No. 23-719

In the
Supreme Court of the United States

Donald J. Trump, *Petitioner*,

v.

Norma Anderson, et al., *Respondents*.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF FOR PROFESSOR SETH BARRETT TILLMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Court granted certiorari (23-719) on the following question presented:

The Supreme Court of Colorado held that President Donald J. Trump is disqualified from holding the office of President because he "engaged in insurrection" against the Constitution of the United States—and that he did so after taking an oath "as an officer of the United States" to "support" the Constitution. The state supreme court ruled that the Colorado Secretary of State should not list President Trump's name on the 2024 presidential primary ballot or count any write-in votes cast for him. The state supreme court stayed its decision pending United States Supreme Court review.

The question presented is:

> Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitution and Statutes

Other Authorities

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.[1]

Tillman has co-authored publications concluding that Section 3 is not self-executing. And Tillman is one of the few academics who has written extensively on the Constitution's "office"- and "officer"-language. Since 2008, Tillman has consistently written that the phrase "Officer of the United States" does not encompass the presidency.

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and his counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This case turns on two threshold questions: "Can States enforce Section 3 in the absence of federal enforcement legislation?" and "Is the President an 'Officer of the United States'?" Both of these questions were settled long ago. In *Griffin's Case*, Chief Justice Chase recognized that Section 3 of the Fourteenth Amendment required federal enforcement legislation. And a historical tradition stretching back to the Early Republic establishes that "Officers of the United States," as used in the Constitution, are appointed, and not elected. Yet, this settled tradition was unsettled in the wake of January 6, 2021. The Colorado Supreme Court discarded *Griffin's Case* and ignored all textual evidence that the President is not an "Officer of the United States."

This Court should reverse on both grounds. First, *Griffin's Case* settled the meaning of Section 3, is consistent with the longstanding sword-shield dichotomy in federal courts' jurisprudence, and reflects a core premise of reconstruction: Congress, and not the distrusted States, was empowered to enforce Section 3. Second, the four provisions of the Constitution of 1788 that use the phrase "Officers of the United States" do not refer to the President. And the Framers of Section 3 used that older, extant, limited language, in particular the Oaths Clause, and in doing so carried forward the meaning of "Officers of the United States" from that "old soil." In 1788, 1868, and today, "Officer of the United States" in the Constitution extends exclusively to appointed positions and not to elected positions.

A ruling on the first ground would immediately halt the litigation in Colorado and other States. A ruling on the second ground would authoritatively resolve the Section 3 case against Petitioner in the leadup to January 6, 2025.

ARGUMENT

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

In *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5815), Chief Justice Chase held that Section 3 is not self-executing.[2] In other words, Chase held that Section 3 could only be put into effect on behalf of a private party seeking affirmative relief against the government, *e.g.*, a party seeking habeas relief, if that relief was authorized by a federal statute. Under *Griffin's Case*, the relief sought by the Respondents is barred precisely because they are seeking affirmative relief against the government to enforce Section 3 without authorization from federal enforcement legislation.

This Court should follow *Griffin's Case*. This decision, and its progeny, settled the meaning of Section 3. *Griffin's Case* is consistent with the longstanding sword-shield dichotomy in federal courts' jurisprudence. And *Griffin's Case* upholds a core premise of Reconstruction: Congress, and not the distrusted States, was empowered to enforce Section 3.

A. *Griffin's Case* is persuasive authority that settled the meaning of Section 3

In May 1869, Chief Justice Chase stated expressly that Section 3 can only be enforced by

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[2] *See* Blackman & Tillman, *Sweeping and Forcing the President into Section* 3, 28 Tex. Rev. L. & Pol. 350, 482–84 (forth. 2024), https://ssrn.com/abstract=4568771 (hereinafter "Blackman & Tillman").

Congress through federal legislation. This decision, issued within a year of the Fourteenth Amendment's ratification, by the Chief Justice of the United States, is reasonably probative evidence of the original public meaning of Section 3, and whether it is self-executing.

However, the Colorado Supreme Court determined that Chief Justice Chase's "non-binding decision" was unpersuasive. True enough: *Griffin's Case* is not binding on the state court. But the United States Supreme Court has often treated decisions by Circuit Justices about the Constitution as highly persuasive authority. *See U.S. v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d); *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230); *Ex Parte Merryman*, 17 F. Cas. 144 (1861) (No. 9487) (chambers).

In *Ex Parte Ward*, this Court cited Chief Justice Chase's decision in *Griffin's Case* favorably, on point, and as good law. 173 U.S. 452, 454–55 (1899). And many other federal and state courts have cited *Griffin's Case* as well. Although not binding, courts at all levels have seen *Griffin's Case* as persuasive. *Griffin's Case* has settled the meaning of Section 3. *See Federalist No. 37* (Madison) (discussing liquidation).

