No. 23-719

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

AMICUS CURIAE BRIEF OF AKHIL REED AMAR AND VIKRAM DAVID AMAR IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Akhil Reed Amar and Vikram David Amar are constitutional scholars and historians who seek to aid this Court in its efforts to practice principled constitutional decision-making and faithful originalism.

SUMMARY OF ARGUMENT

At the heart of this case—perhaps one of the most important cases in American history—is the Oath, specifically the Oath of constitutional fidelity highlighted by Section Three of the Fourteenth Amendment. Each of Your Honors has taken such an Oath, publicly and solemnly. It is an Oath to follow the Constitution as the supreme law of the land.

It is not an Oath to vindicate some vague and free-floating theory of "democracy." In any event, "democracy" is on both sides of this case. For some, excluding an immensely popular political figure from the ballot is profoundly undemocratic. But, for others, what is truly undemocratic is empowering a uniquely dangerous demagogue who has already disobeyed his solemn Oath and is a genuine threat to recidivate and perhaps end the constitutional republic that now exists. The tension between these two clashing visions can be resolved only by attending to the Constitution's own specific implementation of "democracy," which itself was the product of a great democratic process after a series of insurrectionary and democracy-imperiling events in the 1860s.

Over the centuries, America's best constitutional interpreters, both on and off the bench, have generally excelled when they first spotted and

[1] No party or party's counsel authored or financially supported any of this brief.

then heeded the key historical episode—the event, the evil, the mischief—that prompted a given patch of constitutional text. For example, the Constitution forbids those under age thirty-five from the presidency. Why? Because of a concern about dynasties—young favorite sons of famous fathers, such as William Pitt the Younger, the British prime minister in 1787, who took office at age 24. The Constitution's requirement that a president be "natural born" had nothing to do with C-section babies or Shakespeare's *Macbeth*, and everything to do with the Founders' anxieties about European noblemen who might seek political power in America. Article I's rules for congressional membership were crafted with Englishman John Wilkes in mind, as were the later rules of the Fourth Amendment. The first sentence of the Fourteenth Amendment repudiated specific language in *Dred Scott*. The equality commands of Section One of the Fourteenth Amendment aimed especially at ending Black Codes in the Deep South. In affirming fundamental rights from state and local abridgment, Section One had centrally in mind—among other things—the urgent need to protect freedom of speech, freedom of worship, and the right to keep guns for personal protection.

Underlying Section Three of the Fourteenth Amendment, there resides a similar key episode, an episode known to virtually all Americans in the 1860s and, alas, forgotten by most Americans today, even the learned. The episode has gone almost unmentioned in all previous scholarship on Section Three and in all previous briefing in this case. We believe that this episode is a key that can unlock many of the issues presented by today's case.

In Part One of what follows, we briefly tell the story of the *First* Insurrection of the 1860s—the

insurrection *before* the *Second* Insurrection of the 1860s, typically known today as the Civil War. In that First Insurrection, high-level executive officials in Washington, DC, violated their solemn constitutional oaths as part of a concerted plan not just to hand over southern forts to rebels, *but also to prevent the lawful inauguration of the duly elected Abraham Lincoln*. The parallels between this insurrection in late December 1860 and January 1861 and the more recent Trump-fueled insurrection of late December 2020 and January 2021 are deeply and decisively relevant to today's case. (Throughout this brief, we accept the factual findings of the trial court regarding these events.)

If one thinks—as do many journalists and noisemakers lacking historical expertise—that Section Three was only about "insurrections" akin to the Civil War, then the Trump-fueled insurrection of 2020–21 pales in comparison. The invocation of Section Three looks rather cutesy, a gimmick of clever lawyers and law professors. But if one understands—as did all the men who drafted and ratified Section Three—that before the giant insurrection that began in mid-April 1861 there was a smaller one that was also of central concern, then the matter looks entirely different.

Today's facts are remarkably similar to those of the First Insurrection of the 1860s. In a crucial mid-Feb. 1868 Senate discussion about a particular cabinet officer under President James Buchanan, Senator Jacob Howard passionately explained that this ex-officer should never sit in the Senate precisely because—long before Fort Sumter fell—this powerful oath-breaker, one of the nation's "*principal public functionaries*," had been part of a cabal "endeavoring to . . . *beleaguer the city of Washington* with the

design of seizing it, and, *at all events, preventing the inauguration of President Lincoln in the succeeding March*."[2] Later in this key debate, which revolved around a test-oath law closely analogous to Section Three (then a few months shy of official ratification), Senator Oliver Morton likewise blasted several of Buchanan's cabinet members. These oath-breakers, Morton thundered, had abandoned their posts while publicly proclaiming

> that secession was right and that southern States ought to be allowed to break up this Union and form a new government without opposition. Those things went on until the *4th of March, 1861*, when there was scarcely anything left of this Government, *as we all know . . . to protect the inauguration of President Lincoln*.[3]

Of course, the precise actions, inactions, plots, intentions, and *mens rea* of Donald Trump in the insurrection of 2020–21 need to be properly evaluated before he is deemed ineligible under Section Three. As we explain in Part Two, the Constitution's structure enables a *fifty-state solution* in which different states may properly have different procedures and protocols for implementing Section Three. Some states may carefully police ballot access even in primary elections; others will focus more on the general ballot. Still others may wait until vote tabulation begins; and yet another cluster of states may defer to Congress as the last actor when electoral-college ballots are unsealed. Different states may permissibly have

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[2] CONG. GLOBE, 40th Cong., 2d Sess. 1170 (Feb. 14, 1868) (emphasis added).

