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COLORADO SUPREME COURT
2 East 14th Avenue, Denver, Colorado 80203

Appeal under §1-1-113(3), C.R.S. from
Denver District Court, 2023CV32577
Hon. Sarah B. Wallace

▲COURT USE ONLY▲

Petitioner-Appellants: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN, individuals,

v.

Respondent-Appellee: JENA GRISWOLD, in her official capacity as Colorado Secretary of State;

And

Intervenors-Appellees: COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, an unincorporated association, and DONALD J. TRUMP, an individual.

Case No. 2023SA300

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BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL LAW PROFESSOR MARK GRABER IN SUPPORT OF PETITIONERS-APPELLANTS NORMA ANDERSON, ET AL.

CERTIFICATION OF COMPLIANCE

I certify that this brief complies with all relevant requirements of C.A.R. 28, 29, and 32, including all formatting requirements set forth in those rules. Specifically, I certify that:

This amicus brief complies with the applicable word limit set forth in C.A.R. 29(d) (4,750-word limit for amicus briefs filed in support of merits briefs). It contains **4,617** words.

I acknowledge that this brief may be stricken if it does not comply with the requirements of C.A.R. 28, 29, and 32.

s/ Nelson Boyle
Nelson Boyle, Atty. Reg. No. 39525

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I. STATEMENT OF IDENTITY AND INTEREST OF *AMICUS* CONSTITUTIONAL LAW PROFESSOR MARK GRABER

Mark A. Graber is the Regents Professor at the University of Maryland Francis King Carey School of Law. The Regents Professorship is the highest honor in the University of Maryland System. Professor Graber is the seventh person to hold that honor. Professor Graber has taught constitutional law for over thirty years, with a specialty in American Constitutional Development. He has been researching the framing of Sections Two, Three, and Four of the Fourteenth Amendment for almost a decade. Professor Graber has published several articles on the centrality of these provisions to constitutional reform during Reconstruction. He is the only scholar to have published a peer-reviewed university press book on the subject. See *Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform After the Civil War* (Kansas, 2023).

This brief aims to provide the Court with accurate information on the history of Section Three. To that end, the brief emphasizes how Section Three's framers expected disqualification to be implemented; that they and other contemporaneous thinkers believed our president is an officer of the United States; what they thought was an

"insurrection," and what they believed constituted "engaging" in an insurrection.

No party participated in preparing this brief. Professor Graber volunteered his time to prepare this brief with assistance from volunteer attorneys.

II. ARGUMENT

A. Those who Framed the Fourteenth Amendment Thought Section Three Was Enforceable Without Federal Legislation.

The Congressmembers who framed the Reconstruction Amendments intended the substantive provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments to be self-executing. That is, they intended that the provisions could be implemented without congressional legislation.

Americans widely assumed no one could legally enslave another after the Thirteenth Amendment was ratified, even without implementing legislation.[1] The *Report of the Joint Committee on Reconstruction* (1866) introduced the Fourteenth Amendment to

[1] See William Baude and Michael Stokes Paulsen, "The Sweep and Force of Section Three," 172 *University of Pennsylvania Law Review* ___ (2024) (forthcoming), pp. 18-19.

Congress. "Slavery had been abolished by constitutional amendment," the *Report* declared. "A large proportion of the population had become, instead of mere chattels, free men and citizens." *Id*.[2] The Joint Committee reached this conclusion even though Section Two of the Thirteenth Amendment empowers Congress to enforce the amendment through legislation. Section Five of the Fourteenth Amendment is nearly identical to Section Two of the Thirteenth Amendment. No evidence exists that Republicans in Congress intended to bar independent state or federal court enforcement of Section Three of the Fourteenth Amendment when they did not intend for Section Two to bar direct court enforcement of the Thirteenth Amendment.

Republicans in the Thirty-Ninth Congress framed the Fourteenth Amendment. They insisted on constitutional protections for fundamental rights because they wanted more enduring guarantees than legislation like the Civil Rights Act of 1866[3] could provide since such acts were "repealable by a majority."[4] Republicans, the

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[2] *Report of the Joint Committee*, p. xii.

