

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP,)
)
 Petitioner,)
)
 v.) No. 23-719
)
 NORMA ANDERSON, ET AL.,)
)
 Respondents.)

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Petitioner,)
v.) No. 23-719
NORMA ANDERSON, ET AL.,)
Respondents.)
- - - - -

Washington, D.C.

Thursday, February 8, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

JONATHAN F. MITCHELL, ESQUIRE, Austin, Texas; on behalf of the Petitioner.

JASON C. MURRAY, ESQUIRE, Denver, Colorado; on behalf of Respondents Anderson, et al.

SHANNON W. STEVENSON, Solicitor General, Denver, Colorado; on behalf of Respondent Griswold.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument
this morning in Case 23-719, Trump versus Anderson.

Mr. Mitchell.

ORAL ARGUMENT OF JONATHAN F. MITCHELL

ON BEHALF OF THE PETITIONER

MR. MITCHELL: Mr. Chief Justice, and may
it please the Court:

The Colorado Supreme Court held that
President Donald J. Trump is constitutionally
disqualified from serving as president under
Section 3 of the Fourteenth Amendment. The Colorado
Supreme Court's decision is wrong and should be
reversed for numerous independent reasons.

The first reason is that President Trump is
not covered by Section 3 because the president is not
"an officer of the United States" as that term is
used throughout the Constitution. "Officer of the
United States" refers only to appointed officials,
and it does not encompass elected individuals, such
as the President or members of Congress. This is
clear from the Commissions Clause, the Impeachment
Clause, and the Appointments Clause, each of which
uses "officer of the United States" to refer only to

1 appointed and not elected officials.

2 The second reason is that Section 3 cannot
3 be used to exclude a presidential candidate from the
4 ballot even if that candidate is disqualified from
5 serving as president under Section 3 because Congress
6 can lift that disability after the candidate is
7 elected but before he takes office. A state cannot
8 exclude any candidate for federal office from the
9 ballot on account of Section 3, and any state that
10 does so is violating the holding of Term Limits by
11 altering the Constitution's qualifications for
12 federal office.

13 The Colorado Supreme Court's decision is no
14 different from a state residency law that requires
15 members of Congress to inhabit the state prior to
16 Election Day, when the Constitution requires only
17 that members of Congress inhabit the state that they
18 represent when elected.

19 In both situations, a state is accelerating
20 the deadline to meet a constitutionally imposed
21 qualification and is thereby violating the holding of
22 Term Limits. And in this situation, a ruling from
23 this Court that affirms the decision below would not
24 only violate Term Limits but take away the votes of
25 potentially tens of millions of Americans.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Mr. Mitchell, would you --
3 you didn't spend much time on your argument with
4 respect to whether or not Section 3 is
5 self-executing, so would you address that?

6 And -- and in doing that, your argument is
7 that it's not self-executing, but then, in that case,
8 what would the role of the state be, or is it
9 entirely up to Congress to implement the
10 disqualification in Section 3?

11 MR. MITCHELL: It is entirely up to
12 Congress, Justice Thomas. And our argument goes
13 beyond actually saying that Section 3 is
14 non-self-executing. We need to say something more
15 than that because a non-self-executing treaty or a
16 non-self-executing constitutional provision normally
17 can still be enforced by a state if it chooses to
18 enact legislation.

19 The holding of Griffin's Case goes beyond
20 even that by saying that a state is not allowed to
21 implement or enforce Section 3 of the Fourteenth
22 Amendment unless and until Congress enacts
23 implementing legislation allowing it to do so. So,
24 under Griffin's Case, which we believe is correctly
25 decided -- the Anderson litigants disagree with us on

1 that point -- but, if this Court were to adhere to
2 the holding of Griffin's Case, there would not be any
3 role for the states in enforcing Section 3 unless
4 Congress were to enact a statute that gives them that
5 authority.

6 CHIEF JUSTICE ROBERTS: Counsel, what if
7 somebody came into a state secretary of state's
8 office and said, I took the oath specified in Section
9 3, I participated in an insurrection, and I want to
10 be on the ballot? Can the -- does the secretary of
11 state have the authority in that situation to say,
12 no, you're disqualified?

13 MR. MITCHELL: No, the secretary of state
14 could not do that, consistent with Term Limits,
15 because even if the candidate is an admitted
16 insurrectionist, Section 3 still allows the candidate
17 to run for office and even win election to office and
18 then see whether Congress lifts that disability after
19 the election.

20 This happened frequently in the wake of the
21 Fourteenth Amendment, where Confederate
22 insurrectionists were elected to Congress, and
23 sometimes they obtained a waiver; sometimes they did
24 not. And each House would determine for itself
25 whether to seat that elected insurrectionist because

1 each House is the sole judge of the qualifications of
2 its members.

3 So, if a state banned even an admitted
4 insurrectionist from the ballot, it would be adding
5 to and altering the Constitution's qualifications for
6 office because, under Section 3, the candidate need
7 only qualify during the time the candidate holds the
8 office to which he's been elected. And under Your
9 Honor's hypothetical, the secretary of state would be
10 demanding essentially that the candidate obtain a
11 waiver from Congress earlier than the candidate needs
12 to obtain that waiver.

13 CHIEF JUSTICE ROBERTS: Well, even though
14 it's pretty unlikely or at least would be difficult
15 for an individual who says, you know, I -- I am an
16 insurrectionist and I had taken the oath, that would
17 require a two-thirds vote in Congress, right?

18 MR. MITCHELL: Correct.

19 CHIEF JUSTICE ROBERTS: Well, that's a
20 pretty unlikely scenario.

21 MR. MITCHELL: It may be unlikely, but no
22 secretary of state is permitted to predict the
23 likelihood of a waiver because, in doing so, they're
24 adding a new qualification to the ability to run for
25 Congress.

1 And the proper analogy, Mr. Chief Justice,
2 is to state residency laws because the Constitution
3 says that a member of Congress must inhabit the state
4 that he represents when elected. And the lower
5 courts have all held, in reliance on Term Limits,
6 that a state election official cannot move that
7 deadline any earlier by requiring the candidate for
8 Congress to inhabit the state --

9 CHIEF JUSTICE ROBERTS: So even if somebody
10 --

11 MR. MITCHELL: -- before the date of
12 election.

13 CHIEF JUSTICE ROBERTS: -- comes in and
14 says, I'm -- I'm a resident of -- to the secretary of
15 state's office in Illinois and says, I'm a -- a
16 resident of Indiana, I have been all my life, I want
17 to run for office in Illinois, the secretary of state
18 can't say, no, you can't?

19 MR. MITCHELL: Well, the question would be
20 is that person going to inhabit the state when the
21 election is held. So, if the candidate makes clear,
22 perhaps through a sworn declaration or through his
23 own statements, that he has no intention of
24 relocating to that state before Election Day, then
25 the secretary of state would be enforcing an extant

1 constitutional qualification rather than enforcing a
2 new state-imposed qualification.

3 And that's the key under Term Limits: Is
4 the state in any way altering the criteria for a
5 federal office, either for Congress or for the
6 presidency? And in this situation, the Colorado
7 Supreme Court is going slightly beyond what Section 3
8 requires because Section 3 on its face bans an
9 insurrectionist only from holding office.

10 JUSTICE SOTOMAYOR: Counsel, can I stop you
11 a moment and -- and back up a minute? You admitted
12 that the concept of self-executing does generally
13 permit states to provide a cause of action for
14 breaches of a constitutional provision.

15 MR. MITCHELL: Correct.

16 JUSTICE SOTOMAYOR: In fact, they do it
17 frequently for takings clauses. Here, there's no
18 debate that Colorado has placed that -- provided that
19 cause of action. You want to go a step further and
20 say that this, like the Treaty Clause, requires
21 implementing legislation to permit the state to
22 disqualify an insurrectionist --

23 MR. MITCHELL: That's correct. So --

24 JUSTICE SOTOMAYOR: -- under Section 3.

25 MR. MITCHELL: That's right.

1 JUSTICE SOTOMAYOR: So history proves a lot
2 to me --

3 MR. MITCHELL: Mm-hmm.

4 JUSTICE SOTOMAYOR: -- and to my colleagues
5 generally. There's a whole lot of examples of states
6 relying on Section 3 to disqualify insurrectionists
7 for state offices, and you're basically telling us
8 that you want us to go two steps further. You want
9 to -- maybe three.

10 MR. MITCHELL: Mm-hmm.

11 JUSTICE SOTOMAYOR: You want us to say that
12 self-execution doesn't mean what it generally means.
13 You want us now to say it means that Congress must
14 permit states or require states to stop
15 insurrectionists from taking state office.