[3] *Id.* at 1209 (Feb. 17, 1868) (emphasis added).

different standards and modes of proof, both for presidential elections and state judicial elections (also covered by Section Three) and myriad elections in between.

States can have even stricter standards than Section Three provides, so long as such standards meet global federal constitutional principles (free speech, due process, racial equality, etc.) as construed by this Court, and state constitutional requirements as understood by the states' supreme courts. See *Moore v. Harper*, 600 U.S. 1 (2023). There is no federal constitutional requirement that any state even hold a popular presidential election. Each state's greater power to not hold a binding election subsumes a lesser power to structure its presidential election in its own way, within a broad range.

This Brandeisian fifty-state solution means that this Court should recognize Colorado's power to act, and should opine that the facts as found permit Colorado's action under Section Three. Were this Court (wrongly) to hold that Donald Trump is categorically *eligible* and that states cannot invoke Section Three with regard to the events of 2020–21, Your Honors should understand that this Court cannot in the nature of things be the sole and last word. Individual voters may think that Trump is *ineligible* and cast their votes accordingly. Individual Congress members may think the same thing, and Congress has a crucial role to play when opening the electoral ballots in joint session—a role it has played in many past elections.[4] And, to repeat, states could keep Trump off the ballot wherever their

[4] Constitutional text, history, structure, tradition, and precedent give the presiding vice president a merely ministerial and ceremonial role at this event.

constitutions allow them to adopt *stricter* eligibility rules than those in the U.S. Constitution.

In Part Two, we shall canvass a wide range of issues raised by this case and explain why many of them are easy. *Of course* the president is an "officer" covered by Section Three. *Of course* a detailed congressional statute is not necessary to implement Section Three. *Of course* an ineligible person is ineligible unless and until amnestied. *Of course* a person can engage in an insurrection with words as well as deeds. *Of course* an insurrection can begin locally. And so on.

In the end, this momentous case is easier than it may at first seem, once one understands the historical events that triggered Section Three.

ARGUMENT

I. The Story and Significance of the First Insurrection of the 1860s

A. The Story

Almost every American schoolchild today knows the name Benedict Arnold, but how many have heard of John B. Floyd?[5]

Everyone knew his name in the 1860s. Loyal unionists labeled him the new Benedict Arnold, and many did so entirely in reference to his actions in the First Insurrection of the 1860s, prior to Lincoln's

[5] What follows borrows from AKHIL REED AMAR, BORN EQUAL: AMERICA'S CONSTITUTIONAL CONVERSATION, 1840–1920 (forthcoming 2025).

inauguration.[6] Like Arnold, Floyd held the keys to America's national security and then tried to hand those keys to the enemy.

Floyd, an unapologetic Virginia slaveholder, served as President James Buchanan's secretary of war from 1857 to December 29, 1860, when he resigned in protest after Buchanan declined to abandon Fort Sumter. *Most crucially for today's case: In the weeks after Lincoln's election in early November 1860, Floyd used the great powers of his office, through a devious combination of affirmative acts and strategic failures to act, to try to thwart a proper transition of power.*

One bright thread of this storyline involved southern forts—a thread that would eventually become the fuse of April 1861 in Charleston Harbor. South Carolina purported to secede on December 20, 1860. A week later, rebels seized Fort Moultrie and Castle Pinckney in Charleston Harbor and raised the Palmetto flag over these federal outposts. In the days that followed, rebels captured many other strategically positioned fortresses, including Forts Morgan and Gaines guarding the mouth of Mobile Bay; Forts Pulaski and James Jackson, the gateways to Savannah; Pensacola Bay's Forts McRee and

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[6] *See, e.g.*, CONG. GLOBE, 36th Cong. 2d Sess. 1370 (Mar. 2, 1861) (statement of Sen. Chandler) ("Floyd, who, like Benedict Arnold, surrendered your forts and your arms—a man who goes down to everlasting infamy, with Judas Iscariot, Benedict Arnold, and all the traitors who have gone before him."); *The Secretary of War*, N.Y. TIMES, Dec. 29, 1860, at 4; *The Indictment of Floyd*, EVENING POST, Jan. 26, 1861, at 2; BURLINGTON FREE PRESS, Feb. 1, 1861, at 1; *The Great Conspiracy, What Are Its Plans and Purposes?*, N.Y. TIMES, Feb. 5, 1861, at 4 (reprinted in DAILY INTELLIGENCER, Feb. 7, 1861, at 1); *The Great Robbery*, BENNINGTON BANNER, Feb. 21, 1861, at 2.

Barrancas; and Forts Jackson and Saint Philip, which together shielded New Orleans. By early February, the only major installations in the Lower South over which the Union flag still flew were Charleston's own Fort Sumter, Pensacola's Fort Pickens, and Key West's Fort Taylor. On February 7, 1861, Representative Henry Winter Davis of Maryland exclaimed: "Even cabinet ministers have violated their oaths, by organizing insurrection."[7]

Looking back on the 1860–61 interregnum, ex-President Ulysses S. Grant in his famous memoirs denounced Floyd for having "scattered the army so that much of it could be captured when hostilities should commence, and distributed the cannon and small arms from Northern arsenals throughout the South so as to be on hand when treason wanted them."[8]

A furtive insurrectionist in late 1860, Floyd soon became an avowed one in mid-1861, as a Confederate brigadier general openly warring against the very Constitution that he had sworn a solemn Oath to support—as head of the War Department, no less. In early 1862, Grant met Floyd on the battlefield, almost face to face. Floyd commanded Tennessee's Fort Donelson, which fell to Grant in mid-February shortly after Floyd fled the battle scene.

