Section 3 Empowered the Federal Government to Control State Elections, and not the Other Way Around

The District Court did not discuss *Griffin's Case*. Rather, it ruled that the question "whether Section 3 is self-executing is *irrelevant* because Petitioners are proceeding under Colorado's Election Code which provides it a cause of action." Omnibus Order at 19. To the contrary, under Chief Justice Chase's ruling, and with all due respect to state statutes, Colorado election law is *irrelevant*. In light of *Griffin's Case*, the States have no role in enforcing Section 3—that is, no role absent congressional authorization.

This position is supported by a core premise of the Reconstruction Amendments. The idea that the Fourteenth Amendment, absent express federal statutory authorization, allowed the States to operationalize Section 3 only makes sense if state governments could be trusted. But the Fourteenth Amendment and enforcement legislation were enacted precisely because state institutions, state officials, and *even* state courts were *not* considered trustworthy by the national government.[9] Indeed, the idea that Section 3 permitted States, via ballot control, to limit voter and candidate participation for federal positions and to do so absent express federal authorization seems novel and ahistorical. Indeed, the Section 3 cases that Petitioners cite between 1868 and 1870 concerned *state* positions, and not *federal* positions. Section 3 empowered the federal government to control state elections and state office-holding, and not the other way around.

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[9] *See* Ex parte *Milligan*, 71 U.S. 2 (1866) (Chase, C.J., concurring) ("In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.").

II. The President is not an "Officer of the United States"

The second threshold question presented in this case is whether the President is an "Officer of the United States." The District Court correctly held that it is not. This Court should affirm the District Court's ruling on this question for three reasons: text, history, and tradition. First, the text: the phrase "Officer of the United States" in the Constitution of 1788 and Section 3 does not refer to the President. Second, the history: since the framing, prominent jurists have maintained that the phrase "Officer of the United States" would not refer to the President. Third, the tradition: there is a constant stream of authority—from courts, executive branch opinions, and scholarship—that supports these textual and history-based positions. The President is not an "officer of the United States."

A. Text: In 1788, 1868, and Today, the President is not an "Officer of the United States"

The Constitution's original seven articles include twenty-two provisions that refer to "offices" and "officers."[10] Some clauses use the words "office" or "officer," standing alone and unmodified. Other clauses use the word "office" or "officer" followed by a modifier, such as "of the United States" or "under the United States." The presumption should be that where the Framers used different office- and officer-language, they conveyed different meanings. These phrases are not interchangeable.

Four provisions of the Constitution of 1788 use the phrase "Officers of the United States." The District Court concluded that these provisions "lead towards the same conclusion—that the drafters of Section Three of the Fourteenth Amendment

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[10] *See* Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part II: The Four Approaches*, 61 S. Tex. L. Rev. 321 (2022).

did not intend to include the President as 'an officer of the United States.'" Dist.Ct. at ¶311. Rather, this language referred to appointed positions.

First, the District Court held that the Appointments Clause "distinguishes between the President and officers of the United States." Dist.Ct. at ¶311. Under the Appointments Clause, the President can appoint "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . ."[11] All of the enumerated positions are *appointed*. Moreover, these positions must be "established by Law"—that is created by statute. The reference to "all other Officers of the United States" should be understood in a similar fashion as the expressly enumerated positions: appointed positions that are created by statute. Petitioners agree with this conclusion, but assert that "[b]ecause the President does not appoint himself, language addressing the Appointment Clause's phrase 'other officers' has no bearing on whether the President is an officer." Petrs. Br. at 44. The Appointments Clause demonstrates that although the President holds an "office," he is not an "Officer of the United States" as that phrase is used in the Appointments Clause and the other provisions in the Constitution.

Second, the District Court held that the Impeachment Clause "separates" the President and Vice President "from the category" of "all civil Officers of the United States." Dist.Ct. at ¶311. While the Appointments Clause refers to "all *other* Officers of the United States," the Impeachment Clause refers only to "all civil Officers of the United States." Justice Story observed that the absence of the word *other* in the

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[11] The drafting history of the Appointments Clause is discussed in Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution: Part III, The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. Tex. L. Rev. 349, 387–390 (2023) (hereinafter "*Part III*").