[3] 14 *Stat*. 27 (1866).

[4] *Congressional Globe*, 39th Cong., 1st Sess., p. 2459.

Congressional proponents of racial equality, wanted a self-executing Fourteenth Amendment to stop future Democratic majorities from being able to reverse its fundamental protections with legislation. They rejected a version of Section One of the Fourteenth Amendment that required Congressional implementation.[5] Representative John Broomall, a Pennsylvania Republican, observed that the final version of Section One of the Fourteenth Amendment would "prevent[] a mere majority from repealing the [Civil Rights Act]."[6]

Without self-execution, federal repeals of legislation implementing Section Three would have the same baneful consequences as federal repeals of legislation implementing Section One. In both cases, a future Democratic majority in Congress could undo the fruits of the Union victory in the Civil War.

The Union Army enforced Section Three without waiting for statutory instruction or even for that provision to be ratified. On May 2, 1868, more than two months before Congress passed any implementing legislation, Brevet Major General Ed. R.S. Canby issued

[5] *Id.*, p. 1095.

[6] *Id.*, p. 2498.

a general order in South Carolina. He declared, "If any of the State officers elected under the new constitution are disqualified by the third section of the proposed amendment . . . , they will not be allowed to discharge any official functions until the disability has been removed by the Congress of the United States."[7] Two weeks later, Secretary of War J.M. Schofield informed General Ulysses S. Grant that former confederates would be automatically disqualified upon ratification of the Fourteenth Amendment. The "effect" of Section Three, Schofield wrote, "will be at once to remove from office all persons who are disqualified by that amendment."[8]

Congress confirmed that Section Three was self-executing by a provision in a statute it enacted allowing North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to be represented in the national legislature. Section 3 of that measure stated, "no person

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[7] General Orders No. 79, Headquarters Second Military District, Charles, South Carolina, May 2, 1868, *Executive Documents Printed by Order of The House of Representatives During the Second Session of the Fortieth Congress* 1867-'68 (Vol. 19) (Government Printing Office: Washington, D.C., 1868), p. 17.

[8] Schofield, J.M., to General U.S. Grant, May 15, 1868, *The Evansville Journal* (June 4, 1868), p. 1.

prohibited from holding office under the United States, or under any State, by section three of the proposed amendment . . . shall be deemed eligible to any office in either of said States, unless relieved from disability as provided in said amendment."[9] Congress provided no procedure for implementing that command.

States immediately initiated disqualification procedures that Congress had not mandated.[10] Three state constitutions incorporated Section Three of the Fourteenth Amendment.[11] State courts decided whether individuals were disqualified from holding office because they participated in the insurrection.[12] Courts disqualified several officeholders.[13] If Section Three were not self-executing, then either

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[9] 15 *Stat.* 73, 74 (1868).

[10] See Gerard N. Magliocca, "Amnesty and Section Three of the Fourteenth Amendment," 36 *Constitutional Commentary* 87, 98 n. 59 (2021).

[11] See Florida Const., Art. XVI, § 1; S.C. Const. of 1868, Art. VIII, § 2; Texas Const. of 1869, Art. VI, § 1.

[12] *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631 (1869); *Worthy v. Barrett*, 63 N.C. 199, 200 (1869); *In re Tate*, 63 N.C. 308 (1869); *State ex rel Downes v. Towne*, 21 La. Ann. 490 (1869).

[13] See *Sandlin*, at 633-34; *Worthy*, at 200; *Tate*, at 308-09.

these states were acting illegally or Congress had authorized only six states out of 37 to implement that constitutional provision. Neither scenario holds water.