This Union triumph, its first decisive victory of the Civil War, began Grant's rise to glory as Lincoln's heir—first as the Lincoln-appointed commanding general of the U.S. Army (1864–69), then as acting secretary of war (1867–68), and finally as a two-term

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[7] BURLINGTON FREE PRESS, February 15, 1861, at 1.

[8] 1 ULYSSES S. GRANT, PERSONAL MEMOIRS OF U.S. GRANT 226 (1885).

president of the United States (1869–77). Grant surely understood, as did much of America, that his own life and Floyd's had fatefully intertwined.

In telling the story of Fort Donelson, Grant, echoing Henry Winter Davis, emphasized that Floyd was not merely an insurrectionist but also an oath-breaker—*the precise toxic combination at the bullseye of Section Three*. When Section Three of the Fourteenth Amendment was being drafted and proposed in the mid-1860s, Grant had warmly supported this Amendment[9]—as Salmon P. Chase had not. In his memoirs, Grant acidly commented that Floyd was "unfitted for command, for the reason that his conscience must have troubled him and made him afraid. As secretary of war he had taken a solemn oath to maintain the Constitution of the United States and to uphold the same against all its enemies. He had betrayed that trust."[10]

The insurrectionary betrayals perpetrated by Floyd and other top officials in the lame-duck Buchanan Administration went far beyond the abandonment of southern forts. *They also involved, through both actions and inactions of Floyd and his allies, efforts to prevent President-elect Lincoln from lawfully assuming power at his inauguration.*

Even before the inauguration, alarms rang out in Congress about the First Insurrection already underway. On February 1, 1861, Pennsylvania's Representative John W. Killinger declared on the House floor that "preparations are actually threatened to take possession of this Capitol, and prevent the inauguration of the President elect. So far

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[9] RON CHERNOW, GRANT 583–84 (2017).

[10] 2 GRANT, *supra* note 8, at 308–09.

has the *conspiracy* progressed, that it . . . holds within its grasp *the sworn officers* of the Government. . . . Before Mr. Lincoln is inaugurated, this District will be the theater of commotion, and it may be, of violence."[11] Later that month, Killinger's fellow Pennsylvanian James Hepburn Campbell echoed this point about oath-breaking insurrectionists: "[T]his *treasonable conspiracy, to resist the inauguration by force of arms, . . . has drawn within its fatal vortex chiefs of the Cabinet*."[12] And on February 18, 1861, Floyd's successor in the War Department—Joseph Holt, himself true to his oath—confirmed that oath-breaking insurrectionists such as Floyd had indeed aimed to prevent the inauguration:

> *[M]en occupying the highest positions in the public service, . . . who, with the responsibilities of an oath to support the Constitution still resting upon their consciences*, did not hesitate secretly to plan, and openly to labor for, the dismemberment of the Republic . . . . [M]en in high political positions here . . . were known to have intimate affiliations with the revolution—if indeed they did not hold its reins in their hands—*to the effect that Mr. Lincoln would not, or should not, be inaugurated at Washington.*[13]

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[11] CONG. GLOBE, 36th Cong., 2d Sess. 695–96 (Feb. 1, 1861) (emphasis added).

[12] *Id.* at 909 (Feb. 14, 1861) (emphasis added).

[13] CONG. GLOBE, 37th Cong., 1st Sess. 457–58 (Aug. 6, 1861) (emphasis added).

Though the Capitol did not fall in 1861, it was a close-run thing. On February 13—the key day that Congress was set to unseal electoral votes and certify Lincoln's victory—a knot of anti-Lincoln men congregated near the Capitol. But, appropriately fortified by General Winfield Scott, the Capitol held.[14]

In the years that followed, Lincoln men retained vivid memories of this first attempted insurrection in Secession Winter, pre-Sumter. Both in Congress and in public discourse everywhere, Floyd's name became a byword for the toxic combination of *oath-breaking* and *insurrectionism*. He was as infamous as was Benedict Arnold at the Founding.

Between 1861 and 1871, a series of federal Oath policies and laws emerged.[15] Eventually, these policies and laws ripened into what became Section Three of the Fourteenth Amendment. In countless conversations before, during, and after the drafting and ratification of Section Three, Floyd came to

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[14] Ted Widmer, Opinion, *The Capitol Takeover That Wasn't*, N.Y. TIMES (Jan. 8, 2021).

[15] *See generally* HAROLD M. HYMAN, ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION (1954). In 1861, the Lincoln Administration, and later Congress, had all federal civil officers and employees take an oath to support the Constitution. *Id.* at 1–2. One year later, Congress passed the more demanding "Ironclad Oath," requiring civil and military officers (expressly excepting the president) to swear they had not "voluntarily borne arms against the United States," "voluntarily given . . . aid, countenance, counsel, or encouragement" to the Confederacy, nor performed any of the "functions of any [Confederate] office." Act of July 2, 1862, ch. 128, 12 Stat. 502. In 1868 and 1871, Congress added further refinements. Act of July 11, 1868, ch. 139, 15 Stat. 85; Act of Feb. 15, 1871, ch. 53, 16 Stat. 412.

epitomize those who should not be allowed back in power (absent amnesty).[16] For most of this period Floyd himself was dead, having perished in 1863. He had become a meme, an archetype.