Impeachment Clause "lead[s] to the conclusion" that the President is not "included in the description of civil officers of the United States." 2 Joseph Story, Commentaries on the Constitution of the United States § 791 (1833), https://perma.cc/R2GB-ULUW. Moreover, Story's conclusion is consistent with the drafting history of the Impeachment Clause. Early drafts of the Impeachment Clause included the word "other" at precisely this location, but that word was removed.[12] Petitioners maintain that the President is listed separately from "civil Officers of the United States" because he is "both a military and civil officer." Petrs. Br. at 47. They provide no support for this claim. To the contrary, Justice Story maintained that the President, even as Commander in Chief, is still a civilian officer. *See* 2 Story, *supra*, at § 791. This principle was true in the time of George Washington[13] and in modern times.[14]

Third, the District Court pointed to the Commissions Clause, which provides that the President "shall Commission all the Officers of the United States." Dist.Ct. at ¶311. Petitioners concede, as they must, that the President does not commission himself.[15] Petrs. Br. at 47–48. This concession undermines their approach. If the President must commission *all* the "officers of the United States," and the President does not commission himself, then the President cannot be included in the category of *all* the "officers of the United States."

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[12] *Part III, supra*, at 399–400.

[13] Alexander Hamilton's Treasury Department prepared rolls of federal officials and officers with their compensation. The President was included in the "civil list" and not in the military list. *See, e.g.*, *Report on the Estimate of the Expenditure for the Civil List and the War Department to the End of the Present Year* (Sept. 19, 1789), Founders Online, https://perma.cc/EY2C-867F.

[14] *Roosevelt Is Held Civilian At Death*, New York Times (July 26, 1950) (citing Surrogacy Court).

[15] *Part III*, *supra*, at 416–418.

Fourth, the District Court observed that in the Article VI Oath or Affirmation Clause, "the President is explicitly absent from the enumerated list of persons the clause requires to take an oath to support the Constitution." Dist.Ct. at ¶311. The President would only be covered by the Article VI Oath or Affirmation Clause if he is an "Officer of the United States." However, the District Court recognized that the President's separate Article II oath "provides further support for distinguishing the President from 'Officers of the United States'" in Article VI. Dist.Ct. at ¶311. In addition to the different wording between the Article II and Article VI oaths, this distinction is further supported by the different oaths administered to President George Washington and Vice President John Adams (as President of the Senate), nearly two months apart in 1789.[16] The District Court rightly observed that the "class of officers to whom Section Three applies" is the same "Officers of the United States" in Article VI, which does not include the President. Dist.Ct. at ¶313 n.19.[17]

The District Court was correct to conclude that these four constitutional provisions "lead towards the same conclusion—that the drafters of the Section Three of the Fourteenth Amendment did not . . . include the President as 'an officer of the United States.'" Dist.Ct. at ¶311.

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[16] *Part III*, *supra*, at 423–433.

[17] The District Court's conclusion is further supported by George Washington Paschal's 1868 treatise, which stated that Section 3 "seems to be based upon the higher obligation to obey th[e] [Article VI] oath." George Washington Paschal, The Constitution of the United States Defined And Carefully Annotated 250 n.42 (1868), https://bit.ly/3SXvTvm. The 1876 edition of Paschal's treatise stated more directly that the Article VI oath and Section 3 apply to "precisely the same class of officers." George W. Paschal, The Constitution of the United States: Defined and Carefully Annotated xxxviii (1876), https://bit.ly/3SXDg5K.

B. History: Contemporaneous Sources Recognized that the President was not an "Officer of the United States"

Petitioners describe the District Court's interpretation as "hyper-technical lawyering and 'secret-code' hermeneutics." Petrs. Br. at 50 (citing Baude & Paulsen, *supra*, at 108–09). This hyperbole is misplaced. There is no secret-code here. And Petitioners do not address the evidence that *Amicus* has put forward in the scholarly literature.[18]

In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, "the President is not an officer of the United States." Proceedings of the Senate Sitting for the Trial of William W. Belknap at 145. Instead, Booth stated, the President is "part of the Government." *Id.* Two years later, David McKnight wrote an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'" David A. McKnight, The Electoral System of the United States 346 (1878). This contemporaneous evidence supports the District Court's conclusion that the President is not an "Officer of the United States."