The Enforcement Act of 1870[14] acknowledged state and military efforts to implement Section Three. The Enforcement Act was the first federal law to establish procedures for disqualifying governing officials. Senator Lyman Trumbull, an Illinois Republican, maintained that offending past and present office holders were disqualified the instant the Fourteenth Amendment was ratified.[15] The Enforcement Act, he said, simply "afford[ed] a more efficient and speedy remedy to prevent persons from holding office who are not entitled to take office under the Constitution of the United States."[16] Republicans debated whether implementing legislation was practically necessary, while agreeing that it was not legally necessary. Senator Jacob Howard, a Michigan Republican, declared his willingness to support the first section of the Enforcement Act even though he "entertain[ed] very serious doubts of

[14] 16 *Stat*. 140, 143-44 (1870).

[15] *Congressional Globe*, 41st Cong., 1st Sess., p. 626.

[16] *Id*., p. 627.

the necessity for it."[17] He declared, "If the person claiming to hold an office is in fact as well as *de jure* no officer, if instead of being in office he is actually out of office by virtue of that clause of the Constitution, then it is somewhat difficult to see the propriety of instituting the proceeding of *quo warranto* for the purpose, in the language of the first section, of removing him from office."[18]

Chief Justice Salmon Chase was the only Republican who declared that Section Three was not self-executing.[19] But the merits of

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[17] *Id*., p. 628.

[18] *Ibid*.

[19] Claims to the contrary fail to provide the full quotation or are otherwise grossly misleading. References to Representative Thaddeus Stevens's declaration, "It will not execute itself," *Congressional Globe*, 39th Cong., 1st Sess., p. 2544, fail to include his previous qualification that "you must legislate to carry out many parts of it," which indicates the measure in question was partly self-executing. And, more importantly, they do not acknowledge that the comment was made with respect to a deleted provision of the Fourteenth Amendment that disenfranchised all former Confederates until 1870. When Stevens complained about the revised Section Three stating, "I see no hope of safety unless in the prescription of proper enabling acts," he continued, "which shall do justice to the freedmen and enjoin enfranchisement as a condition precedent."[19] *Id*., p. 3148. He was not calling for legislation to implement Section Three, but legislation exercising other congressional powers. Senator Trumbull's claim during the debates over the Enforcement Act that "the Constitution provides no means for enforcing itself" was not specific to Section Three. Instead, he said covered officials were disqualified immediately with ratification of Section

his opinion in *In re Griffin*, 11 F. Cas. 7, 1 Chase 364 (C.C.D. Va. 1869), are dubious.[20] *In re Griffin* was also an isolated episode, embodying the views of a single individual. Newspapers condemned the Chief Justice's claim that Section Three was not self-executing. A *Milwaukee Sentinel* editorial asserted:

> If this is sound doctrine, then a future Democratic Congress, . . . has only to repeal all laws for the enforcement of the amendment, and it is absolutely null. And the same is true of every other provision of the Constitution, including the amendment abolishing slavery. In fact this decision makes Congress superior to the Constitution, and concedes to that branch of the government the power and the right to disregard and annul the entire instrument by simply neglecting to enforce it by legislation, or by repealing all existing laws for its enforcement.[21]

When self-execution served Chase's political goals, as in the treason trial of Jefferson Davis, he found no need for implementing

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Three, while past state and military implementation was ineffective but not illegal. *Congressional Globe*, 41st Cong., 1st Sess., pp. 626-27.

[20] See Magliocca, "Amnesty and Section Three of the Fourteenth Amendment," p. 106; Baude and Paulsen, "The Sweep and Force of Section 3," pp. 35-49.

[21] "The Fourteenth Amendment—Chase's Decision," *Milwaukee Sentinel*, May 17, 1869, p. 1. See "Justice Chase and the Fourteenth Amendment," *The Bangor* (Me.) *Daily Whig and Courier,* June 7, 1869, p. 3.

legislation, agreeing with both the prosecution and defense that Section Three "executes itself," and had immediate legal consequences even in the absence of implementing legislation. [22]

B. Those who framed Section Three Regarded the President of the United States as an Officer of the United States

The Framers of Section Three had no intention to exclude the President of the United States by using either the phrase "officer of the United States" or "officer under the United States."