B. Decisions from Louisiana and North Carolina are consistent with *Griffin's Case*

The Respondents have cited several cases for the proposition that "states can, and have, applied Section [Three] pursuant to state statute[s] without federal legislation." Co.Sup.Ct.¶329 (Samour, J., dissenting). Three of the cases were from Louisiana. *State v. Lewis*, 22 La. Ann. 33 (1870); *Sandlin v.*

Watkins, 21 La. Ann. 631 (1869); *Downes v. Townes*, 21 La. Ann. 490 (1869). And two of the cases were from North Carolina. *In re Tate*, 63 N.C. 308 (1869); *Worthy v. Barrett*, 63 N.C. 199 (1869). None of these cases show that Section 3 can be implemented merely by a state statute, in the absence of federal enforcement legislation.

First, as a threshold matter, the three Louisiana cases were decided after *Griffin's Case* (May 10, 1869). Yet, *Lewis*, *Watkins*, and *Townes* did not attempt to distinguish *Griffin's Case*, nor explain why it was wrong.

Second, Congress had mandated that these States enforce Section 3, even *before* the Fourteenth Amendment had been ratified on July 9, 1868. *See* An Act to Admit States, ch. 70, § 3, 15 Stat. 73, 74 (June 25, 1868). The five cases were all adjudicated, expressly or impliedly, under state statutes that were authorized by this federal statute.

Third, the federal statutory authorization extended *only* to state control over "eligib[ility] to any office in either of said States," and not over any federal positions. *Id.* And the Louisiana and North Carolina statutes only applied to state positions. *See* La. Intrusion Act, No. 156 of 1868, § 1 (Oct. 15, 1868); N.C. Acts of 1868, ch. 1, § 8 (July 21, 1868).

C. The Colorado Supreme Court engaged in improper speculation about Chief Justice Chase's motives

The Colorado Supreme Court found that *Griffin's Case* was not "compelling" because of "persuasive criticism" from two law professors who

"criticiz[ed] Chief Justice Chase's interpretation as wrong and as constituting a strained interpretation based on policy and circumstances rather than established canons of construction." Co.Sup.Ct.¶103 (citing William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forth. 2024) (manuscript at 37–49) (hereinafter "Baude & Paulsen")). Professors Baude and Paulsen do not simply write that *Griffin's Case* was wrongly decided. They call it "appalling" and charge that Chief Justice Chase likely "had complex political motivations" when writing *Griffin's Case*—perhaps that "Chase was gunning for the Democratic nomination for President." Baude & Paulsen, *supra*, at 10 n.14, 44. This sort of criticism is spreading. The Maine Secretary of State ruled that *Griffin's Case* "has been discredited," relying on another professor who charged that Chase's jurisprudence "served … his political goals." Ruling of the Maine Secretary of State (Dec. 28, 2023) at 20 (citing Professor Graber), https://perma.cc/TZ3S-WDHF.

If this approach were to become widespread, it would cause a "serious jolt to the legal system." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 357 (2022) (Roberts, C.J., concurring). Many Justices have maintained close ties with political parties, and a few had their eyes on political office. Perhaps most notably, Justices Charles Evans Hughes resigned from the Court to run for president and Justice William O. Douglas was a short-lister for the vice-presidential nomination. It would be extremely disruptive to root out all of the opinions these and other Justices authored with a "jaundiced lens that questions [their] motivation." Blackman & Tillman,

supra, at 504. The Nation, as well as Hughes, Douglas, and Chase—a leading light of antebellum anti-slavery litigation—do not deserve this *ex post* extirpation.

Griffin's Case has not been "discredited." It was not based on some set of political "circumstances." Chief Justice Chase's jurisprudence was not "bonkers" or "wacky." Baude & Paulsen, *supra*, at 43, 44. Rather, *Griffin's Case* is the "fountainhead" and "wellspring of Section 3 jurisprudence." Co.Sup.Ct.¶285 (Samour, J., dissenting). For 150 years, from 1869 to 2021, *Griffin's Case* was settled law.

D. *Griffin's Case* is consistent with the deeply rooted sword-shield dichotomy in federal courts' jurisprudence

"In our American constitutional tradition there are two distinct senses of self-execution. First, as a *shield*—or a *defense*. And second, as a *sword*—or a *theory of liability* or *cause of action supporting affirmative relief*." Blackman & Tillman, *supra*, at 362. This dichotomy is deeply rooted in federal courts' jurisprudence. *See Mich. Corr. Org. v. Mich. Dep't. of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014) (Sutton, J.).

The dissent below, citing *Amicus*'s scholarship, applied the sword-shield dichotomy. Co.Sup.Ct.¶300 (Samour, J., dissenting). And the dissent observed that the Fourth Circuit "aptly adopted this distinction … thereby reconciling any apparent inconsistencies in Fourteenth Amendment jurisprudence." Co.Sup.Ct.¶301 (Samour, J., dissenting). *Cale v. Covington*, which discussed *Griffin's Case*, recognized "the protection the Fourteenth Amendment provided of its own force as a *shield* under the doctrine of

judicial review." 586 F.2d 311, 316 (4th Cir. 1978) (emphasis added). The Fourth Circuit held "that the Congress and Supreme Court of the time were in agreement that *affirmative* relief under the amendment should come from Congress." *Id.* (emphasis added).