An early and widely publicized version of Section Three, drafted in the spring of 1866, was quite draconian, envisioning the *disenfranchisement* of *millions* of *insurrectionists*: "Sec. 3. Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States."[17] Section Three's final version was much softer but more focused on Floyd-like high betrayal, mandating the mere *disqualification* of a *few thousand* insurrectionists who were also *oath-breakers*, and also providing for *congressional amnesty*.

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[16] *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 970 (Feb. 18, 1862) (statement of Sen. Trumbull) ("[If] a traitor in arms against the Government, Floyd, of Virginia, for instance, were appointed . . . does the Senator hold that we should be bound to receive him as a member . . . ?"); *id.* at 970 (Feb. 26, 1862) (statement of Sen. Sherman); CONG. GLOBE, 39th Cong., 1st Sess. 145 (Jan. 8, 1866) (statement of Rep. Shellabarger); CONG. GLOBE, 40th Cong., 2d Sess. 970 (Feb. 18, 1868) (statement of Rep. Cook) (discussing Section Three and proclaiming that "persons who had, like . . . Floyd, . . . held high office in the Government and betrayed and well-nigh ruined the Government, whose Constitution they had solemnly sworn to support, should not again be [e]ntrusted with power over loyal men . . . ."); *cf.* CONG. GLOBE, 39th Cong., 1st Sess. 3146 (June 13, 1866) (statement of Rep. Finck) (assuming that disloyal cabinet members fell within the ambit of any version of Section Three under consideration).

[17] CONG. GLOBE, 39th Cong., 1st Sess. 2542 (May 10, 1866).

But in one obvious and high-profile respect, Section Three as enacted went far beyond the early draft. It referred to all insurrections, past and future, and not merely to "the late insurrection" of the 1860s. It laid down a rule for the benefit of generations yet unborn—for us today, if only we are wise enough and faithful enough to follow its words as written and intended.

Soon after the Fourteenth Amendment formally came into effect in mid-1868, America elected Grant president. Grant placed Brevet Major General Edward Canby in charge of Virginia's Reconstruction. As Grant later explained in his memoirs, Canby was an officer "of great merit"—"naturally studious and inclined to the law." Few, if any, army officers, wrote Grant, "took as much interest in reading and digesting every act of Congress. . . . His character was as pure as his talent and learning were great."[18]

Shortly after the Fourteenth Amendment's formal promulgation, Canby properly concluded that Section Three was self-executing. Any disqualified candidates in the Virginia elections, Canby announced, would not "be allowed to enter upon the duties of the offices to which they may have been chosen, unless their disabilities have been removed by Congress."[19] He kept at least two disqualified candidates-elect out of the legislature.[20]

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[18] 2 GRANT, *supra* note 8, at 372.

[19] *Official Orders*, DAILY MORNING CHRON., Sept. 17, 1869, at 1.

[20] CONG. GLOBE, 41st Cong., 2nd Sess. 382, 417 (Jan. 12–13, 1870) (statements of Sens. Stewart and Thurman); PHILA. INQUIRER, Oct. 5, 1869, at 4 (discussing Canby's exclusion of over a dozen candidates).

When word of Canby's constitutional decisions reached Congress, John Bingham, a chief architect of the Fourteenth Amendment, cheered. "[T]hat veteran officer," Bingham said, "faithful to his duty, excluded from the Legislature of Virginia in its organization every man who could not swear he was not disqualified by the provisions of the fourteenth article of the amendments of the Constitution."[21]

Canby acted on his own initiative. No congressional statute had specifically provided for "proceedings, evidence, decisions, and enforcements of decisions"—contrary to Chief Justice Chase's claim on circuit that these "are indispensable." *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869).[22] Like other military governors under President Grant,[23] Canby took the Constitution at its word.

B. The Significance

In certain respects, the insurrection of 2020–21 posed an even more egregious invasion of our democracy than the First Insurrection of 1860–61. The Capitol did not fall in 1861. The First

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[21] CONG. GLOBE, 41st Cong., 2nd Sess. 495 (statement of Rep. Bingham).

[22] A pair of Reconstruction statutes did authorize military enforcement of Section Three but provided no specific guidance. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, 429; Act of June 25, 1868, ch. 70, 15 Stat. 73, 74. The purpose of this generic statutory language was to authorize enforcement of Section Three's rules in military districts even prior to the formal ratification of the Fourteenth Amendment.

[23] For example, President Grant, via General William T. Sherman, ordered Alfred H. Terry, military governor of Georgia, Florida, and Alabama, to "[e]xercise [his] own discretion" in investigating whether disqualified Georgians could take office. CONG. GLOBE, 41st Cong., 2nd Sess. 713 (Jan. 24, 1870).

Insurrection of the 1860s largely failed in DC. But in 2021 the Capitol did in fact briefly fall, in an insurrectionist effort to impede the lawful counting of presidential ballots and the inauguration of President Biden. On January 6, 2021, the Confederate flag made its way into America's citadel, as it had not on February 13, 1861—*all because of what Donald Trump did do and did not do, over the course of many weeks, as recounted by the trial court in this case*.