The decision below relied heavily on the distinction between the presidential oath of office in Article Two and the Congressional oath of office in Article Six.[23] No member of the Thirty-Ninth Congress made that distinction.[24] The Framers understood both to be oaths to support

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[22] Ibid.

[23] *Dist. Ct. Op.*, p. 100.

[24] The Constitution does not make this distinction either. Article VI declares, "The Senators and Representatives before mentioned, and 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." If the presidential oath mandated in Article II is not an oath to support the Constitution, then Article VI requires presidents, who are executive officers, to take a second oath.

the Constitution. Kentucky Senator Garrett Davis saw no legal difference between the constitutional requirement that "all officers, both Federal and State, should take an oath to support" the Constitution and the constitutional requirement that the president "take an oath, to the best of his ability to preserve, protect, and defend the Constitution."[25] Wisconsin Senator James Doolittle declared that Congress need not pass laws requiring presidents to swear to "support" the Constitution because that "oath is specified in the constitution."[26] Presidents John Adams and James Madison declared they had a duty to "support" the Constitution in their inaugural addresses. Andrew Johnson said the same in his message to Congress. And Andrew Jackson and Grover Cleveland declared they had taken an oath to "support" the Constitution. No president distinguished the presidential oath from the oath constitutionally required of other governmental officials. Courts after the Civil War agreed that the precise wording of constitutional oaths made no difference for whether Section Three applied. Judge Emmons charged the grand jury that "[t]he oath which

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[25] *Congressional Globe*, 39th Cong., 1st Sess., App., p. 234.

[26] *Id.*, p. 2915.

shall have been taken need not be in the precise words of the amendment 'To support the Constitution of the United States.'"[27]

The district court's finding that "there is scant direct evidence regarding whether the President is one of the positions subject to disqualification," fails to acknowledge the substantial evidence that Republicans intended a comprehensive constitutional disqualification of *all* federal and state officers who violated their oath of office by participating in an insurrection.[28] Republicans when describing Section Three often stated that the persons subject to disqualification were those who held offices. Missouri Senator John Henderson stated that Section Three "strikes at those who have heretofore held high office position."[29] Illinois Senator Richard Yates stated, "By the proposed amendment to the Constitution certain men are excluded from holding office, those who, having taken an oath to support the Constitution heretofore, have violated that oath."[30] No member of the Thirty-Ninth

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[27] "Office-Holders and the 14th Amendment," 13 *Internal Rev. Record and Customs J.* 39 (Feb. 4, 1871).

[28] Dist. Ct. Op., p. 95.

[29] *Congressional Globe*, 39th Cong., 1st Sess., p. 3035-36.

[30] *Id.*, p. 4003. And see *id.*, p. 2989 (Cowan).

Congress suggested that the language of Section Three excluded any prominent government official from its strictures.

One month after sending the Fourteenth Amendment to the states, the House of Representatives firmly rejected any constitutional distinction between the phrases "office under" and an "office of" as they were used in various constitutional provisions, including Section Three of the Fourteenth Amendment, which declares persons holding "offices of the United States" are subject to disqualification from "offices under the United States." Federal law prohibited a person who held "any office under the Government of the United States" that paid them more than $2,500 a year from receiving "compensation for discharging the duty of any other office."[31] Representative Roscoe Conkling of New York claimed he did not violate this statute when taking a paid position as a federal prosecutor after being elected to Congress. Conkling insisted that the president and members of Congress could hold dual offices because they were officers "of the United States," not officers "under the United States."[32] The select committee investigating Conkling disagreed

[31] 10 *Stat.* 76, 100 (1852).