16 MR. MITCHELL: Mm-hmm.

17 JUSTICE SOTOMAYOR: And -- and so this is a
18 complete preemption in a way that's very rare, isn't
19 it?

20 MR. MITCHELL: Well, the -- the only thing
21 I would --

22 JUSTICE SOTOMAYOR: It's rare under the
23 Fourteenth Amendment.

24 MR. MITCHELL: Oh, of course, it's rare.
25 This is -- this is a one-off situation. And, Your

1 Honor, the only thing I'm --

2 JUSTICE SOTOMAYOR: Well, it is one-off. I
3 don't disagree with you. But it's not with -- with
4 respect to how we define "self-executing."

5 MR. MITCHELL: We're not asking this Court
6 to redefine the concept of non-self-execution. We
7 were careful in our brief not to rely on that phrase.
8 And Griffin's Case doesn't --

9 JUSTICE SOTOMAYOR: Right, you are, because
10 it's not.

11 MR. MITCHELL: That's right.

12 JUSTICE SOTOMAYOR: All right.

13 MR. MITCHELL: And Griffin's Case --

14 JUSTICE SOTOMAYOR: So now the question is
15 a very different one --

16 MR. MITCHELL: Mm-hmm.

17 JUSTICE SOTOMAYOR: -- in my mind. I
18 understand you're relying on Griffin. Let's just be
19 very clear.

20 MR. MITCHELL: Right.

21 JUSTICE SOTOMAYOR: Griffin was not a
22 precedential Supreme Court decision.

23 MR. MITCHELL: That's correct.

24 JUSTICE SOTOMAYOR: All right. It was a
25 circuit court decision by a justice who, when he

1 becomes a justice, writes in the Davis case, he
2 assumed that Jefferson Davis would be ineligible to
3 hold any office, particularly the presidency, and
4 treated -- and this is his words --

5 MR. MITCHELL: Mm-hmm.

6 JUSTICE SOTOMAYOR: -- Section 3 as
7 executing itself, needing no legislation on the part
8 of Congress to give it effect.

9 So you're relying on a non-precedential
10 case by a justice who later takes back what he said.

11 MR. MITCHELL: But the key point with
12 Griffin's Case and why it's an important precedent,
13 despite everything Your Honor said, it is not a
14 precedent of this Court, but Griffin's Case provided
15 the backdrop against which Congress legislated the
16 Enforcement Act of 1870 when it first provided an
17 enforcement mechanism for Section 3.

18 JUSTICE SOTOMAYOR: Then did away with it
19 later.

20 MR. MITCHELL: It did away with it later.
21 But, as --

22 JUSTICE SOTOMAYOR: But -- but that has
23 nothing to say with respect to what Section 3 means.

24 Can we get to the issue, which is, I think,
25 one that I go back to that I started with, and -- and

1 very briefly, what sense does it say that states
2 can't enforce Section 3 against their own officials?

3 MR. MITCHELL: Be --

4 JUSTICE SOTOMAYOR: And I think, logically,
5 those are two separate issues in my mind: Can states
6 enforce the Insurrection Clause against their own
7 officeholders, or can they enforce it against federal
8 officials, or can they enforce it against the
9 president? Those are all three different questions
10 in my mind.

11 MR. MITCHELL: And the -- the answer to all
12 three of those questions turns on whether this Court
13 agrees with the holding of Griffin's Case. If
14 Griffin's Case is the proper enunciation of the law,
15 then a state cannot do any of the things Your Honor
16 suggested unless Congress gives it authority to do so
17 through implementing legislation.

18 JUSTICE SOTOMAYOR: So a non-precedential
19 decision that relies on policy, doesn't look at the
20 language, doesn't look at the history, doesn't
21 analyze anything than the disruption that such a suit
22 would bring, you want us to credit as precedential?

23 MR. MITCHELL: Because Congress relied on
24 Griffin's Case when it enacted the Enforcement Act of
25 1870 and established the --

1 JUSTICE KAGAN: So, Mr. Mitchell, if I may
2 interrupt just to clarify, I mean, this sounds like
3 your reply brief, where it sounds like you're not
4 making a constitutional argument, you're really
5 making a statutory preemption argument. And --

6 MR. MITCHELL: Right.

7 JUSTICE KAGAN: -- is that -- is that what
8 you're doing here? You're not saying that the
9 Constitution gives you this rule. It's the kind of
10 combination of Griffin's Case plus the way Congress
11 acted after Griffin's Case --

12 MR. MITCHELL: Yes.

13 JUSTICE KAGAN: -- that gives you the rule?

14 MR. MITCHELL: That's exactly right,
15 Justice Kagan, because we have implementing
16 legislation, Congress took up the invitation provided
17 by Griffin's Case and established writs of quo
18 warranto in the 1870 Enforcement Act, later repealed
19 them.

20 The only enforcement legislation that's
21 currently on the books is the insurrection criminal
22 statute, Section 2383. And when Congress made all of
23 these decisions -- the initial enactment of the
24 Enforcement Act in 1870, the repeal of the quo
25 warranto provisions in 1948 -- all of those were made

1 with Griffin's Case as the backdrop. The under --

2 JUSTICE KAGAN: I -- please.

3 MR. MITCHELL: Well, the understanding was
4 that these congressionally established remedies would
5 be exclusive of state court remedies. So there's not
6 an express statement of preemption in these statutes,
7 but there didn't need to be because Griffin's Case
8 provided the backdrop.

9 JUSTICE KAGAN: And if I could just
10 understand the argument a little bit better, suppose
11 that we took all of that way away. You know, suppose
12 there were no Griffin's Case and there were no
13 subsequent congressional enactment. What do you then
14 think the rule would be?

15 MR. MITCHELL: So in just as a matter of
16 first principles without Griffin's Case, it's a much
17 harder argument for us to make because, normally, I
18 mean, every other provision of the Fourteenth
19 Amendment has been treated as self-executing.

20 What we would argue in the hypothetical
21 that Your Honor has suggested is that there are
22 practical considerations unique to Section 3 that
23 counsel in favor of a rule similar to what Chief
24 Justice Chase spelled out in Griffin's Case and it
25 goes to I think the policy concerns he talks about,

1 where this was a case -- Griffin's Case involved a
2 convicted criminal who was seeking a writ of habeas
3 corpus on the ground that the judge who tried his
4 case was an insurrectionist disqualified under
5 Section 3, and Chief Justice Chase realizes that if
6 he enforces Section 3 in this situation, it would
7 nullify every official act taken not only by this
8 particular judge but by anyone who is an
9 insurrectionist or arguably an insurrectionist under
10 Section 3, and that was --

11 JUSTICE BARRETT: Well, why do you need
12 those consequential concerns, though? I mean, it
13 kind of seems to me that what Justice Kagan is
14 getting at is why don't you have an argument that the
15 Constitution of its own force, that Section 3 of its
16 own force, preempts the states' ability not -- not
17 necessarily, I think, not to enforce Section 3
18 against its own officers but against federal
19 officers, like in a Tarble's Case kind of way.

20 MR. MITCHELL: So there could also be an
21 argument that's more limited. You're suggesting
22 there may be a barrier under the Constitution to a
23 state legislating an enforcement mechanism for
24 Section 3 specific to federal officers.

25 We could rely on precedents such as McClung

1 that says that state courts lack the authority to
2 issue mandamus relief against federal officials and
3 extend that principle here.

4 JUSTICE BARRETT: Well, why aren't you
5 making those arguments?

6 MR. MITCHELL: Because that doesn't get us
7 -- that -- Griffin's Case --

8 JUSTICE BARRETT: That only gets you out of
9 state court, it doesn't get you out of federal court?

10 MR. MITCHELL: Right. And also the holding
11 of Griffin's Case went well beyond that because Chief
12 Justice Chase said in this opinion, which, again,
13 provided the backdrop for the congressional
14 enforcement legislation, that states had no role in
15 enforcing Section 3 unless Congress was to give them
16 that authority through a statute that they passed
17 pursuant to their legislative powers.

18 JUSTICE GORSUCH: I --

19 JUSTICE BARRETT: But your argument's --
20 oh, sorry.

21 JUSTICE GORSUCH: No, please go ahead.

22 JUSTICE BARRETT: I was just going to add
23 one last thing. I think your argument's a little
24 broader than that because I think, if we accept your
25 position that disqualifying someone from the ballot

1 is adding a qualification, really, your position is
2 that Congress can't enact a statute that would allow
3 Colorado to do what it's done either because then
4 Congress would be adding a qualification, which it
5 can't do either.

6 MR. MITCHELL: No, I don't agree with that,
7 Justice Barrett. Congress is not bound by the
8 holding of Term Limits. Term Limits only prohibits
9 the states from adding additional qualifications or
10 altering the Constitution's qualifications for
11 federal office. It does not purport to restrain
12 Congress.

13 So, if Congress were to enact implementing
14 legislation that authorized the states to exclude
15 insurrectionists from the ballot, we believe that
16 would be valid enforcement legislation under Section
17 3 with an important caveat. There has to be
18 congruence and proportionality under this Court's
19 precedents.