Finally, it is these "two distinct senses of self-execution" which "reconciled in a principled manner" *Griffin's Case* and Chase's decision in the *Case of Jefferson Davis*. *See* Co.Sup.Ct.¶299 (Samour, J., dissenting) (citing Blackman & Tillman, *supra*, at 484–505).

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In light of *Griffin's Case*, the States have no role in enforcing Section 3 absent federal statutory authorization. The proceedings in the Colorado courts, because they are not premised on federal enforcement legislation, must be dismissed.

II. In 1788, 1868, and today, "Officer of the United States" in the Constitution extends exclusively to *appointed* positions and not to *elected* positions

In this litigation, there is actually some consensus. All sides agree that the presidency is an *office*, and by implication, the President is an *officer*. All sides agree that the President is not an *officer* of any particular state, or of a foreign government, but is an officer of the United States government. All sides agree that the President is not somehow *above* the laws of the United States, but is *under*, and subject to, the laws of the United States. Finally, all sides agree

that rank-and-file members of Congress are not *officers* of any stripe. This is where agreement ends.

The Respondents argue the President is obviously an *officer*, and an *officer of the United States*, and holds an *office under the United States*. The Respondents present their conclusion as the only rational reading of the Constitution. They argue that the contrary position renders the Constitution a "secret code." They warn about *absurd* consequences if the presidency is not an "Officer under the United States." They insist that the Framers never would have intended to exclude the President from Section 3. These arguments may sound plausible at first blush, but crumble on closer inspection.

First, there is nothing "secret" about *Amicus*'s position. *Amicus* uses the same methodology employed in *D.C. v. Heller*, 554 U.S. 570 (2008). To understand the original meaning of "the right to keep and bear arms," Justice Scalia analyzed the "historical background" of that provision in its antecedent provision, the English Bill of Rights. *Id.* at 592–93. Likewise, the roots of "Office under the United States," are in the English and British legal tradition, where "Office under the Crown" referred only to *appointed* positions, and not to *elected* positions. The phrase "Office under the United States" was used in the Articles of Confederation and in the Constitution. Here, the Framers "employ[ed] a term of art obviously transplanted from another legal source, [and] it brings the old soil with it." *Biden v. Nebraska*, 143 S.Ct. 2355, 2379 (2023) (Barrett, J., concurring) (citations omitted). In the Constitution of 1788, the presidency was not an "Office under the United States."

However, the phrase "Officer of the United States" was not widely used in federal and state organic documents prior to 1788. Because there is no "historical background" of "Officer of the United States" in documents like the Articles of Confederation, *Amicus* analyzes how that phrase is used in the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oaths Clause. Irrespective of how "Officer of the United States" may have been used outside organic documents, the Appointments Clause defined the scope of this phrase in the Constitution.

The text of these four provisions supports the conclusion that "Officers of the United States" refers to appointed positions in the Executive and Judicial Branches of the federal government. But this phrase does not extend to appointed positions in the Legislative Branch, like the Clerk of the House, because these positions are not appointed pursuant to the Appointments Clause. This textualist argument has been recognized by jurists for two centuries, including Chief Justice Marshall and Justice Story. There is no "secret code."

Second, Respondents argue that *Amicus*'s position would lead to *absurd* consequences. For example, they argue that if the presidency is not an "Office under the United States," then the President could freely accept foreign gifts. As a threshold matter, Respondents have some explaining to do. Under *their* position, members of Congress do not hold an "Office *under* the United States," so Representatives and Senators would likewise be exempt from the Foreign Emoluments Clause.

Moreover, there is no potential parade of absurdities if the President is not an "Officer *of* the United States." Indeed, to date, the Respondents have not produced a record of anyone stating that the President is an "Officer of the United States" for purposes of Section 3. None. But in April 1868, while ratification of the Fourteenth Amendment remained ongoing, a Louisville newspaper, citing the Commissions and Impeachment Clauses, argued that the President was not an "Officer of the United States."

The Framers of Section 3 had no reason to think about a person who: (1) was elected as President; (2) but had never before taken any other constitutional oath; (3) then is alleged to have engaged in insurrection; and (4) then sought re-election. The "failure to appreciate the effect of certain provisions" does not support the invocation of the "absurdity doctrine." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 191 (2012). And *Amicus*'s position easily clears the bar of *objective* reasonableness. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2156–57 (2016). Finally, "[m]aking exceptions either to achieve greater equity or avoid absurdity offends the rule of law norm ...." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 168 (2010). This principle is especially apt in a case seeking to disqualify a presidential candidate from the ballot. The Respondents wield absurdity as a loose canon.