Given that Section Three was drafted with *both* the First Insurrection of the 1860s (aka Secession Winter) *and* the Second Insurrection of the 1860s (aka the Civil War) *exactly* in mind, faithful interpreters today must admit that the events of 2020–21 fall squarely within the heartland of Section Three—in much the same way that, say, 1950s Jim Crow laws violated the core commitments of Section One and early-twenty-first-century laws prohibiting guns in homes violated other core commitments of Section One.

Section Three does not require that an oath-breaker actually use his powers of office *in connection with* his insurrectionary acts. But Floyd had done just that. In this way, he was worse than Jefferson Davis and Robert E. Lee. Davis in 1860 was a former secretary of war and a current member of Congress. In neither official capacity could he thwart Lincoln's inauguration or betray federal forts. Lee in 1860 was a mid-level federal military man. Like Davis, Lee in 1861 was an insurrectionist and a former officer, but he had not been an *insurrectionist officer*—an insurrectionist while in office using the powers of the office to engage in insurrection and give aid to other insurrectionists. But Floyd did in fact bend his *office* to betray his *oath*.

And so did Donald Trump, according to the facts as found by the court below in this case. Trump's case is thus the easy case—a paradigmatic case—for application of Section Three.

Floyd's misconduct also reminds us that engaging in insurrection, and giving aid or comfort to insurrection and insurrectionists, often involves a complex combination of devious actions and inactions. Certain inactions loom especially large when a current officer, with special obligations to affirmatively thwart other insurrectionists—indeed, other insurrectionists who have been egged on by that very officer—instead sits on his hands, smiling, as chaos erupts around him. *This is precisely the case of Donald Trump*.

War Secretary Joseph Holt put the point well in February 1861, expressing a sentiment very widely shared by the Lincoln men who later crafted Section Three: "*[T]he highest and most solemn responsibility resting upon a President withdrawing from the Government [is] to secure to his successor a peaceful inauguration*."[24]

No congressional statute specifying enforcement procedures is necessary to implement Section Three. This was the view of Lincoln's truest heir, Ulysses S. Grant. Grant had supported Section Three when it was pending and faithfully enforced it thereafter, via Canby and others.

Salmon P. Chase, another Lincoln man, had not supported Section Three when it was pending and failed to faithfully enforce it thereafter. Chase harbored presidential ambitions in the late 1860s,

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[24] CONG. GLOBE, 37th Cong., 1st Sess. 457–58 (Aug. 6, 1861) (emphasis added).

and many scholars have suggested that these ambitions warped his judicial judgments in Section Three cases. Whatever his motivation, his Section Three rulings were poorly reasoned and internally inconsistent.[25]

If this Court must ultimately choose between Grant and Chase, it should choose Grant, as did the American people themselves, when in the fall of 1868—almost immediately after the ratification of Section Three—they voted to put Grant and not Chase in the sacred office where Lincoln once sat.

II. Twenty Questions

1. Is the president an officer within the meaning of Section Three?

Undoubtedly. It would have made no sense whatsoever in 1866–68 to say that Floyd (were he alive) could not oversee the Army as secretary of war but could command all armed forces as commander in chief. No scholar has identified even a single person who clearly said anything like the following in Congress or in state-legislative ratification debates in 1866–68: "The president is not an officer within the meaning of Section Three." At one point in the drafting process, Senator Reverdy Johnson asked on the floor why the presidency was not mentioned explicitly. Senator Lot Morrill immediately replied that Section Three's generic "office" language covered the presidency. Johnson pronounced himself entirely satisfied. He now had "no doubt" that the presidency was covered.[26] Thereafter, myriad politicians and publishers expressly declared that Section Three

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[25] *See infra* note 33 and accompanying text.

[26] CONG. GLOBE, 39th Cong., 1st Sess. 2899 (May 30, 1866).

would bar oath-breaking insurrectionists such as Jefferson Davis from the presidency, absent amnesty. Indeed, this was a central aim of the Section.

Article II provides that the president shall "hold his *Office*" for a four-year term, prescribes an oath for "the *Office* of President of the United States," and further provides that the president "shall be removed from *Office* on Impeachment . . . and Conviction" (emphasis added). Elephants do not hide in mouseholes. If Section Three exempted presidents, we should expect to see many discussions of why Section Three included such an egregious loophole. No such discussions exist.

When Civil War lawmakers aimed to exempt the president, they did so expressly. The Ironclad Oath Act of 1862 applied to "every person elected or appointed to 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*."[27] This language—in a landmark Oath-law predecessor to Section Three itself—proves that Congress and the public plainly understood that "the President of the United States" was emphatically a person who held an "office . . . under the government of the United States."

2. Doesn't every officer need a commission?

The Constitution says that the president "shall Commission all the Officers of the United States."[28] The president ordinarily does not commission

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[27] Act of July 2, 1862, ch. 128, 12 Stat. 502 (emphasis added).

[28] U.S. CONST. Art. II, § 3.

himself. So does the Constitution mean that the president is thus not an officer?