20 JUSTICE ALITO: Well, why would that be an
21 important -- why would that be permissible? Because
22 Section 3 refers to the holding of office, not
23 running for office. And so --

24 MR. MITCHELL: Mm-hmm.

25 JUSTICE ALITO: -- if a state or Congress

1 were to go further and say that you can't run for the
2 office, you can't compete in a primary, wouldn't that
3 be adding an additional qualification for serving for
4 president? You must have been free from this
5 disqualification at an earlier point in time than
6 Section 3 specifies.

7 MR. MITCHELL: I think the answer to your
8 question, Justice Alito, depends on how you interpret
9 the word "enforce" in Section 5. And some members of
10 this Court, such as Justice Scalia, thought that
11 "enforce" means you can do nothing more than enact
12 legislation that mirrors the Fourteenth Amendment's
13 self-executing requirements and you can't go an inch
14 beyond that. That's not the current jurisprudence of
15 this Court --

16 JUSTICE ALITO: No. Well, all right. We
17 have --

18 MR. MITCHELL: -- that allow --

19 JUSTICE ALITO: -- to decide whether it's
20 congruent and proportional.

21 MR. MITCHELL: Right.

22 JUSTICE ALITO: And we would get into the
23 question of whether that would be congruent and
24 proportional.

25 Well, let me shift gear a little bit. I --

1 I take you to -- to argue -- and I think this is
2 right -- that the term "self-executing" is a misnomer
3 as applied here.

4 MR. MITCHELL: Yes, it is.

5 JUSTICE ALITO: Very often, when we use the
6 term, what we're referring to is the proposition that
7 a particular provision of the Constitution or a
8 statute in and of itself creates a private right of
9 action. That's not what the issue is here.

10 MR. MITCHELL: No, that's not the issue
11 here. And sometimes the phrase "self-executing" is
12 used that way. The only thing I would add is
13 sometimes it's used in a different sense. With
14 self-executing treaties or non-self-executing
15 treaties, the issue is whether that treaty has any
16 force as domestic law whatsoever.

17 JUSTICE ALITO: Right. Right. Well, I
18 don't see what is gained by using this term which is
19 used in different contexts rather than directly
20 addressing what's involved here, which is the
21 question of who can enforce Section 3 with respect to
22 a presidential candidate.

23 MR. MITCHELL: Mm-hmm.

24 JUSTICE ALITO: The consequences of what
25 the Colorado Supreme Court did, some people claim,

1 would be quite severe. Would it not permit -- would
2 it not lead to the possibility that other states
3 would say, using their choice-of-law rules and their
4 rules on -- on collateral estoppel, that there's
5 non-mutual collateral estoppel against former
6 President Trump and so the decision of the Colorado
7 Supreme Court could effectively decide this question
8 for many other states, perhaps all other states?
9 Could it not lead to that consequence?

10 MR. MITCHELL: I don't think so because
11 Colorado law does not recognize non-mutual collateral
12 estoppel. And I believe the preclusive effect of the
13 decision would be determined by Colorado law rather
14 than the law of another state.

15 But I think your question, Justice Alito,
16 gives rise to an even greater concern because, if
17 this decision does not have preclusive effect in
18 other lawsuits, it opens the possibility that a
19 different factual record could be developed in some
20 of the litigation that occurs in other states, and
21 different factual findings could be entered by state
22 trial court judges. They might conclude as a matter
23 of fact that President Trump did not have any intent
24 to engage in incitement or make some other finding
25 that differs from what this trial court judge found.

1 JUSTICE ALITO: Yeah, exactly. So this --
2 in this decision, the -- the trial court in Colorado
3 thought that it was proper to admit the January 6th
4 report, and it also admitted the testimony of an
5 expert --

6 MR. MITCHELL: Mm-hmm.

7 JUSTICE ALITO: -- who testified about the
8 meaning of certain words and phrases to people who
9 communicate with and among extremists, right?

10 Another -- another state court could reach
11 an opposite conclusion on both of those questions.

12 MR. MITCHELL: Certainly. Other states
13 could conclude that the January 6th report is
14 inadmissible hearsay. They might also conclude that
15 statements within the January 6th report were hearsay
16 even if the report itself is not. And they could
17 certainly reach a different conclusion with respect
18 to the expert testimony of Professor Simi. Perhaps
19 in another state, we would have time to produce our
20 own sociology expert who would contradict Professor
21 Simi.

22 JUSTICE ALITO: Now should -- should these
23 considerations be dismissed as simply
24 consequentialist arguments, or do they support a
25 structural argument that supports the position that

1 you're taking here?

2 MR. MITCHELL: I think they all mutually
3 reinforce each other. We have an argument, we
4 believe, that is sufficient to dispose of this case
5 just based on the meaning of "officer of the United
6 States," as well as the argument we're making based
7 on Term Limits, but all of the consequentialist
8 considerations that Your Honor has suggested are
9 additional reasons to reverse the Colorado Supreme
10 Court, although we don't think it's necessary to get
11 into consequences because the law is clearly on our
12 side.

13 JUSTICE SOTOMAYOR: Can I -- you keep
14 saying Term Limits. There are other presidential
15 qualifications in the Constitution, age.

16 MR. MITCHELL: Yes.

17 JUSTICE SOTOMAYOR: Citizenship. There's a
18 separate amendment, the Twenty-Second Amendment, that
19 doesn't permit anyone to run for a second term.

20 We have a history of states disqualifying
21 -- not all, but some -- of disqualifying candidates
22 who won't be of age if elected. We have a history of
23 at least one state disqualifying someone who wasn't a
24 U.S. citizen.

25 MR. MITCHELL: Right.

1 JUSTICE SOTOMAYOR: Is -- are your
2 arguments limited to Section 3?

3 MR. MITCHELL: Not quite. The question,
4 Justice Sotomayor, is whether the state is violating
5 Term Limits by adding to or altering the extant
6 qualifications for the presidency in the
7 Constitution. Now the hypo --

8 JUSTICE SOTOMAYOR: So you want us to say
9 -- I'm wondering why the Term Limits qualification is
10 important to you.

11 MR. MITCHELL: Because it --

12 JUSTICE SOTOMAYOR: Are you setting up so
13 that if some president runs for a third term, that a
14 state can't disqualify him from the ballot?

15 MR. MITCHELL: Of course, a state can
16 disqualify him from the ballot because that is a
17 qualification that is categorical. It's not
18 defeasible by Congress. So a state is enforcing the
19 Constitution when it says you can't appear on our
20 ballot if you've already served two terms as
21 president.

22 The same goes --

23 JUSTICE SOTOMAYOR: The same if they're
24 under age when elected and the same if they're not a
25 U.S. citizen.

1 MR. MITCHELL: The same if they're not --
2 well, the same if they're not a U.S. citizen for
3 sure. The age is a little more nuanced because you
4 can imagine a scenario where the person is 34 years
5 old at the time of the election, but he turns 35
6 before Inauguration Day.

7 JUSTICE SOTOMAYOR: Well, then that would
8 come up --

9 MR. MITCHELL: A state could not --

10 JUSTICE SOTOMAYOR: -- that would probably
11 come up to us at some point. The state would make a
12 decision and say he's ineligible, and we would have
13 to decide that question then.

14 But my point is so what -- adding
15 qualifications to what term limit --

16 MR. MITCHELL: You're --

17 JUSTICE SOTOMAYOR: -- is your argument
18 based on?

19 MR. MITCHELL: You're changing --

20 JUSTICE SOTOMAYOR: I'm just confused.

21 MR. MITCHELL: Okay. With respect to the
22 -- maybe I'll start with the age example.

23 JUSTICE SOTOMAYOR: Mm-hmm.

24 MR. MITCHELL: If a state like Colorado
25 says you can't appear on our presidential ballot

1 unless you are 35 years old on the day of the
2 election, that would be a violation of Term Limits
3 because there could be a 34-year-old on the day of
4 the election who turns 35 before Inauguration Day.

5 What Colorado has done here, what their
6 supreme court has done, is similar because, under
7 Section 3, President Trump needs to qualify during
8 the time that he would hold office, and the Colorado
9 Supreme Court is saying to President Trump: You have
10 to show that you would qualify under Section 3 now,
11 at the time of the election, or at the time that we,
12 the state supreme court --

13 JUSTICE SOTOMAYOR: Now I understand.

14 JUSTICE KAGAN: So what -- what --

15 CHIEF JUSTICE ROBERTS: Now just -- just a
16 point of clarification so we're all on the same page.
17 When you say "Term Limits," you mean our decision in
18 the Term Limits case --

19 MR. MITCHELL: Yes. I'm sorry.

20 CHIEF JUSTICE ROBERTS: -- not the
21 constitutional provision governing term limits?

22 MR. MITCHELL: Yes. U.S. Term Limits
23 against Thornton. Maybe I should call it Thornton
24 instead of Term Limits.

25 CHIEF JUSTICE ROBERTS: That would be

1 easier for me to --

2 MR. MITCHELL: I'm sorry.

3 JUSTICE JACKSON: And does it have some --

4 JUSTICE SOTOMAYOR: I -- I was confused.

5 JUSTICE JACKSON: So does it have something
6 to do with the fact that the particular circumstance
7 that you're talking about can change? Is that what
8 you mean? I'm trying to understand --

9 MR. MITCHELL: Yeah.

10 JUSTICE JACKSON: -- the distinction
11 between the provision in the Constitution that
12 relates to disqualification on the basis of
13 insurrection behavior --

14 MR. MITCHELL: Mm-hmm.

15 JUSTICE JACKSON: -- and these other
16 provisions that Justice Sotomayor points out. They
17 all seem to me to be extant constitutional
18 requirements. So you -- but you're drawing a
19 distinction.