Petitioners and their *Amici* cite a slew of statements from the 1860s in which the President is referred to as an "Officer," the "High Office of the Government," "the chief executive officer of the United States," and more. None of these exchanges were made in the context of Section 3. These references to the President may have

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[18] *See* Josh Blackman & Seth Barrett Tillman, *Is the President an 'Officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment*, 15 NYU J. of Law & Lib. 1 (2021) (hereinafter "*Is the President?*").

been made in a more colloquial sense, but they did not state the President was an "Officer of the United States" for purposes of Section 3, or for purposes of the Constitution of 1788. *Amici* have yet to point to a single statement in which anyone argued that the President is an "Officer of the United States" for purposes of Section 3's triggering or jurisdictional clause. Not one.

And there is a good reason why no such evidence has been found. As the District Court acknowledged, President Trump was "the first President of the United States who had not previously taken an oath of office." Dist.Ct. at ¶313 n.20. All prior Presidents had taken some *other* oath. There would have been no reason for those who framed and ratified the Fourteenth Amendment to discuss a person who (1) was elected as President, (2) but had never before taken any *other* constitutional oath, (3) and then engaged in insurrection, (4) and then sought re-election. The District Court concluded that "For whatever reason the drafters of Section Three did not . . . include a person who had only taken the Presidential Oath." Dist.Ct. at ¶313. It is the meaning of the ratified text which controls, and not speculations about unexpressed intentions. *E.g.*, Antonin Scalia, A Matter of Interpretation 38 (1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

C. Tradition: There is a Constant Stream of Authority from the Judicial and Executive Branches That Supports the District Court's Holding

In addition to the text and history of Section 3, there is a constant stream of authority from the Supreme Court and the Executive Branch that support the District Court's conclusion: the President is not an "officer of the United States."[19]

[19] This tradition is discussed at length in *id.* at 24–33.

- *United States v. Hartwell* stated that "[a]n office is a public station, or employment, conferred by the *appointment* of *government*." 73 U.S. 385, 393 (1867) (emphases added). Presidents are not "appointed" by the "government." Rather, Article II describes the President as an "elected" position in several clauses.
- In 1882, Attorney General Brewster, citing Justice Story, stated that the phrase "Officers of the United States" in the Appointments Clause *and* in Section 3 should be read in a similar fashion. Member of Cong., 17 U.S. Op. Att'y Gen. 419, 420 (1882). As discussed above, Story contended that the phrase "officer of the United States" did not extend to the presidency.
- *United States v. Mouat*, decided two decades after ratification, interpreted a statute that used the phrase "officers of the United States." 124 U.S. 303 (1888). The Court observed that a person is "not strictly speaking, an officer of the United States" unless he "holds his place by virtue of an appointment by the president or of one of the courts of justice or heads of departments . . . ." *Id.* at 307.
- In 1918, Attorney General Gregory wrote an opinion that distinguished between elected officials and "officers of the United States." Emps. Comp. Act-Assistant United States Att'y, 31 U.S. Op. Att'y Gen. 201, 202 (1918), https://tinyurl.com/bdesdrrk; *see also* Prosecution of Claims by Members of War Price and Rationing Boards, 40 U.S. Op. Att'y Gen. 294, 296 (1943) (Biddle, A.G.).
- In 1969, future-Chief Justice William H. Rehnquist observed that federal courts do not extend general "officer"-language in statutes to the President,

"unless there is a specific indication that Congress intended to cover the Chief Executive." Memorandum from William H. Rehnquist, Asst. Att'y Gen., to the Honorable Egil Krogh, Re: Closing of Government Offices in Memory of Former President Eisenhower (Apr. 1, 1969), https://perma.cc/P229-BAKL; *see also* Memorandum from Antonin Scalia, Asst. Att'y Gen., to Honorable Kenneth A. Lazarus, Re: Applicability of 3 C.F.R. Part 100 to the Pres. and V.P. (Dec. 19, 1974), https://perma.cc/GQA4-PJNN.

- In *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, Chief Justice Roberts wrote, "[t]he people do not vote for the 'Officers of the United States.'" 561 U.S. 477, 497–98 (2010). To be sure, this case was not about whether the President was an "Officer of the United States." But we have found no indication that anyone cast doubt on the correctness of this statement.

All of this evidence suggests that the meaning of "officer of the United States" was part of a continuous, widely understood legal tradition, starting in 1788, and extending forward into Reconstruction and beyond. Petitioners make no effort to address this long-standing tradition.

Respectfully submitted 27th day of November 2023,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of November, 2023, a true and correct copy of the foregoing **Brief Submitted by Professor Seth Barrett Tillman as *Amicus Curiae* in Support of Intervenor-Appellant/ Cross-Appellee Donald J. Trump** on the following via CCE e-service:

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