[32] *Congressional Globe*, 39th Cong., 1st Sess., p. 3939.

unanimously. Members rejected claims that the Constitution divided government officials into "officers of the United States" and "officers under the United States." The committee report declared, "It is irresistibly evident that no argument can be based on the different sense of the words 'of' and 'under.'"[33] No difference existed between "an officer 'of' the United States, or one 'under' the government of the United States," the report concluded. "In either case he has been brought within the constitutional meaning of these words . . . because they are made by the Constitution equivalent and interchangeable."[34]

The House Select Committee was aware that some uses of those phrases in the Constitution excluded various members of the national government. Its report listed the same constitutional provisions that the district court relied on when concluding the president was not an officer of the United States.[35] The persons who framed Section Three were nevertheless "unwilling to place any confidence upon an argument

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[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.*; Dist. Ct. Op., pp. 99-100 ¶¶ 311-12.

derived from mere verbal criticism."[36] They insisted that "when construing the character of a Government our views should comprehend all its parts, and our aim should be to execute it according to its general and true design." This "general and true design" of Section Three compels the conclusion that presidents were subject to constitutional disqualification.

The district court acknowledged that the persons responsible for drafting Section Three regularly described the president as "an officer of the United States."[37] Ohio Representative Rufus Spalding spoke of the presidency as "this high office of the Government."[38] Many members of Congress, sometimes quoting President Andrew Johnson or Attorney General James Speed, declared that the president was "the chief executive officer of the United States."[39]

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[36] *Ibid.*

[37] Dist. Ct. Op., pp. 97-99, ¶¶ 306, 308, 310.

[38] *Id.*, p. 132. And see *id.*, p. 1158 (Eldridge) ("any President or other officer of the Government").

[39] *Id.*, p. 1318. And see *id.*, pp. 335 (Guthrie) (same); 775 (Conkling) (quoting Speed); 915 (H. Wilson); 2551 (Howard) (quoting A. Johnson) ("chief civil officer"); 2914 (Doolittle); *Congressional Globe*, 39th Cong., 1st Sess., App., p. 150 (Saulsbury).

Courts after the Civil War rejected a presidential exception to the persons and offices subject to Section Three. Federal Circuit Judge Halmor Hull Emmons, when charging a federal grand jury on Section Three, declared, "Without perplexing you with the difficult classifications or nice distinctions between political, judicial, or executive officers, I charge you that it includes *all* officers."[40]

Two articles insist that the framers of Section Three intended to exclude the president or were not clear on that point. The first article, by Josh Blackman and Seth Tillman, makes no reference to the Framers of the Fourteenth Amendment, the Ratifiers of the Fourteenth Amendment, contemporaneous commentary, or any quotation supporting their opinion made within a decade of the ratification of Section Three.[41] Kurt Lash's article promises to produce "drafts" of Section Three that had explicitly referred to the President,[42] but only

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[40] "Office-Holders and the 14th Amendment," *supra*.

[41] Josh Blackman and Seth Barrett Tillman, "Sweeping and Forcing the President Into Section 3," 28(2) Tex. Rev. L. & Pol. __ (forthcoming 2024)<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568771> (abstract).

[42] Kurt Lash, "The Meaning and Ambiguity of Section Three of the Fourteenth Amendment," abstract,

one draft he produced makes explicit reference to the President of the United States.[43] That draft's author, Kentucky Representative Samuel McKee, abandoned that reference during the debates over the Fourteenth Amendment,[44] but in no speech did McKee indicate any difference in the scope of his two proposals. Rather, his remarks make clear McKee took for granted presidents and the presidency were covered by both proposals. He declared, "I desire that the loyal alone shall rule the country which they alone have saved,"[45] and that his proposal "cuts off the traitor from all political power in the nation."[46] McKee treated "office," "office of trust or profit under the Government of the United States," and "office under this Government" as interchangeable. The goal of constitutional reform was to "seize them forever from office."[47]

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838>, p. 3.

[43] Lash, "Meaning and Ambiguity," pp. 48-50. Several drafts declared the President and Vice-President of the Confederacy ineligible for public office.

[44] *Congressional Globe*, 39th Cong., 1st Sess., p. 2504.

[45] *Id*., p. 2505.

[46] Ibid.

[47] Ibid.