20 MR. MITCHELL: Right. I'm drawing a
21 distinction because some of them are categorical,
22 such as --

23 JUSTICE JACKSON: What do you mean by
24 "categorical"? Whether or not you are an
25 insurrectionist is or is not categorical?

1 MR. MITCHELL: It is not categorical
2 because Congress --

3 JUSTICE JACKSON: Because?

4 MR. MITCHELL: -- because Congress can lift
5 the disability by a two-thirds vote. And there is --

6 JUSTICE JACKSON: But -- but why does --
7 why does that change the initial determination of
8 whether or not you fall into the category? I don't
9 understand the fact that you can be excused from
10 having been in the category -- why does that not make
11 it a categorical determination?

12 MR. MITCHELL: Because we don't know
13 whether President Trump will be excused before he's
14 sworn in, if he wins the election, on January 20th,
15 2025. And a -- and a court that is saying that
16 President Trump has to show now, today, that he would
17 qualify under Section 3 is accelerating the deadline
18 that the Constitution provides for him to obtain a
19 waiver from Congress.

20 JUSTICE JACKSON: But that's by virtue of
21 the "hold," right, "hold office." This is --

22 MR. MITCHELL: Correct. Yes.

23 JUSTICE JACKSON: Oh.

24 MR. MITCHELL: Section 3 bans him only from
25 holding office. It does not --

1 JUSTICE JACKSON: All right. Can I ask you
2 -- I'm just -- now that I have the floor --

3 MR. MITCHELL: Yes.

4 JUSTICE JACKSON: -- can I ask you to
5 address your first argument, which is the
6 office/officer point?

7 JUSTICE KAGAN: Could -- could --

8 JUSTICE JACKSON: Oh, sorry.

9 CHIEF JUSTICE ROBERTS: Yeah, why don't we
10 --

11 JUSTICE KAGAN: -- could we --

12 JUSTICE JACKSON: Oh.

13 JUSTICE KAGAN: Is that okay if we do this
14 and then we go to that?

15 JUSTICE JACKSON: Sure. Sure, sure, sure.

16 JUSTICE KAGAN: You know, but --

17 JUSTICE JACKSON: Go ahead.

18 JUSTICE KAGAN: Will there be an
19 opportunity to do "officer" stuff, or should we --

20 CHIEF JUSTICE ROBERTS: Absolutely.
21 Absolutely.

22 (Laughter.)

23 JUSTICE KAGAN: I just want to understand.
24 So, on -- on -- on this theory, what is the sum total
25 of ways that the -- that Section 3 can be enforced,

1 that -- that -- that -- that -- that some --

2 MR. MITCHELL: Yeah.

3 JUSTICE KAGAN: -- that somebody out there
4 can say, yes, there has been a former president who
5 engaged or led or participated in an insurrection and
6 so should be disqualified from office, putting aside
7 the officer argument --

8 MR. MITCHELL: Right.

9 JUSTICE KAGAN: -- what is the sum total of
10 ways that that enforcement can happen?

11 MR. MITCHELL: So the answer to that
12 question is going to depend on what Your Honor thinks
13 of Griffin's Case. So, if this Court were to affirm
14 the rationale of Griffin's Case, then the only way
15 Section 3 could be enforced is through congressional
16 legislation that creates a remedy. So Congress could
17 reinstate the quo warranto provisions that they
18 initially had in the 1870 --

19 JUSTICE KAGAN: Is that your position?

20 MR. MITCHELL: Yes, because we believe
21 Griffin's Case is correctly decided and should be
22 followed --

23 JUSTICE KAGAN: And how does that fit with
24 -- a lot of the -- the -- the answers to the
25 questions that we've been giving, you said, well,

1 Congress has to have the ability by a two-thirds vote
2 to lift the disqualification.

3 MR. MITCHELL: Right.

4 JUSTICE KAGAN: But so too I -- I would
5 think that that provision would -- would -- would be
6 in some tension with what you just said --

7 MR. MITCHELL: There is some, yeah.

8 JUSTICE KAGAN: -- because, if Congress has
9 the ability to lift the vote by a two-thirds
10 majority, then, surely, it can't be right that one
11 House of Congress can do the exact same thing by a
12 simple majority.

13 MR. MITCHELL: Yeah, there certainly is
14 some tension, Justice Kagan, and some commentators
15 have pointed this out. Professor Baude and Professor
16 Paulsen criticized Griffin's Case very sharply.

17 JUSTICE KAGAN: Then I must be right.

18 (Laughter.)

19 MR. MITCHELL: Well, we don't think it's --
20 we don't think this problem is fatal because, to us,
21 the -- the two-thirds provision that allows Congress
22 to lift a disability is something akin to a pardon
23 power, where Congress, through enforcement
24 legislation, creates a mechanism by which the
25 insurrectionist issue is to be determined by some

1 entity, it could be the legislature in the case of an
2 elected member of Congress, each House has the
3 ability to judge the qualifications of their members,
4 or if it's outside the situation of Congress, it
5 would be whatever Congress enacts.

6 So, when it was the writs of quo warranto,
7 each federal prosecutor had the authority to bring a
8 quo warranto writ against an incumbent official and
9 seek his ouster from office under Section 3, but it
10 was still subject to that amnesty provision in
11 Section 3 of the Fourteenth Amendment.

12 So we do acknowledge the tension, but we
13 don't think that's an insurmountable obstacle to you
14 hearing the case.

15 JUSTICE ALITO: I don't even see why
16 there's -- why there's a tension. If you analogize
17 the -- the lifting by Congress of the
18 disqualification by a two-thirds vote to a pardon,
19 then, surely, one would not argue that the fact that
20 the president or a governor can pardon someone from a
21 criminal conviction or a criminal offense means that
22 the person couldn't be prosecuted in the first place
23 for the criminal offense.

24 MR. MITCHELL: That's right.

25 JUSTICE ALITO: Right?

1 MR. MITCHELL: Yes.

2 JUSTICE ALITO: So I don't see what the
3 tension is. They're two separate things. Did the
4 person engage in this activity which is prohibited,
5 and second, even if the person did engage in the
6 activity, are there reasons why the disqualification
7 or the -- should be lifted or the pardon should be
8 granted.

9 MR. MITCHELL: That's right. I mean, if --
10 again, if the Court accepts the holding of Griffin's
11 Case, that's exactly the regime that we would have,
12 like the Court described.

13 JUSTICE ALITO: Yeah. I don't see there's
14 a tension.

15 JUSTICE KAGAN: But I guess I don't --

16 JUSTICE ALITO: But, also, there's a limit
17 on what one can infer from the mere fact that
18 Congress can lift the disqualification. You can't
19 infer from that that it is impermissible to have a
20 prior determination that the person did engage in the
21 insurrection. You can't make that inference.

22 MR. MITCHELL: Okay.

23 JUSTICE ALITO: It's not logical.

24 JUSTICE KAGAN: Well, but I think --

25 JUSTICE JACKSON: Yet isn't that what

1 you're doing?

2 JUSTICE KAGAN: -- what's -- what's --
3 what's -- what's -- what's in tension is that you
4 would have the exact same actor and say, look, that
5 actor can lift --

6 MR. MITCHELL: Right.

7 JUSTICE KAGAN: -- the disqualification by
8 a two-thirds vote.

9 But you're saying only that actor can put
10 the disqualification into effect in the first place
11 and it can do that by far less than two-thirds. It
12 can do that just by a simple majority of one House.