Third, Respondents ultimately abandon all principles of original public meaning, and turn back

the jurisprudential clock to original intentions. Justice Scalia stated the proper rule: "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." Antonin Scalia, *A Matter of Interpretation* 38 (1997). Yet the Respondents are "forced to abandon the [constitutional] text and precedent altogether and appeal to assumptions and policy." *See Bostock v. Clayton Cnty., Ga.*, 140 S.Ct. 1731, 1749 (2020). *In effect*, the Respondents "contend that few in [1868] would have expected [Section 3] to [not] apply to" the President. *See id. Bostock* emphatically rejected this purposivist jurisprudence:

> But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a [text] give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law ....

Id. at 1737.

Section 3 of the Fourteenth Amendment was a compromise. Early versions of Section 3 would have restricted the franchise of *all* former confederates, or restricted the ability of *all* former confederates to hold public office. But the most the 39th Congress could agree upon was to "exclude from *certain* offices a *certain* class of persons." *Griffin's Case*, 11 F. Cas. at 25 (emphases added). Therefore, the Framers reached to extant, limited language in the Oaths Clause, and in doing so carried forward that "old soil." Perhaps some expected Section 3 to cover a person who only

took one oath as President, but that is not what the ratified text means.

In the Constitution, the President was not an "Officer of the United States" in 1788, in 1868, and today. That is enough to definitively resolve this action, and, by implication, all other Section 3 cases concerning the Petitioner. Finally, if the Court agrees with *Amicus* that the President is not an "Officer of the United States," then there is no need to opine on whether the presidency is an "Office under the United States," and the consequences that may result from such a decision.

A. In the Constitution of 1788, the President did not hold an "Office … under the United States"

The phrase "Office under the United States" in the Constitution traces its roots to a British drafting convention, "Office under the Crown," which referred to appointed positions. Five provisions of the Constitution of 1788 use the phrase "Office under the United States." The President and members of Congress are not covered by this language.

1. The "historical background" of "Office under the United States" was "Office under the Crown"

The Colorado Supreme Court wrote that: "When interpreting the Constitution, we prefer a phrase's normal and ordinary usage over 'secret or technical meanings that would not have been known to ordinary citizens in the founding generation.'" Co.Sup.Ct.¶130 (quoting *D.C. v. Heller*, 554 U.S. 570, 577 (2008)). Along similar lines, Professors Baude and Paulsen contend that *Amicus*'s textualist approach is "hidden-meaning hermeneutics" that renders Section

3 "a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati." Baude & Paulsen, *supra,* at 104.

Amicus follows the same methodology that Justice Scalia employed in *Heller*. In the absence of precedent, to understand the original meaning of the "right to keep and bear arms," the Court analyzed the "historical background of the Second Amendment." *Heller*, 554 U.S. at 592. Specifically, Justice Scalia considered the individual right in the English Bill of Rights, the "predecessor to our Second Amendment." *Id.* at 593.

For the last three centuries, the phrase "Office under the Crown" has referred to appointed positions. This English and British legal tradition crossed the Atlantic—ultimately becoming part of a wider Anglo-American legal tradition. *See* Tillman & Blackman, *Offices and Officers of the Constitution, Part IV: The "Office … under the United States" Drafting Convention*, 62 S. Tex. L. Rev. 455, 461–65 (2023) (hereinafter "*Part IV*"). This drafting convention was used in the Articles of Confederation, by the first Congress, and by the Washington Administration to refer to appointed, and not elected positions. *Id.* at 465–524.

In 1788, the elected presidency was not an "Office under the United States." Five clauses of the Constitution refer to an "Office … under the United States," which will each be discussed in turn.

2. The President is covered by the Religious Test Clause

The Religious Test Clause provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The President and members of Congress hold a "public Trust." The Religious Test Clause extends to these public trusts. See Tillman & Blackman, *Offices and Officers of the Constitution, Part II: The Four Approaches*, 61 S. Tex. L. Rev. 321, 396–401 (2021) (hereinafter "*Part II*").

3. The President and members of Congress are not covered by the Foreign Emoluments Clause

The Foreign Emoluments Clause applies to those who hold an "Office of Profit or Trust under [the United States]." The President, as well as members of Congress, do not hold such an office, so are not barred by this specific provision from accepting foreign state gifts. *Part II*, *supra*, at 388. (Respondents should agree with *Amicus* regarding members of Congress.) For example, President George Washington publicly received, accepted, and kept diplomatic gifts without seeking congressional consent. *See* Blackman, *Defiance and Surrender*, 59 S. Tex. L. Rev. 157, 158–62 (2017) (hereinafter "*Defiance and Surrender*"). During oral argument before the Colorado Supreme Court, Petitioner's counsel cited the Washington gifts, saying "no one thought that [the Clause] applied to George Washington." Recording at 2:02:25. The practices of Alexander Hamilton, the Secretary of the Treasury during the Washington Administration, further support this position. *See Part IV*, *supra*, at 484–97.

The Colorado Supreme Court cited foreign gifts that Presidents Jackson and his successors declined to accept, but ignored practices from the Early Republic. Co.Sup.Ct.¶136 n.14. In our separation of powers jurisprudence, the earlier practices are more persuasive. *Defiance and Surrender*, *supra*, at 164–66. One since-vacated district court opinion, which found that the President was subject to the Foreign Emoluments Clause, likewise ignored the gifts to President Washington. *See D.C. v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018), *vacated by* 838 Fed. Appx. 789 (4th Cir. 2021).