The decision below, citing Kurt Lash, wrongly claims that "Section Three . . . ensures[s] that only loyal electors voted for the President of the United States."[48] Every former member of the Confederate Army who had not held state or federal office before the Civil War remained constitutionally qualified to be a presidential elector. In fact, at least three former confederate soldiers, including General John B. Gordon, one of Robert E. Lee's "most trusted" officers, were presidential electors from Georgia in 1868.[49] Unsurprisingly, given the likely composition of Electoral College members from former confederate states, no proponent of the Fourteenth Amendment expressed Lash's confidence that the Electoral College was a bulwark against election of a disloyal president. For the same reason, the Electoral College cannot explain Intervenor Trump's nonsensical claim that Section Three permitted

[48] Lash, "Meaning and Ambiguity," p. 4. See Lash, "Meaning and Ambiguity," p. 37 ("The Electors Clause secured pro-Union voters in the Electoral College"), 45.

[49] Gerard N. Magliocca, "Confederate Presidential Electors," *PrawfsBlawg*, Oct. 17, 2023 <https://prawfsblawg.blogs.com/prawfsblawg/2023/10/confederate-presidential-electors.html>.

former confederate leaders to become president, but not occupy lesser offices.

C. A Legal Consensus Existed Through Reconstruction that an Insurrection Occurred When Two or More Persons by Force or Intimidation Resisted the Execution of any Federal Law for a Public Purpose.

Insurrection "had a precise and well-understood meaning" in the American legal community when Section Three was framed and ratified.[50] American jurists understood an insurrection against the United States to be an attempt by two or more persons for public reasons to obstruct by force or intimidation the implementation of federal law. General agreement existed among judges and influential legal commentators that an insurrection had four elements: (a) an assemblage, (b) actual resistance to a federal law, (c) force or intimidation, and (d) a public purpose. Resistance to a federal law was sufficient. Section Three, like the constitutional law of *treason*, which informed the framers of Section Three, did not require an effort to overthrow the government.

Justices of the United States Supreme Court before, during and

[50]Carlton F.W. Larson, *On Treason: A Citizen's Guide to the Law* (HarperCollins: New York, 2020), p. 7.

after the Civil War agreed on the substance of the constitutional law of treason and insurrection. In particular, they agreed that "levying war" did not require a rebellion on the scale of the Civil War or an attempt to overthrow the government. Justice William Patterson in *United States v. Mitchell* declared for the Court that if the "object" of an insurrection "was to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation, the offence, in legal estimation, is High Treason; it is an usurpation of the authority of government; it is High Treason by levying of war."[51] Charging a jury in 1863, Justice Field elaborated:

> The words 'levying war' in the Constitution are not restricted to the act of making war for the entire overthrow of the Government, but embrace any combination to prevent, or oppose by force, the execution of a provision, either of the Constitution of the United States or any public statute of the United States, if accompanied or followed by an act of forcible opposition in pursuance of such combination. There must be an assemblage of men to carry the treasonable purpose into effect; and there must be actual resistance by force, or intimidation by numbers. The conspiracy must be directed against the provision of the Constitution or law generally, and not to its application or enforcement in a particular case, or against a particular individual; in order words, the conspiracy must be to effect something of a *public nature*, as the overthrow of the Government, or a department thereof, or to

[51] *United States v. Mitchell*, 2 U.S. 348, 355 (1795).

nullify some law of the United States.[52]

D. A Legal Consensus Existed when Section Three was Framed and Ratified that Persons Engaged in Insurrection Whenever They Knowingly Incited, Assisted, or Otherwise Participated in an Insurrection.

The constitutional law of treason when the Thirty-Ninth Congress framed the Fourteenth Amendment regarded persons as "engaged" in an insurrection or "levying war" against the United States whenever they played any role in a concerted attempt for public reasons to resist by force or intimidation the implementation of any law of the United States. Because any role in an insurrection made the participant an insurrectionist, judges, legal commentators, and members of Congress before, during, and immediately after the Civil War accepted Blackstone's dictum, "in treason, all are principals"[53] The members of Congress who passed the Second Confiscation Act[54] just a few years

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[52] Stephen Field, *Treason and Rebellion Being in Part the Legislation of Congress and of The State of California Thereon, Together with the Recent Charge by Judge Field of the U.S. Supreme Court* (Towne & Bacon, Book and Job Printers: San Francisco, CA, 1863), pp. 29-30 (emphasis in original).