This makes a hash of the Constitution as a whole. It makes far more sense to say that the president is not *the kind of officer who needs a president-issued commission*. Nor is the vice president. The reason for this is simple, when the Constitution is read holistically: A commission is a piece of paper identifying *who* is an officer and *when* his/her status as an officer commenced. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 156–57 (1803). But for presidents and vice presidents, the Constitution itself provides a separate mechanism for answering these questions. As we explained more than a decade ago, Congress in certifying the electoral votes issues a "*commission-equivalent*," identifying *who* the new president and vice president will be. And the Constitution itself specifies *when* the office commences: precisely every four years, at noon on Inauguration Day.[29]

This congressional commission-equivalent process is of enormous constitutional significance. It is, formally, what makes a president president. It was the very process that the insurrection of 2020–21 aimed to disrupt. Donald Trump's current efforts in this Court to exempt himself from the Constitution's plain letter and spirit—based on the Commission Clause, of all things!—give new meaning to the word chutzpah.[30]

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[29] *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 575–76 n.14 (2012).

[30] *Cf.* Transcript of Oral Argument at 111, *SEC v. Jarkesy*, No. 22-859 (Nov. 29, 2023) (Kagan, J.).

3. What about the Impeachment Clause?

This clause refers to "the President, Vice President, and all civil officers of the United States." If the president is an officer, why doesn't the text say "all *other* civil Officers of the United States"? Aha!, exclaims Professor Mousehole, triumphantly.

One obvious answer to the fictional Professor Mousehole is that the president is not purely a civil officer but also a military one, as commander-in-chief. The vice president is second in military command, should the commander fall. Or so a draftsman might have thought. Today, America's soldiers salute the president and vice president, but not, say, a typical senator or cabinet secretary or justice.

4. What about Justice Story's Commentaries*?*

Justice Story basically asked Questions 2 and 3, to which we have offered our short answers. Of course, Story did not live to see Section Three, so he cannot be strongly relevant on what its drafters and ratifiers meant. Great as he was, Story was hardly infallible, as this Court recognized in *Moore v. Harper*, 600 U.S. at 34, which sidestepped Story's hasty embrace of ISL theory. See also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting) (critiquing Story similarly).

5. Isn't a presidential Oath to "preserve, protect, and defend the Constitution" different than an Oath "to support the Constitution" within the meaning of Section Three?

If anything, the presidential oath is more demanding. A president must *affirmatively* protect the Constitution. Certain intentional inactions—smiling and sitting on his hands amidst an insurrection—are more constitutionally culpable.

Such conduct is "giv[ing] aid or comfort" by inaction precisely because the presidential Oath creates a more explicit and emphatic duty of action. To repeat Holt's famous language that rang in the ears of Section Three's drafters: "*[T]he highest and most solemn responsibility resting upon a President withdrawing from the Government [is] to secure to his successor a peaceful inauguration*."[31]

It is silly to say that the president's Oath is not covered by the sweeping and generic language of Section Three. This is like saying that the Fifth Amendment prohibits double but not triple jeopardy.

6. Is a detailed congressional statute necessary to implement Section Three?

No. Neither President Grant nor Congressman Bingham thought so. They were right. While the proposed Fourteenth Amendment was pending in the states, senators of both parties—men who were on opposite sides of the proposed amendment—simply took for granted, in debating companion Reconstruction legislation, that Section Three would kick in, and thus kick out any existing ineligible officers, the very "moment" the amendment was duly ratified.[32]

No detailed statute is necessary to implement any other part of the Fourteenth Amendment or its cognate amendments, the Thirteenth, Fifteenth, and Nineteenth. For example, no statute was needed when this Court desegregated public schools, mandated appointed counsel for indigent criminal defendants, incorporated the Bill of Rights against

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[31] *See supra* note 24.

[32] CONG. GLOBE, 40th Cong., 2nd Sess. 3008–10 (June 10, 1868) (statements of Sens. Morton, Williams, and Hendricks).

states, and ended malapportionment. A congressional statute is indeed necessary for federal criminal sanctions to operate. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). A congressional statute may be necessary for funds to be expended in various situations. See *Missouri v. Jenkins*, 515 U.S. 70 (1995). But much of Section Three is self-executing, as Grant and his men understood. Thus, Section Three can be properly executed by state officials of all sorts as part of a fifty-state solution.

7. What about Griffin's Case*?*

This 1869 ruling by Circuit Justice Chase, claiming that Section Three cannot be operationalized absent specific implementing legislation from Congress, clashes with an earlier Chase ruling involving Jefferson Davis. There, Chase treated Section Three as emphatically self-executing. *United States v. Davis*, 7 F. Cas. 63, 102 (C.C.D. Va. 1869). *Davis* was itself deeply flawed in other ways. (The notion that Section Three somehow effectively barred criminal prosecution of actual traitors—and the worst traitors at that, oath-breaking traitors, including Jefferson Davis!—borders on the preposterous.) Chief Justice Chase was a giant, but these Section Three cases were not his finest hour. Nor do they bind this Court.[33] Also, they conflict with the contemporaneous

[33] For Chase's jurisprudence on circuit, see C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 AKRON L. REV. 1165 (2009); CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS 293–300 (2017); Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 105–08 (2021); and William Baude & Michael Stokes Paulsen, *The Sweep and Force*

actions of the Grant Administration. Chase expressed doubts about Section Three prior to its ratification, so he was likely not its best exponent. By contrast, Bingham and Grant both backed the Fourteenth Amendment at every stage. Bingham was himself a great constitutional lawyer. Though not law-trained, Grant was a gifted reader and writer of the English language, a champion of honest plain meaning.

8. Is a criminal conviction necessary to trigger Section Three?

No. Section Three says nothing of the sort, and it could have easily done so had its drafters aimed to enact such a requirement. Grant did not require convictions for those deemed ineligible under Section Three in 1869 Virginia and elsewhere.