In 2009, the Office of Legal Counsel, without considering any of the evidence discussed above, stated that the Foreign Emoluments Clause "surely" applies to the President.[3] But, in 2017, the Department of Justice's Civil Division only *assumed* for the purposes of litigation that the President was subject to the Foreign Emoluments Clause, and favorably cited Tillman's scholarship.[4] In 2019, the Congressional Research Service declined to take a position on whether the President is covered by the Foreign Emoluments Clause in light of the "significant academic debate about whether Office of Legal Counsel's conclusion comports with the original public meaning of the Foreign Emoluments Clause."[5] CRS favorably cited Tillman's scholarship.

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[3] 33 Op. O.L.C., 2009 WL 6365082, at *4 (Dec. 7, 2009).

[4] *OLC and Civil Division*, Reason (Oct. 4, 2019), https://perma.cc/PS6X-35X8.

[5] CRS Report (Sept. 25, 2019), 2019 WL 6524757.

4. The Elector Incompatibility Clause does not bar the President from serving as an elector

The Elector Incompatibility Clause provides that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." This clause does not bar the President from serving as an elector. This position should not be particularly surprising. If the President serves as an elector, his independence is not at risk of being pressured or coerced to change his vote by any superior. *See Federalist No. 68* (Hamilton).

5. The Incompatibility Clause does not bar the President from holding a seat in Congress

The Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." It has long been *Amicus*'s position that this provision does not bar the President from holding a seat in Congress. The Colorado Supreme Court charged that this reading is "foreclosed by basic principles of separation of powers." Co.Sup.Ct.¶135.

The Incompatibility Clause was not a separation of powers provision. In *Federalist No. 76*, Hamilton explained that the Incompatibility Clause was motivated by worries about British-style corruption**,** where the King manipulated members of Parliament by offers of *appointed* office. Of course, the King never tried to manipulate members by offering them the crown. *See also* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev.

1045, 1062–63 (1994). Textually, the clause is not a bar against the President being a member of Congress.

6. Disqualification after impeachment and conviction does not extend to the presidency

The Impeachment Disqualification Clause provides that a person who is impeached and convicted can be subject to "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." The scope of disqualification extends to appointed positions, but not elected federal positions, including the presidency. *See* Tillman, *Originalism & The Scope of the Constitution's Disqualification Clause*, 33 Quinnipiac L. Rev. 59 (2014). As a result, a person impeached, convicted, and disqualified could serve in Congress or the presidency. The Colorado Supreme Court found this position "nonsensical," but did not cite any evidence of original meaning. Rather, it looked to the Articles of Impeachment against President Trump. Co.Sup.Ct.¶134.

Amicus has no doubt that the House Managers sought to use the impeachment process to prevent Trump from running for a second term. But House Managers, who are intent on removing a president from office, are not always the most neutral, objective indicators of the original meaning of the Constitution. To the contrary, evidence from the *Blount* and *Belknap* impeachments supports *Amicus*'s position: the Impeachment Disqualification Clause was designed to prevent the President from reinstating

disqualified statutory officers.[6] And the April 15, 1868 issue of the *Louisville Daily Journal*, which will be discussed below, observed that "a judgment in the case of his impeachment cannot disqualify [the President] from holding the [p]residency if re-elected." As a result, disqualification would not deprive the people of the right to choose their elected officials.

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Despite the Colorado Supreme Court's charges of absurdity, there is substantial evidence to support *Amicus*'s *position*: In the Constitution of 1788, the President did not hold an "Office … under the United States." In four other clauses, the Constitution also uses another distinct phrase, which has a distinct meaning: "Officers of the United States."

B. In the Constitution of 1788, the President was not an "Officer of the United States"

The trial court held that the President was not an "Officer of the United States." The trial court's careful textualist analysis was primarily based on four provisions of the Constitution that use the phrase "Officers of the United States": the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oaths Clause. As a textual matter, in none of these clauses does the phrase "Officers of the United States" refer to the President. The District Court concluded that these four provisions "lead towards the same conclusion—that the drafters of Section Three of the Fourteenth Amendment did not

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[6] Blackman & Tillman, *Impeachment Disqualification Clause*, Reason (Feb. 7, 2021), https://perma.cc/JS3G-PXQB.

intend to include the President as 'an officer of the United States.'" Dist.Ct.¶312. Rather, this language referred to appointed positions. Presidents are not *appointed*; they are *elected*. Yet the Colorado Supreme Court did not discuss the text of *any* of these provisions. Not one. In 1788, the President was not an "Officer of the United States" in the Constitution.

1. The President does not appoint himself under the Appointments Clause

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 …." The Appointments Clause defines who are the "Officers of the United States."[7] The District Court held that the Appointments Clause "distinguishes between the President and officers of the United States." Dist.Ct.¶311. 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 fashion similar to the expressly enumerated positions: all other appointed positions that are created by statute.