13 MR. MITCHELL: Or -- or it could do that by
14 doing nothing at all if -- if the holding of
15 Griffin's Case is correct because just --

16 JUSTICE KAGAN: Yes, exactly.

17 MR. MITCHELL: -- congressional inaction
18 would --

19 JUSTICE KAGAN: But that means that there
20 will --

21 MR. MITCHELL: -- effectively act as a --

22 JUSTICE KAGAN: The only thing it takes --

23 MR. MITCHELL: Yeah.

24 JUSTICE KAGAN: -- to have no action --

25 MR. MITCHELL: Right.

1 JUSTICE KAGAN: -- is -- you know, is, you
2 know, half plus one saying we don't feel like it.

3 MR. MITCHELL: But that's why we tried to
4 characterize our Griffin's Case argument the way we
5 did where we rely on preemption doctrines as well.
6 So we have --

7 JUSTICE KAVANAUGH: Well, don't -- don't
8 you think --

9 CHIEF JUSTICE ROBERTS: Why don't we --

10 JUSTICE KAVANAUGH: -- Griffin's Case is
11 also relevant to trying to figure out what the
12 original public meaning of Section 3 of the
13 Fourteenth Amendment is? It's by the Chief Justice
14 of the United States a year after the Fourteenth
15 Amendment. That seems to me --

16 MR. MITCHELL: Yes.

17 JUSTICE KAVANAUGH: -- highly probative of
18 what the meaning or understanding of that language,
19 otherwise elusive language, is.

20 MR. MITCHELL: I do think it's probative,
21 Justice Kavanaugh. We didn't rely too heavily on the
22 point that you're making, partly because we have this
23 other opinion from Justice Chase in the Jefferson
24 Davis case. So that argument could potentially
25 boomerang on us, which is why we didn't push it very

1 hard in our briefing.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 MR. MITCHELL: But I think Your Honor is
4 right. This is --

5 CHIEF JUSTICE ROBERTS: Why don't you
6 finish your sentence and then we'll move on.

7 MR. MITCHELL: Just it is -- it is relevant
8 and probative for sure, but I think there is other
9 evidence too that might perhaps undercut the
10 usefulness of trying to characterize Griffin's Case
11 as completely emblematic of the original
12 understanding.

13 CHIEF JUSTICE ROBERTS: Then why don't we
14 move on to the officer point.

15 MR. MITCHELL: Certainly.

16 CHIEF JUSTICE ROBERTS: And, Justice
17 Jackson, I think you --

18 JUSTICE JACKSON: Yes. So I had a question
19 about it because you're making a textualist argument.

20 MR. MITCHELL: Mm-hmm.

21 JUSTICE JACKSON: And as I look at Section
22 3, I see two parts of the first sentence of Section
23 3.

24 MR. MITCHELL: Mm-hmm.

25 JUSTICE JACKSON: The first is a list of

1 offices that a disqualified person is barred from
2 holding, and the second are specific circumstances
3 that give rise to disqualification.

4 So, first, am I right about seeing that
5 there are two different things happening in the first
6 sentence?

7 MR. MITCHELL: Yes, for sure.

8 JUSTICE JACKSON: Okay. So are you arguing
9 both in this case or just one? Are you arguing both
10 that the office of the presidency should not be
11 considered one of the barred offices --

12 MR. MITCHELL: Mm-hmm.

13 JUSTICE JACKSON: -- and that the person --
14 a person who previously took the presidential oath is
15 not subject to disqualification?

16 MR. MITCHELL: We are arguing both, Your
17 Honor.

18 JUSTICE JACKSON: I don't see that in your
19 brief.

20 MR. MITCHELL: Well --

21 JUSTICE JACKSON: I see a lot of focus on
22 the second but not on the first.

23 MR. MITCHELL: -- there is definitely more
24 focus on the second, and we acknowledge that we have
25 a somewhat heavier lift on the first point just

1 because --

2 JUSTICE JACKSON: Why? It seems to me that
3 you have a list and president is not on it.

4 MR. MITCHELL: That -- that's certainly an
5 argument in our favor, but there are also -- with
6 respect to "officer of the United States," that's
7 used repeatedly in the Constitution in the
8 Commissions Clause, in the Appointments Clause, and
9 also in the Impeachment Clause, and every time it
10 appears, it's used in a way that clearly excludes the
11 president.

12 JUSTICE JACKSON: No, I understand.

13 MR. MITCHELL: So we don't --

14 JUSTICE JACKSON: But that's the second
15 argument.

16 MR. MITCHELL: That is. And the --

17 JUSTICE JACKSON: So the first argument --

18 MR. MITCHELL: Mm-hmm.

19 JUSTICE JACKSON: -- is we have a list of
20 offices --

21 MR. MITCHELL: Yes.

22 JUSTICE JACKSON: -- that a person is
23 barred from holding, right --

24 MR. MITCHELL: Yes.

25 JUSTICE JACKSON: -- under your theory or

1 under the -- the language of --

2 MR. MITCHELL: Mm-hmm.

3 JUSTICE JACKSON: -- and we see it begins
4 with senator, representative, elector --

5 MR. MITCHELL: Elector.

6 JUSTICE JACKSON: -- of the president and
7 vice president, and all other civil or military
8 officers -- offices.

9 MR. MITCHELL: Well, offices under the
10 United States --

11 JUSTICE JACKSON: Offices under the United
12 States.

13 MR. MITCHELL: -- is how it's phrased.

14 JUSTICE JACKSON: But the word "president
15 or vice president" does not in it appear -- not
16 appear specifically --

17 MR. MITCHELL: That's right.

18 JUSTICE JACKSON: -- in that list. So I
19 guess I'm trying to understand, are you giving up
20 that argument?

21 MR. MITCHELL: No.

22 JUSTICE JACKSON: And, if so, why?

23 MR. MITCHELL: No, we're not giving it up
24 at all. You're right, the president and the vice
25 president are not specifically listed, but the

1 Anderson litigants claim that they are encompassed
2 within the meaning of the phrase "office under the
3 United States." And that --

4 JUSTICE JACKSON: And do you agree that --
5 that the Framers would have put such a high and
6 significant and important office, sort of smuggled it
7 in through that catch-all phrase?

8 MR. MITCHELL: No, we don't agree at all.
9 That's why we're still making the argument that the
10 presidency is excluded from the covered offices that
11 are listed at the beginning of Section 3.

12 JUSTICE SOTOMAYOR: I -- I'm sorry, your
13 brief says you didn't take a position on that point.

14 MR. MITCHELL: I'm sorry.

15 JUSTICE SOTOMAYOR: And your brief said --
16 I don't have the -- the cite, I -- I apologize.

17 MR. MITCHELL: Okay.

18 JUSTICE SOTOMAYOR: You don't affirmatively
19 argue that point I think is what your brief said.

20 MR. MITCHELL: In the blue brief?

21 JUSTICE SOTOMAYOR: Yes.

22 MR. MITCHELL: Well, we certainly argued it
23 in the reply brief, and I'll have to look at what we
24 -- how we phrased it. But we did point out in our
25 opening brief that there are potential issues if this

1 Court were to rule on "office under" because that
2 phrase appears in other parts of the Constitution,
3 including the Emoluments Clause, the Impeachment
4 Disqualification Clause, and it would --

5 JUSTICE JACKSON: Would we necessarily have
6 to say -- I mean, I thought -- I thought the point
7 was that Section 3 was unique, that there was
8 something happening with Section 3 that could explain
9 why certain offices were left off or whatnot.

10 MR. MITCHELL: Perhaps, but there are also
11 implications from other parts of the Constitution
12 which really help us on the "officer of the United
13 States" argument in that second part of Section 3 but
14 somewhat cut against us when it comes to "office
15 under the United States."

16 And the Anderson litigants point this out
17 in Footnote 9 in the red brief where they say, if
18 this Court were to say the presidency is an excluded
19 office under the United States, that could imply, for
20 example, the president is not covered by the
21 Emoluments --

22 JUSTICE GORSUCH: Mr. -- Mr. Mitchell --

23 MR. MITCHELL: Yes.

24 JUSTICE GORSUCH: -- stepping back on this

25 --

1 MR. MITCHELL: Mm-hmm.

2 JUSTICE GORSUCH: -- a -- a lot hinges on
3 the difference between -- in your argument between
4 the term "office" and "officer."

5 MR. MITCHELL: Yes.

6 JUSTICE GORSUCH: And I -- I -- I guess I'm
7 wondering what theory do you have from an original
8 understanding or a textualist perspective --

9 MR. MITCHELL: Mm-hmm.

10 JUSTICE GORSUCH: -- why those two terms so
11 closely related would carry such different weight?

12 MR. MITCHELL: Because it's clear from the
13 constitutional text that there are officers that do
14 not hold offices under the United States, for
15 example, the Speaker of the House and the President
16 Pro Tempore. They're described as officers in
17 Article I who are chosen by the legislature.

18 They also have to be officers if they're
19 able to be covered by the Presidential Succession Act
20 because, under the Constitution, only officers can
21 serve when there's a vacancy in both the presidency
22 and the vice presidency.

23 So they're officers, but they're not
24 offices under the United States because of the
25 Incompatibility Clause, which says that if you're a

1 member of Congress, you cannot simultaneously hold an
2 office under the United States. So that provision of
3 the Constitution clearly demonstrates that --

4 JUSTICE GORSUCH: I -- I --

5 MR. MITCHELL: -- members of Congress can't
6 hold offices.

7 JUSTICE GORSUCH: -- I -- I appreciate that
8 response. Is -- is there anything in the original
9 drafting, history, discussion that you think
10 illuminates why that distinction would carry such
11 profound weight?