9. Does Section Three apply beyond the two main insurrections of the 1860s?

Emphatically. The early public draft expressly referred only to "the late insurrection" and expressly sunsetted after 1870. Congress shifted gears dramatically when it revised Section Three to apply to all future insurrections, but to do so modestly—with a lesser penalty (disqualification, not disfranchisement), for a vastly smaller group of malefactors (only oath-breaking insurrectionists), and an express provision for congressional amnesty.

10. Could Trump be amnestied at some future point?

Yes. But until that happens, he can be deemed disqualified and kept off the ballot. The theoretical

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of Section Three, 172 U. PA. L. REV. (forthcoming 2024) (manuscript at 35–49). For Chase's pre-ratification qualms about Section Three, see JOHN B. NIVEN, SALMON P. CHASE: A BIOGRAPHY 409 (1995).

possibility of a future change of law or fact does not change the law or facts at present. States may legitimately keep persons off the ballot who will not be eligible to serve absent some utterly speculative future development. More than a decade ago, the Tenth Circuit, per then-Judge Gorsuch, rightly affirmed Colorado's authority to keep a non-natural-born citizen off the presidential ballot, even though the Constitution at some later time prior to inauguration could have been amended to eliminate the Natural-Born Clause. *Hassan v. Colorado*, 495 F. App'x 487 (10th Cir. 2012). Thus, Senator Daines's too-clever-by-half distinction between "categorical" and other ineligibility rules will not wash.[34] To rule that Section Three cannot be applied before Inauguration Day is either to read Section Three out of the Constitution or to create a crisis on Inauguration Day.

11. Can mere words suffice to trigger Section Three?

Definitely. Conspiracies—agreements—are paradigmatically effectuated with words. So are incitements. In 1860, John Floyd used words galore, both publicly and privately, to incite and encourage others to take up arms against the Constitution. In 2020–21, so did Donald Trump, according to the well-supported factual findings of the trial court.

The super-strict free-speech doctrines applicable in criminal prosecutions, see, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969), do not automatically carry over to mere issues of ballot eligibility. One takes an Oath of constitutional fidelity by speaking, and one may refuse to take an Oath by

[34] Brief for Senator Steve Daines et al. at 16, *Trump v. Anderson*, Nos. 23-696 & 23-719 (2024).

speaking—for example, by saying "no." A refuser cannot be criminally punished but surely can be barred from office. The Constitution itself says so in Article VI. Likewise, Oath-violators can be kept from office, even if these violations occur via pure speech.

12. Can inactions ever count as giving "aid or comfort"?

Yes, see question 5, *supra*. In Trump's case—as with the paradigm case of Floyd—there exists a complex web of spidery actions and inactions, as the trial court below made clear in its findings of fact. Especially because some of Trump's own actions of plotting and incitement prompted actual violent insurrection by others, he was under a stronger duty to take affirmative steps to arrest that insurrection once it erupted into a deadly assault on the Capitol. It was perfectly sensible for the trial court to consider Trump's entire course of conduct, including his inactions, as a whole.

13. Can a local event ever be a true insurrection?

Yes. Kittens can become cats. Chickens can hatch from eggs. Small insurrections can swell into giant insurrections. In American history, notable insurrections have included Shays' Rebellion in the 1780s, the Whiskey Rebellion in the 1790s, and the Nullification Crisis of the 1830s.[35] Orchestrated and large-scale political violence in the national capital and assaults on the national Capitol are especially apt to be *per se* insurrectionary, particularly when they aim, on a quite specific and supremely important day

[35] For detailed analysis of each of these three episodes, see AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840 (2021), 299–302, 382–87, 598–604.

of America's constitutional calendar, to prevent the lawful certification of a duly elected president-elect (February 13 in 1861, January 6 in 2021). This "local" scenario was squarely in the minds of those who framed and ratified Section Three, focused as these Lincoln men were on villains such as John Floyd and his cabal.

14. Who decides and how?

In many respects, our Constitution is decentralized and departmentalist. Many interpreters properly play a role.

For example, in federal criminal law, each of six distinct entities can thwart criminal punishment if that entity alone has strong constitutional scruples. The House may refuse to vote for a criminal law it deems unconstitutional, regardless of what this Court thinks. Ditto for the Senate. In these scenarios, the naysaying legislative chamber plainly prevails, because no federal common law of crimes is allowed. *Hudson & Goodwin*, 11 U.S. at 32–33. A president may veto a criminal bill, or pardon all potential defendants, even before trial, and may do so on constitutional grounds that this Court rejects—much as President Thomas Jefferson effectively nullified judicial rulings on behalf of the Sedition Act of 1798. A grand jury may refuse to indict and may not be mandamused. A trial jury may refuse to convict, and judges may "strike down" a criminal law on its face or as applied. In general, this system is asymmetric. The entity with the stronger constitutional doubts/objections often prevails.

So too in presidential elections on the issue of eligibility. Entities with higher constitutional standards often prevail. Even were this Court to reverse the Colorado Supreme Court, Colorado could

seek to reinstate its ruling against Trump on independent state-law grounds—say, on the theory that even behavior short of insurrection should disqualify a given candidate from America's post of highest honor and power. States have long had sore-loser laws, which prohibit the loser of a primary election from running in the general election. A state tomorrow may amend its existing laws to encompass the conduct of Donald Trump in 2020–21. If he does not epitomize a sore loser, it is hard to think who does. Of course, states may not pass ex post facto criminal laws, but mere ballot ineligibility is different from traditional criminal punishment.