The text of the Appointments Clause demonstrates that the President is not an "Officer of the United States."

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[7] *See* Tillman & Blackman, *Offices and Officers of the Constitution: Part III, The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. Tex. L. Rev. 349, 387–90 (2023) (hereinafter "*Part III*").

2. The Impeachment Clause distinguishes the President from "all other Officers of the United States"

The Impeachment Clause provides, "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment ...." 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.¶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, in discussing the *Blount* trial, observed that the absence of the word *other* in the 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.

The presidency is a civilian or civil position, not a military one. In 1789, Secretary of the Treasury Alexander Hamilton included the President on the "civil list," but not on the military list. *Report on the Estimate of the Expenditure* for *the Civil List and the War Departmen*t (1789), https://perma.cc/EY2C-867F. *See Parker v. Levy*, 417 U.S. 733, 751 (1974).

3. The President does not commission himself

The Commissions Clause provides that the President "shall Commission *all* the Officers of the United States." The President does not commission himself. If the President must commission all the

"officers of the United States," and the President does not commission himself or his successor, then the President cannot be included in the category of "all the officers of the United States." *All* means *All*.

4. The President does not take an Article VI Oath as an "Officer of the United States"

The Article VI Oaths Clause provides, "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution." The District Court observed that "the President is explicitly absent from the enumerated list of persons the clause requires to take an oath to support the Constitution." Dist.Ct.¶311. The President would only be covered by the Article VI Oaths 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.¶311.

Vice President John Adams also did not take an Article VI Oath. Rather, as President of the Senate he took his exclusive oath as a legislative officer, as mandated by the Rules of Proceedings Clause and the Oaths Act (1789). *Part III, supra,* at 424–28.

Finally, Congress determines the timing of the Article VI Oath by statute, as it has done since 1789. But the President *must* take his oath before he begins to execute his office.

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The Appointments, Impeachment, Commissions, and Oaths Clauses support the same textual conclusion: in 1788, the President was not an "Officer of the United States." And unlike with "Office under the United States," no potential parade of absurdities could follow if this Court holds that the President is not an "Officer of the United States." *Amicus*'s textual argument is consistent with longstanding practice associated with each of these four constitutional provisions.

C. In 1868, the President was not an "Officer of the United States" in the Constitution

Section 3 represented a compromise between radicals and others in the Thirty-Ninth Congress. Rather than restricting the franchise of *all* confederates, or restricting the ability of *all* confederates to hold *all* public office, Section 3 "exclude[d] from *certain* offices a *certain* class of persons." *Griffin's Case*, 11 F. Cas. at 25 (emphases added). And to draft Section 3, the Framers reached to the extant, limited language in the Oaths Clause, which did not mention the President, but applied to "Officers of the United States." And in doing so, Section 3 carried forward that "old soil."

During ratification, in April 1868, a Louisville newspaper, citing the Commissions and Impeachment Clauses, argued that the President was not an "Officer of the United States." This position is further bolstered by a longstanding tradition of authority from the Judicial and Executive Branches demonstrating that the President is not an "Officer of the United States."

1. Section 3 was a compromise that brought the "old soil" from 1788 to 1868 for "Officer of the United States"

Section 3, which had a complex drafting history, proceeded along two primary tracks. One approach would have disenfranchised former confederates from voting. This expansive approach would have ensured that those who fought for the confederacy lacked power to influence U.S. elections. However, it appears this approach was seen by many as "harsh," and it was not adopted. *See* CRS Report (Dec. 28, 2023), at 4, https://crsreports.congress.gov/product/pdf/LSB/LSB11094. A second approach would have barred former confederates from serving in government. This more limited and moderate approach would have allowed insurrectionists to vote, but they could not put insurrectionists into office. After much debate, and many proposals, Congress settled on something of a middle ground: Section 3 would "exclude from *certain* offices a *certain* class of persons." *Griffin's Case*, 11 F. Cas. at 25 (emphases added). Critically, former insurrectionists would retain the franchise, and they could even vote for former confederates who were not otherwise subject to disqualification.

Section 3 was, in every sense of politics, a compromise. Congress could have provided that *all* insurrectionists would be disqualified from holding *all* federal and state positions, but that is not the language the Framers chose. Rather, Section 3 applied to a specific subset of former confederates who had taken constitutional oaths for four categories of positions. The oath provision of Section 3 closely tracks the Oaths Clause.

Oaths Clause (1788)	Section 3 (1868)
"The [1] Senators and Representatives before mentioned, and the Members of the [2] several State Legislatures, and [3] all executive and judicial Officers, both of the United States [4] and of the several states, shall be bound by Oath or Affirmation, to support this Constitution"	"No person … who having previously taken an oath, as a [1] member of Congress, or as [3] an officer of the United States, or as a [2] member of any state legislature, or as an [4] executive or judicial officer of any State, to support the Constitution of the United States …."