12 MR. MITCHELL: Not -- not of which we're
13 aware. So these are textual inferences that we're
14 drawing --

15 JUSTICE GORSUCH: Yeah.

16 MR. MITCHELL: -- from constitutional
17 structure, intratextualist analysis.

18 JUSTICE GORSUCH: Yeah.

19 MR. MITCHELL: But we aren't relying
20 necessarily on the thought processes of the people
21 who drafted these provisions because they're
22 unknowable. But, even if they were knowable, we're
23 not sure they would be relevant in any event because
24 this language, especially in Section 3, was enacted
25 as a compromise.

1 There were certainly radical Republicans
2 who wanted to go much further. If you look at some
3 of the earlier drafts that were proposed, some people
4 wanted to ban all insurrectionists from holding
5 office regardless of whether they previously swore an
6 oath. Some people wanted to go further and ban them
7 even from voting. And --

8 CHIEF JUSTICE ROBERTS: Thank you. Thank
9 you, counsel.

10 I just have one very technical question.
11 The statute in 1870, if it were still in effect,
12 would require you to modify your arguments slightly.
13 It was repealed, as you say, in 1948.

14 I tried to find it, but I couldn't. Do you
15 know why it was repealed?

16 MR. MITCHELL: No, we don't know why. It
17 looks like it was done as part of a reorganization of
18 the U.S. Code, so it doesn't appear there was any
19 policy motivation behind that decision. I think a
20 lot of things got repealed during the 1948 decisions
21 that were made.

22 CHIEF JUSTICE ROBERTS: Okay.
23 Justice Thomas, anything further?

24 Justice Alito?

25 JUSTICE ALITO: Is there any history of

1 states using Section 3 as a way to bar federal
2 officeholders?

3 MR. MITCHELL: Not that I'm aware, Justice
4 Alito, because of Griffin's Case. I mean, Griffin's
5 Case has been the law -- I shouldn't say that it's
6 been the law because it was just a circuit court
7 decision, but that has been the settled understanding
8 of Section 3 since 1870 when it was decided.

9 JUSTICE ALITO: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

11 JUSTICE SOTOMAYOR: I just want to pin down
12 your principal argument on Section 3. You argue that
13 even though the president may or may not qualify --
14 presidency may or may not qualify as an office under
15 the United States, your principal argument is that
16 the president is not an officer of the United States,
17 correct?

18 MR. MITCHELL: Yeah, I would say it a
19 little more forcefully than what Your Honor just
20 described. We believe the presidency is excluded
21 from "office under the United States," but the
22 argument we have that he's excluded, the president,
23 as an officer of the United States is the stronger of
24 the two textually.

25 JUSTICE SOTOMAYOR: Ah.

1 MR. MITCHELL: It has fewer implications
2 for other constitutional --

3 JUSTICE SOTOMAYOR: A bit of a
4 gerrymandered rule, isn't it, designed to benefit
5 only your client?

6 MR. MITCHELL: I certainly wouldn't call it
7 gerrymandered. That implies nefarious intent. We're
8 --

9 JUSTICE SOTOMAYOR: Well, that you didn't
10 make it up. I know some scholars have been
11 discussing it. But just so we're clear, under that
12 reading, only -- only the Petitioner is disqualified
13 because virtually every other president except
14 Washington --

15 MR. MITCHELL: Mm-hmm.

16 JUSTICE SOTOMAYOR: -- has taken an oath to
17 support the Constitution, correct?

18 MR. MITCHELL: That's right. Every
19 president -- to our knowledge, every other president
20 -- John Adams might also be excluded because he took
21 the oath as a vice president, which is not an officer
22 -- but, yes, President Biden would certainly be
23 covered. He took the oath as a member of Congress.
24 And that's true of every previous president.

25 JUSTICE SOTOMAYOR: Would that be true if

1 we were to hold more narrowly in a reversal that it's
2 not Section 3 that's at issue but Thornton and others
3 as to whether Section 3 can be enforced by states
4 against the president?

5 MR. MITCHELL: That would extend to every
6 presidential candidate --

7 JUSTICE SOTOMAYOR: Exactly.

8 MR. MITCHELL: -- not just our client.
9 That's correct.

10 JUSTICE SOTOMAYOR: Not just to yours.

11 MR. MITCHELL: Yes.

12 JUSTICE SOTOMAYOR: Okay. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: If I could just understand,
15 I mean, given that you say you don't have a lot of
16 evidence that the founding generation -- or the
17 generation that we're looking at is really thinking
18 about "office" versus "officer of the United States,"
19 I mean, it -- it -- it would suggest that we should
20 ask what -- is that rule a sensible one? You know,
21 if they had thought about it, what reason would they
22 have given for that rule?

23 And it does seem as though there -- there's
24 no particular reason, and you can think of lots of
25 reasons for the contrary --

1 MR. MITCHELL: Right.

2 JUSTICE KAGAN: -- to say that the only
3 people who have engaged in insurrection who are not
4 disqualified from office are presidents who have not
5 held high office before. Why would that rule exist?

6 MR. MITCHELL: Yeah. I don't think there
7 is a good rationale given that this was compromise
8 legislation. And sometimes this happens with
9 statutory compromises and even constitutional
10 compromises. There's an agreed-upon set of words
11 that can pass both Houses of Congress, but different
12 legislators may have had goals and motivations. They
13 didn't all get their way. In a compromise, everyone
14 goes away miserable.

15 But this was the text that was settled
16 upon. And it does seem odd that President Trump
17 would fall through the cracks in a sense, but if
18 "officer of the United States" means appointed
19 officials, there's just no way he can be covered
20 under Section 3. The Court would have to reject our
21 officer argument to get to that point.

22 JUSTICE KAGAN: And is there any better
23 reason, if you go to the office argument that Justice
24 Jackson was suggesting, is there any better reason
25 for saying that an insurrectionist cannot hold the

1 whole panoply of offices in the United States, but
2 we're perfectly fine with that insurrectionist being
3 president?

4 MR. MITCHELL: I think that's an even
5 tougher argument for us to make as a policy matter
6 because one would think, of all offices, the
7 presidency would be the one you'd want to keep out
8 the Confederate insurrectionists. That's the
9 commander-in-chief of the Army. So, again, that's
10 why we're leaning more on the "officer of" argument
11 than the "office under."

12 We're not conceding "office under," but we
13 definitely have the stronger textual case and
14 structural case on "officer of the United States."

15 JUSTICE KAGAN: Thank you.

16 MR. MITCHELL: Thanks.

17 CHIEF JUSTICE ROBERTS: Justice Gorsuch?

18 JUSTICE GORSUCH: Do you want to respond to
19 some of the specific textual arguments on the
20 "officer of" with respect to the Appointments Clause,
21 the Impeachment Clause, and some of the others?

22 MR. MITCHELL: Yeah. So the way -- let's
23 start with --

24 JUSTICE GORSUCH: But why --

25 MR. MITCHELL: Well, I'll start with the

1 Commissions Clause.

2 JUSTICE GORSUCH: The ball has been
3 bouncing --

4 MR. MITCHELL: Yeah.

5 JUSTICE GORSUCH: -- on that back and
6 forth, and I wanted to see where you landed today.

7 MR. MITCHELL: There are three textual
8 inferences that could be drawn from each of those
9 provisions Your Honor just mentioned, but the
10 Commissions Clause, I think, is the strongest because
11 it says "the president shall," you know, "commission
12 all the officers of the United States." "Shall" is
13 mandatory. "All" is all-encompassing. And the
14 president doesn't commission himself, and he can't
15 commission himself. So that's one of the first
16 problems.

17 I think the Anderson litigants are trying
18 to say, you know, there's somehow an implied
19 exception there because the president obviously can't
20 commission himself, so we should construe that to
21 mean all officers of the United States besides the
22 president. But you also have members of Congress who
23 are not commissioned by the president, and that's
24 because they're not officers of the United States.

25 So the only sensible distinction that we

1 can see, given the language of the Commissions
2 Clause, is that officers of the United States are
3 appointed officials, and elected officials, such as
4 members of Congress and the president and the vice
5 president, are not.

6 And the Impeachment Clause reinforces that.
7 The president, the vice president, and all civil
8 officers of the United States shall be removed from
9 office upon impeachment for and conviction of all
10 high crimes and misdemeanors. The president and the
11 vice president are listed separately from officers of
12 the United States.

13 And then, of course, the Appointments
14 Clause, we know the president is not appointed
15 pursuant to Article II. Neither is the vice
16 president. Neither are members of Congress. So they
17 can't be officers either.