This Court is thus not the only decisionmaker in a complex electoral-college system. States have wide discretion in structuring their systems, both procedurally and substantively. See *Hassan v. Colorado*, 495 F. App'x 487 (10th Cir. 2012) (Gorsuch, J.) ("[A] state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office"). In many ways, state courts, and not this Court, are the main backstops. See *Moore v. Harper*, 600 U.S. at 34–37.

15. What about Congress?

Congress on Judgment Day can refuse to count electoral votes that it alone deems improper. Congress has in fact done so in past elections. For example, in 1873 Congress refused to count actual electoral votes that had been cast for Horace Greeley, who had recently died and would be unable to assume

the presidency.[36] In 1865, it refused to count electoral votes from at least two states, Louisiana and Tennessee, then claiming to be states in good standing.[37]

16. What if other states react to Colorado by playing tit for tat, removing other candidates from the ballot, perhaps pretextually, and setting off an interstate electoral-arms race?

Other states can do this even now, with or without honest enforcement of Section Three. So far as the U.S. Constitution is concerned, the Florida legislature can itself choose presidential electors. But in doing so, it must follow its own state constitution as construed by its state supreme court. Thanks to this Court's sound decision in *Moore v. Harper*, a ruling upholding the Colorado court will not create chaos, contrary to the fevered imaginations of some commentators.

17. What if Section Three were used in some future case to disqualify prominent supporters of, say, the George Floyd protestors?

If these supporters truly meet the standards of Section Three, then so be it. But Section Three by careful design applies only to a handful of oath-takers, not all Americans. It requires genuine "engage[men]t" or "giv[ing] aid or comfort." And it requires a genuine insurrection, not a mere tumult. Deadly assaults on the Capitol on the day Congress

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[36] *See* Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 218–19, 226–30 (1995).

[37] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 378 (2005); Joint Resolution of Feb. 8, 1865, 13 Stat. 567. On the vice president's role, see *supra* note 4.

meets to count electoral-college votes and certify/commission a new president should not be conflated with barroom brawls in Peoria. Abstract statements of solidarity by legislators are very different from actions undertaken by executive officers with operational power and control. Any law can be applied mindlessly far beyond its proper scope. That cannot be an excuse to refuse to apply the law at its core. The core of Section Three is a situation akin to the *John* Floyd scenario of 1860, not the *George* Floyd scenarios of recent years.

18. Is it relevant that Section Three also applies to purely state offices?

Yes. State legislatures, for example, are squarely covered. Ballot rules for state legislators fall in the heartland of state law as overseen by state courts. Constitutionally, presidential elections also fall in this state-law heartland: The electoral-college system involves fifty separate and simultaneous state elections, not one undifferentiated national election. Given this reality, this Court should tread lightly in overseeing the state court below. Otherwise, various states may face great difficulty creating unitary election systems integrating state and federal elections.[38]

[38] *Cf.* Brief of Amici Curiae Professors Akhil Reed Amar, Vikram David Amar and Steven Gow Calabresi in Support of Respondents at 26–28, *Moore v. Harper*, 600 U.S. 1 (2023) (No. 21-1271).

19. Which ruling would best comport with judicial minimalism?

A fifty-state solution along the lines we advocate.[39] A contrary ruling would, by contrast, impose this Court's views on all fifty states—and would do so without proper warrant in the Constitution's text, history, and structure.

20. Which ruling would be the most democratic?

Our democracy allows We the People to democratically protect Ourselves, and the most obvious way We do this is through the Constitution. In the 1860s, We the People carefully considered recent, vivid, and existential threats to democracy itself, and Our answer was Section Three. We the People today can unmake Section Three, should We choose, via constitutional amendment. But until that happens, this Court must honestly enforce Section Three in the name of *constitutional* democracy. The questions presented by Section Three's enforcement through state electoral systems are discrete and judicially manageable—typically supervised by democratically accountable state judges. And of course, that Section expressly authorizes additional relief—amnesty—via a two-thirds vote of the Constitution's most democratic branch, Congress.[40]

Section Three is hardly the only limit on presidential eligibility. We the People over the years have insisted that a president be at least thirty-five

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[39] *Cf.* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

[40] Gerard Magliocca, Opinion, *What the Supreme Court Should Not Do in Trump's Disqualification Case*, N.Y. TIMES (Jan. 5, 2024).

and a natural-born citizen. He or she must fulfill residency requirements. He or she cannot serve more than two and a half terms. He or she may not be a member of Congress. Many of these provisions have democratic justifications even as they also limit democracy in certain respects. Ditto for Section Three.

CONCLUSION

On notable occasions, some of this Court's greatest rulings have highlighted and heeded key historical episodes that prompted the relevant constitutional text at issue. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 527–31 (1969) (emphasizing the story of John Wilkes in construing Article I); *McDonald v. City of Chicago*, 561 U.S. 742, 779 (2010) (discussing the Black Codes in connection with Section One of the Fourteenth Amendment). The Court should extend this grand interpretive tradition today, this time by highlighting and heeding the lessons of John Floyd and the First Insurrection of the 1860s to do justice to Section Three of the Fourteenth Amendment.

Respectfully submitted,

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