[53] See *United States v. Burr*, 25 F. Cas. 55, 178 (C. C.D. Va. 1807).

[54] 12 *Stat.* 589 (1862).

before framing Section Three endorsed these judicial decisions and legal commentaries. For example, quoting both Chief Justice John Marshall and Justice Joseph Story, Republican Representative William P. Sheffield of Rhode Island stated without contradiction by anyone in Congress that "all those who perform any part, *however* minute, or *however remote from the scene of the action*, and who are actually leagued in the general conspiracy, are to be considered as traitors."[55]

Marshall, Story, Sheffield and other jurists recognized that a person need not participate in every element of an insurrection to be an insurrectionist. Field agreed that "when war is actually levied in any part of the country, any person, however far removed from the scene of military operations, who aids in its prosecution, is equally involved in the guilt of treason."[56] Philip Thomas was barred from the Senate under Section Three for giving his son $100 knowing that the money would

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[55] *Congressional Globe*, 39th Cong., 1st Sess., App., p. 169.

[56] Field, "The Charge delivered by Judge Field to the Grand Jury Impaneled for the Circuit Court of the United States for the Northern District of California at the City of San Francisco on the Thirteenth of August, 1863," in *Treason and Rebellion*, p. 30.

most likely be spent in ways that aided the Confederate insurgence.[57]

Under Nineteenth Century law, persons who incited insurrections were insurrectionists. Simon Greenleaf, a prominent legal commentator at the time, maintained that treason or insurrection was committed by "every one who counsels, commands, or procures others to commit an overt act of treason, which is accordingly committed."[58] Judge John Kane's charge to a grand jury stated that those who "counsel and instigate others to acts of forcible oppugnation to the provisions of a statute,—to inflame the minds of the ignorant by appeals to passion, and denunciations of the law as oppressive, unjust, revolting to the conscience, and not binding on the acts of men" were guilty of insurrection.[59] To "successfully to instigate treason," he declared, "is to commit it."[60]

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[57] See Myles S. Lynch, "Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment," 30 *William & Mary Bill of Rights Journal* 153, 201 (2021).

[58] Simon Greenleaf, "On the Law of Treason," 14 *The Monthly Law Reporter* 409, 419-20 (1852).

[59] *Charge to Grand Jury—Treason*, 30 F. Cas. 1047, 1048 (E.D. Pa. 1851) (Kane, J.)

[60] *Ibid.* And see *United States v. Hanway*, 9 West L. J. 103, 128 (C. C.D.

The Second Confiscation Act (1862) speaks of both "treason" and "incite, set on foot, assist or engage in any rebellion"[61] when identifying the individuals who are disqualified from holding public office. A fundamental purpose of Section Three would have been frustrated if "engaged" did not include "incite, set on foot, and assist." Past and present officeholders who served on secession conventions or in the Confederate Government would not be disqualified from office under Section Three. There is no evidence that Section Three's Framers intended to allow these leaders of the Confederacy to hold public office.

III. CONCLUSION

Given the history of Section Three, the Court should reconsider and reverse the district court's finding that Donald J. Trump was not an officer of the United States, to uphold the district court's other conclusions, and to remand to the district court to order the Secretary of State not to place Mr. Trump on the ballot.

Pa. 1851) (Grier, J. concurring with Judge Kane's charge).

[61] 12 *Stat.* 589.

Respectfully submitted on November 20, 2023.

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CERTIFICATE OF SERVICE

I certify that on November 20, 2023, I filed and served a copy of this **Brief of *Amicus Curiae* Constitutional Law Professor Mark Graber in Support of Petitioners-Appellants Norma Anderson, Et Al.** via email or CCE e-service via on the following counsel of record:

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