Both provisions reference, in some fashion, the same basic four categories of officials who had sworn an oath to support the Constitution. *See* Blackman & Tillman, *Is the President an 'Officer of the United States'?*, 15 N.Y.U. J.L. & Liberty 1, 23–24 (2021) (hereinafter "*Is the President?*").

There is no detailed drafting history that would explain why the Framers of Section 3 chose the specific language that they did. Rather, they did what legal draftspersons frequently do and what drafters of the Thirteenth Amendment and Reconstruction-era statutes had done and would go on to do: they borrowed language from earlier sources. The Thirteenth Amendment, which prohibited slavery, used language very similar to the Northwest Ordinance of 1787. The Privileges or Immunities Clause of the Fourteenth Amendment bears some

similarities to the Privileges and Immunities Clause of Article IV. The text of the Due Process Clause of the Fourteenth Amendment is nearly identical to the text of the Due Process Clause of the Fifth Amendment.

The Thirteenth and Fourteenth Amendments were not written on a blank slate. It is not surprising that the Framers of Section 3, under time constraints, and in the midst of heated debates, reached back to the Oaths Clause as part of this compromise. It had a settled meaning on which everyone could agree. In 1876, George Washington Paschal, a Southern Unionist, published the second edition of his treatise on constitutional law. Paschal stated directly that the Article VI oath and Section 3 apply to "*precisely* the same class of officers." George Washington Paschal, *The Constitution of the United States* xxxviii (2d ed. 1876) (emphasis added), https://bit.ly/3SXDg5K. And that class of positions does not include the President. 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.¶313 n.19.

In the statutory interpretation context, "it is well established that '[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." *Biden v. Nebraska*, 143 S.Ct. 2355, 2379 (2023) (Barrett, J., concurring) (citations omitted).

This venerable textual canon applies with full force to interpreting the Constitution. *See Matter of Interpretation*, *supra,* at 38. Indeed, under Fourteenth Amendment incorporation doctrine, the Court has "assumed that the scope of the protection applicable to

the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *NYSRPA v. Bruen*, 597 U.S. 1, 37 (2022).

Amicus articulates this principle: "[W]hen a provision of the Fourteenth Amendment adopts language that was used in earlier provisions of the Constitution, it is reasonable to conclude that the Fourteenth Amendment should be interpreted in light of those earlier provisions." Blackman & Tillman, *supra,* at 540.

This principle should not be controversial. Indeed, the Respondents, as well as the Colorado Supreme Court, interpret the phrase "Office under the United States" in Section 3 based on how that same phrase was used in the Constitution of 1788. Co.Sup.Ct.¶¶134–136. Yet, in something of a tell, the state court did not even mention how the phrase "Officers of the United States" was used in the Constitution of 1788 when it would support the Petitioner's position.

The Framers of Section 3 brought forward the "old soil" from Article VI. The President is not covered by the Oaths Clause. The President was not an "Officer of the United States" in the Constitution of 1788, and the Framers of Section 3 adopted the same language. It follows that the President is not an Officer of the United States as used in the Constitution "in either period," in 1788 or 1868. *See Bruen*, 597 U.S. at 82 (Barrett, J., concurring).

2. A rigorous textualist analysis from April 1868 demonstrates that the President is not an "Officer of the United States"

In April 1868 the *Louisville Daily Journal* published a series of articles contending the President is not an "Officer of the United States."[8] The newspaper articles used the same mode of analysis that *Amicus* advances: considering how the phrase "Officer of the United States" is used in the Commissions and Impeachment Clauses; relying on analysis from Justice Story's *Commentaries on the Constitution*; and more. This rigorous textualist analysis demonstrates that the President was not understood to be an "Officer of the United States" in April 1868—at a time when ratification remained ongoing.

a. *Louisville Daily Journal*, April 11, 1868

The *Louisville Daily Journal* (*LDJ*) provided a definition of an "officer of the United States": "one who derives his appointment from the government of the United States." *Louisville Daily Journal*, April 11, 1868, at 1. Here, the article invoked language similar to *U.S. v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747). Chief Justice Marshall, while riding circuit, limited the construction of the phrase "officer of the United States" to "an individual [who] is appointed by government." *Id.* Presidents are not

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[8] *See generally* John Connolly, Did *Anyone* in the late 1860s Believe the President was not an Officer of the United States?, https://ssrn.com/abstract=4658473 (locating archival documents).

appointed; they are *elected* by electors who "vote by ballot." U.S. Const. art. II, § 1.

The *LDJ* also found that the text of the Commissions Clause was "decisive," and "appears to us to end the question" about the meaning of "Officers of the United States." About nine days earlier, another publication made a similar argument based on the Commissions Clause. *See* Washington *National Intelligencer*, April 2, 1868, at 2. In 1788, 1868, and today, the Commissions Clause is a key to understanding the scope of "Officer of the United States" as used in the Constitution.

b. *Louisville Daily Journal*, April 15, 1868

The *LDJ* explained that the President, like members of Congress, are not appointed by the federal government. *Louisville Daily Journal*, April 15, 1868, at 1. Instead, the presidency is filled by action of "the several states, which, pursuant to the Constitution, appoint electors who elect him. He is therefore not an officer of the United States."