18 JUSTICE GORSUCH: And how does Article I,
19 Section 6, fit into this discussion?

20 MR. MITCHELL: And this is about officers
21 being in the line of succession?

22 JUSTICE GORSUCH: Yes, exactly.

23 MR. MITCHELL: Right. So you have to be an
24 officer to be in the line of succession. We have a
25 federal statute that puts the Speaker and the

1 President Pro Tempore in the line of succession.
2 They are officers. But they're not officers of the
3 United States because they're not subject to
4 impeachment, they're not commissioned by the
5 president, and they're not appointed pursuant to
6 Article II.

7 So there is this gap between the term
8 "officer" and the phrase "officers of the United
9 States," reinforcing the idea that "officers of the
10 United States" is a term of art that doesn't refer
11 just to federal officeholders, which is what the
12 Anderson litigants are claiming, but refers only to
13 those who are appointed, not to those who are
14 elected.

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

17 JUSTICE KAVANAUGH: Can I just make sure I
18 understand how you're using Griffin's Case again?
19 Section 3 refers to insurrection and raises questions
20 about who decides what processes are to be used.
21 That's ratified in 1868. The next year, Chief
22 Justice Chase opines that states do not have the
23 authority, that only Congress has the authority to
24 enforce that. That could be evidence, as you say, of
25 the original public meaning, at least some evidence.

1 MR. MITCHELL: Mm-hmm.

2 JUSTICE KAVANAUGH: It's a precedent,
3 although not binding. But your point then is it's
4 reinforced because Congress itself relies on that
5 precedent in the Enforcement Act of 1870 and forms
6 the backdrop against which Congress does legislate.
7 And then, as Justice Alito says, the historical
8 practice for 155 years has been that that's the way
9 it's gone. There hasn't -- there haven't been state
10 attempts to enforce disqualification under Section 3
11 against federal officers in the years since.

12 MR. MITCHELL: Right.

13 JUSTICE KAVANAUGH: So whether that's a
14 Federalist 37 liquidation argument, it all reinforces
15 what happened back in 1868, 1869, and 1870.

16 MR. MITCHELL: Right.

17 JUSTICE KAVANAUGH: Do you want to add to
18 that, alter that?

19 MR. MITCHELL: No, I think that's exactly
20 right. And the last part you mentioned, Your Honor,
21 is crucial to our argument, that Congress relied on
22 Griffin's Case. It provided the backdrop against
23 which they legislated, which is why we should read
24 these extant enforcement mechanisms -- and, right
25 now, the only one left is the federal insurrection

1 statute, 2383 -- as exclusive of state court
2 remedies. It's a -- it's a form of implied
3 preemption, almost Sea Clammers implicit preemption
4 of other remedies, because Congress made these
5 decisions in explicit reliance on Griffin's Case.

6 JUSTICE KAVANAUGH: And if we agree with
7 you on Griffin's Case and what you've elaborated on
8 there, that's the end of the case, right?

9 MR. MITCHELL: It should be, yes, unless
10 Congress decides to enact a statute, which we can't
11 --

12 JUSTICE KAVANAUGH: A new --

13 MR. MITCHELL: -- rule out the possibility.

14 JUSTICE KAVANAUGH: -- a new statute in
15 addition to 2383. And just to be clear, under 2383,
16 you agree that someone could be prosecuted for
17 insurrection by federal prosecutors and, if
18 convicted, could be or shall be disqualified then
19 from office?

20 MR. MITCHELL: Yes. But the only caveat
21 that I would add is that our client is arguing that
22 he has presidential immunity. So we would not
23 concede that he can be prosecuted for what he did on
24 January 6th under 2383.

25 JUSTICE KAVANAUGH: Understood. Asking --

1 MR. MITCHELL: Yes.

2 JUSTICE KAVANAUGH: -- the question about
3 the theory of 2383. Thank you.

4 MR. MITCHELL: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Barrett?

6 JUSTICE BARRETT: So Griffin's Case was a
7 collateral proceeding, so it's habeas relief.

8 MR. MITCHELL: Yes.

9 JUSTICE BARRETT: Could Griffin have -- so
10 even if Section 3 is not a basis for collateral
11 relief in habeas, which was new at the time, could
12 Griffin have raised at his trial or in direct appeal
13 the argument that Sheffey, Judge Sheffey, you know,
14 you can't legitimately sit -- or constitutionally sit
15 on my case because you're an insurrectionist and
16 you're disqualified? Could he have won then?

17 MR. MITCHELL: No.

18 JUSTICE BARRETT: Why?

19 MR. MITCHELL: Not if -- not if Griffin's
20 Case is correct. So a court would have to reject the
21 rationale of Griffin's Case to accept what Your Honor
22 was suggesting.

23 JUSTICE BARRETT: Well, why? Like I said,
24 Griffin's Case -- I mean, I think there's some
25 language that might be a little bit broad --

1 MR. MITCHELL: Mm-hmm.

2 JUSTICE BARRETT: -- but, at bottom,
3 Griffin's Case is about a collateral habeas
4 proceeding. And Griffin had brought his case after
5 the fact. He needed a cause of action.

6 Why wouldn't it work in a trial for him to
7 challenge Sheffey's constitutional ability to
8 adjudicate his case?

9 MR. MITCHELL: What Griffin's Case holds is
10 that only Congress can provide the means of enforcing
11 Section 3. And under Your Honor's hypothetical,
12 Congress has not enacted any such statute that would
13 give Mr. Griffin the right to raise those types of
14 arguments at his trial. So he would have to await
15 legislation from Congress.

16 JUSTICE BARRETT: Okay. Let's assume that
17 I disagree with you about the officer argument, so
18 Section 3 covers President Trump. Let's say that
19 Congress enacts a quo warranto provision that would
20 allow a state or I guess it doesn't really matter for
21 this purpose, even -- even a federal prosecutor, to
22 bring such an action against him to remove him from
23 office --

24 MR. MITCHELL: Mm-hmm.

25 JUSTICE BARRETT: -- in a quo warranto way.

1 Wouldn't that be in some tension with
2 impeachment? He would be extracted from office
3 outside of the process of impeachment. Couldn't then
4 President Trump simply say, well, the only way to get
5 me out of office is the impeachment process and not
6 this quo warranto action?

7 MR. MITCHELL: So I don't know how that
8 would play out because the quo warranto actions that
9 were brought that I'm aware of under the 1870
10 Enforcement Act were brought against state officials.
11 And Your Honor's impeachment hypothetical would apply
12 not only to the president but any federal --

13 JUSTICE BARRETT: I know.

14 MR. MITCHELL: -- officer of the United
15 States.

16 JUSTICE BARRETT: I know.

17 MR. MITCHELL: So I don't know how that
18 played out in the courts and whether anyone ever
19 tried to argue that impeachment was the exclusive
20 remedy for --

21 JUSTICE BARRETT: Well, I don't think
22 anybody did argue it. I guess what I'm asking is,
23 you know, you said it's Congress's exclusive
24 province.

25 MR. MITCHELL: Yes.

1 JUSTICE BARRETT: And you also said that it
2 has to apply, you know, after one is holding office,
3 is elected. And I'm asking whether then the
4 implication of your argument is that Congress could
5 not enact such a provision that applied against
6 federal officeholders that were covered by Section 3
7 as opposed to state ones?

8 MR. MITCHELL: I believe they could. The
9 Impeachment Clause says that the president, the vice
10 president, and also the officers of the United States
11 shall be removed from office upon impeachment and
12 conviction. But it doesn't say that's the only way
13 you can remove them.

14 I mean, Congress can defund a position and
15 effectively, it's not quite the same as formal
16 removal, but the other relevant precedent is Stuart
17 against Laird when the Jeffersonians repealed the
18 Midnight Judges Act and abolished all of these
19 positions for federal judges. And some people
20 thought that was unconstitutional because they
21 thought the only way you could eliminate federal
22 judges was through impeachment, but Chief Justice
23 Marshall upheld that statute.

24 So that to me is a relevant precedent
25 showing that impeachment is not the only way to get

1 rid of a federal official.

2 JUSTICE BARRETT: Okay. Let me just ask
3 one question, and this is just a point of
4 clarification.

5 Does President Trump have any kind of due
6 process right here? I mean, I'm wondering, this kind
7 of goes not to the cause of action point or the
8 preemption point but more to the question of what
9 procedures he might have been entitled to. You don't
10 make the argument that he was entitled to any, nor
11 did I see the argument that he had any kind of
12 constitutionally protected right to ballot access so
13 that he was, you know, constitutionally entitled to
14 an opportunity to be heard. Is that right?

15 MR. MITCHELL: We -- we made --

16 JUSTICE BARRETT: He had no due process
17 right?

18 MR. MITCHELL: We made that argument below.
19 We did not make that in our briefs to this Court for
20 several reasons. I mean, Your Honor's, I think,
21 suggesting and this is correct that the proceedings
22 below, to put it charitably, were highly irregular.