The *LDJ* found that its conclusion was "made impregnable by the language of the" Impeachment Clause, which "implies that the President and Vice-President are not officers of the United States. It fairly admits of no other construction." And the article further quotes from Justice Story's celebrated *Commentaries on the Constitution*: "In the words of Mr. Justice Story, [the Impeachment Clause] 'does not even affect to consider [the President and Vice President as] officers of the United States.'" Story put forward the position that the President is not an "Officer of the United States." *See supra* II.B.2. In

1788, 1868, and today, the Impeachment Clause is another key to understanding the phrase "Officer of the United States" in the Constitution.

c. *Louisville Daily Journal*, April 22, 1868

The third installment in the *LDJ* series responded to a Cincinnati newspaper, which had argued that the President was an "Officer of the United States." Cincinnati *Commercial*, April 18, 1868, at 4. In something of a preview of modern day debates, the *Commercial* charged the *LDJ* with "splitting constitutional hairs" and reaching an "absurd conclusion." But the *Commercial* never contested any of the arguments put forward by the *LDJ* based on the Impeachment and Commissions Clauses, as well as Story's *Commentaries*.

After explaining its reasoning, the *LDJ* concludes: "It follows that an officer who derives his appointment from the several States or from any of them is not an officer of the United States. And such an officer is the President." *Louisville Daily Journal*, April 22, 1868, at 1.

d. The careful textualist analysis by the *Louisville Daily Journal* demonstrates that in 1868, the President was not an "Officer of the United States"

The *LDJ* develops its position using analytic arguments and evidence. It does not merely recite its conclusions or expectations. Its understanding of "officers of the United States" flows directly from Chief Justice Marshall's seminal opinion in *U.S. v. Maurice*. And the *LDJ* was not an elite legal publication intended for a specialized readership. It was a

newspaper from Louisville, Kentucky. Marshall's and Story's writings were so ingrained in public discourse about the Constitution that the author could cite passages to prove his point.

By any objective measure, the *LDJ* advances a rigorous and reasoned analysis, while the *Commercial* provides only naked assertions and intuitions. The *LDJ*'s analysis is persuasive evidence of how "Officer of the United States" was understood in 1868.

D. There is a tradition of authority from the Judicial and Executive Branches demonstrating that the President is not an "Officer of the United States"

In addition to the text and history of Section 3, there is a tradition of authority from the Supreme Court and the Executive Branch that supports the conclusion that the President is not an "officer of the United States." *See Is the President?*, *supra*, at 24–33.

- *U.S. 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) (emphasis added).
- 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).
- *U.S. v. Mouat* 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 ….” 124 U.S. 303, 307 (1888).

- In 1918, Attorney General Gregory wrote an opinion that distinguished between elected officials and “officers of the United States.” Emps. Comp. Act, 31 U.S. Op. Att’y Gen. 201, 202 (1918), https://bit.ly/48GYidP; *see also* Prosecution of Claims, 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 (Apr. 1, 1969), https://perma.cc/P229-BAKL; *see also* Memorandum from Antonin Scalia (Dec. 19, 1974), https://perma.cc/GQA4-PJNN.
- *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.* observed “[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 *Amicus* has found no indication that anyone cast doubt on the correctness of this statement.

Since the framing, prominent jurists have maintained that the phrase “Officers of the United States” in the Constitution does not refer to the President. And a holding to that effect would be

entirely consistent with the precedents of this Court and a long stream of other authorities. By contrast, a holding that the President is an "Officer of the United States" would be in considerable tension with this Court's precedents and a long stream of other authorities. And Respondents "offer no account [or theory] of how their argument fits within the landscape of [the Court's] case law." *Haaland v. Brackeen*, 599 U.S. 255, 279 (2023).

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The Framers were not omniscient. They had no reason to think about a person who: (1) was elected as President; (2) but had never before taken any other constitutional oath; (3) then is alleged to have engaged in insurrection; and (4) then sought re-election.

"Should we consider the expectations of those who had no reason to give a particular application any thought ...?" *See Bostock*, 140 S.Ct. at 1751. No. Rather, "the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a [text] give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law." *See id.* at 1737. In 1868, under the written word of the Constitution, the President was not an "Officer of the United States."

CONCLUSION

If the Court holds that Section 3 is not self-executing, and requires federal enforcement legislation, the litigation in Colorado and in other state courts would come to a halt. But in Congress, an important date looms on the horizon: January 6, 2025.

Can the joint session of Congress determine that electoral votes for a purportedly disqualified presidential candidate are not "regularly given"? 3 U.S.C. § 15(d)(2)(B)(ii)(II). There is no clear answer to this question, and we are uncertain if an appeal to the courts would lie from the joint session.

By contrast, a holding that the President is not an "Officer of the United States" would authoritatively resolve the Section 3 case against the Petitioner. In that event, it will be the people, and not judges, or state officials, or Congress, who will decide.

Respectfully submitted,

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Dated: January 9, 2024