23 JUSTICE BARRETT: Well, I wasn't suggesting
24 that. I was just asking --

25 MR. MITCHELL: I'm sorry. The question --

1 JUSTICE BARRETT: Yeah.

2 MR. MITCHELL: -- seems to suggest that
3 there might be due process issues. But we didn't
4 develop that argument in this Court for several
5 issues. Winning on due process doesn't really do as
6 much for our client as the other arguments that we've
7 made because that would be a ruling specific to this
8 particular proceeding in the State of Colorado and
9 would leave the door open for Colorado to continue on
10 remand to exclude him from the ballot.

11 JUSTICE BARRETT: Okay. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Jackson?

13 JUSTICE JACKSON: Going back to whether the
14 presidency is one of the barred offices, I -- I guess
15 I'm a little surprised at your response to Justice
16 Kagan because I thought that the history of the
17 Fourteenth Amendment actually provides the reason for
18 why the presidency may not be included.

19 And by that, I mean I didn't see any
20 evidence that the presidency was top of mind for the
21 Framers when they were drafting Section 3 because
22 they were actually dealing with a different issue.

23 The pressing concern, at least as I see the
24 historical record, was actually what was going on at
25 lower levels of the government, the possible

1 infiltration and embedding of insurrectionists into
2 the state government apparatus and the real risk that
3 former Confederates might return to power in the
4 South via state-level elections either in local
5 offices or as representatives of the states in
6 Congress. And that's a very different lens.

7 Your concern is trying to make sure that
8 these people don't come back through the state
9 apparatus and control the government in that
10 direction seems to me very different than the worry
11 that an insurrectionist will seize control of the
12 entire national government through the presidency.

13 And so I just am surprised that you would
14 -- given the text of the provision and the historical
15 context that seems to demonstrate that their concern
16 or their focus was not about the presidency, I just
17 don't understand why you're giving that argument up.

18 MR. MITCHELL: There -- there is some
19 evidence to suggest that, Justice Jackson, but --

20 JUSTICE JACKSON: Is there any evidence to
21 suggest that the presidency was what they were
22 focused on?

23 MR. MITCHELL: There is some evidence of
24 that. There were people saying we don't want
25 Jefferson Davis to be elected president, and there

1 was also -- one of the drafts of Section 3
2 specifically mentioned the presidency and the vice
3 presidency --

4 JUSTICE JACKSON: But it wasn't the final
5 --

6 MR. MITCHELL: -- as an office.

7 JUSTICE JACKSON: -- but it wasn't the
8 final enactment. So where do you --

9 MR. MITCHELL: It -- it wasn't the final --
10 it wasn't --

11 JUSTICE JACKSON: Right.

12 MR. MITCHELL: I'm sorry. It wasn't the
13 final enactment, but it does show that there was some
14 concern by some people about Confederate
15 insurrectionists ascending to the presidency.

16 And we didn't want to make a law office
17 history type argument where we just look at the
18 historical evidence and pick the evidence that we
19 like and interpret it tendentiously because the other
20 side can come back with us and throw the
21 countervailing evidence back in our face.

22 So we wanted to focus more on the text of
23 the Constitution because this was ultimately a
24 compromise provision that was enacted in Section 3,
25 and --

1 JUSTICE JACKSON: All right. Let me ask
2 you another question --

3 MR. MITCHELL: Mm-hmm.

4 JUSTICE JACKSON: -- about the states
5 because you have forcefully made an argument about
6 the states not being able to enforce Section 3.

7 So, if we agree with you on that, what
8 happens next? I mean, I thought you also wanted us
9 to end the litigation. So is there a possibility
10 that this case continues in federal court if that's
11 our conclusion?

12 MR. MITCHELL: I don't see how it could
13 unless Congress were to enact a statute in response
14 to this Court's decision.

15 JUSTICE JACKSON: So your point is that it
16 would -- we would have to say congressional enacting
17 legislation is necessary for either state or federal
18 enforcement?

19 MR. MITCHELL: That's correct.

20 JUSTICE JACKSON: All right. Final
21 question. The Colorado Supreme Court concluded that
22 the violent attempts of the Petitioner's supporters
23 in this case to halt the count on January 6th
24 qualified as an insurrection as defined by Section 3.

25 And I read your opening brief to accept

1 that those events counted as an insurrection, but
2 then your reply seemed to suggest that they were not.

3 So what is your position as to that?

4 MR. MITCHELL: Oh, we -- we never accepted
5 or conceded in our opening brief that this was an
6 insurrection. What we said in our opening brief was
7 President Trump did not engage in any act that can
8 plausibly be characterized as insurrection because he
9 did not engage --

10 JUSTICE JACKSON: All right. So why would
11 this not be an -- what is your argument that it's not
12 -- your reply brief says that it wasn't because, I
13 think, you say, it did not involve an organized
14 attempt to overthrow the government. So --

15 MR. MITCHELL: Right. That's one of many
16 reasons. But, for an insurrection, there needs to be
17 an organized, concerted effort to overthrow the
18 government of the United States through violence.
19 And this riot that occurred --

20 JUSTICE JACKSON: So your point is that a
21 chaotic effort to overthrow the government is not an
22 insurrection?

23 MR. MITCHELL: No, we didn't concede that
24 it's an effort to overthrow the government either,
25 Justice Jackson. None of these criteria were met.

1 This was a riot. It was not an insurrection. The
2 events were shameful, criminal, violent, all of those
3 things, but it did not qualify as insurrection as
4 that term is used in Section 3 --

5 JUSTICE JACKSON: Thank you.

6 MR. MITCHELL: -- because -- thanks.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 MR. MITCHELL: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Murray.

10 ORAL ARGUMENT OF JASON C. MURRAY

11 ON BEHALF OF RESPONDENTS ANDERSON, ET AL.

12 MR. MURRAY: Mr. Chief Justice, and may it
13 please the Court:

14 We are here because, for the first time
15 since the War of 1812, our nation's capitol came
16 under violent assault. For the first time in
17 history, the attack was incited by a sitting
18 president of the United States to disrupt the
19 peaceful transfer of presidential power.

20 By engaging in insurrection against the
21 Constitution, President Trump disqualified himself
22 from public office. As we heard earlier, President
23 Trump's main argument is that this Court should
24 create a special exemption to Section 3 that would
25 apply to him and to him alone. He says Section 3

1 disqualifies all oath-breaking insurrectionists,
2 except a former president who never before held other
3 state or federal office.

4 There is no possible rationale for such an
5 exemption, and the Court should reject the -- the
6 claim that the Framers made an extraordinary mistake.
7 Section 3 uses deliberately broad language to cover
8 all positions of federal power requiring an oath to
9 the Constitution.

10 My friend relies on a claimed difference
11 between "an office under" and "an officer of the
12 United States," but this case does not come down to
13 mere prepositions. The two phrases are two sides of
14 the same coin, referring to any federal office or to
15 anyone who holds one.

16 President Trump's other arguments for
17 reversal ignore the constitutional role of the states
18 in running presidential elections. Under Article II
19 and the Tenth Amendment, states have the power to
20 ensure that their citizens' electoral votes are not
21 wasted on a candidate who is constitutionally barred
22 from holding office.

23 States are allowed to safeguard their
24 ballots by excluding those who are under age,
25 foreign-born, running for a third presidential term,

1 or, as here, those who have engaged in insurrection
2 against the Constitution, in violation of their oath.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Do you have
5 contemporaneous examples -- and by contemporaneous, I
6 mean shortly after the adoption of the Fourteenth
7 Amendment -- where the states disqualified national
8 candidates, not its own candidates, but national
9 candidates?

10 MR. MURRAY: The only example I can think
11 of, Justice Thomas, is the example of governor -- of
12 -- of Congressman Christy, who was elected in Georgia
13 in I believe 1868, and the governor of Georgia
14 refused -- or -- or declined to certify the results
15 of that election because Mr. Christy was
16 disqualified.

17 But I think it's not surprising that there
18 are few examples because we didn't have ballots in
19 the same way back then. Candidates were either
20 write-in or they were party ballots, so the states
21 didn't run the ballots in the same way, and there
22 wouldn't have been a process for determining before
23 an election whether a candidate was qualified, unlike
24 the processes that we have now that states have
25 created under their Article I and Article II powers

1 to run elections.

2 JUSTICE THOMAS: But it would seem that
3 particularly after Reconstruction and after the
4 Compromise of 1877 and during the period of Redeemers
5 that you would have that kind of conflict. There
6 were a plethora of Confederates still around. There
7 were any number of people who would continue to
8 either run for state offices or national offices.

9 So it would seem -- that would suggest that
10 there would at least be a few examples of national
11 candidates being disqualified if your reading is
12 correct.

13 MR. MURRAY: Well, there were certainly
14 national candidates who were disqualified by Congress
15 refusing to seat them.

16 JUSTICE THOMAS: I understand that, but
17 that's not this case. I'm talking -- did states
18 disqualify them? That's what we're talking about
19 here. I understand Congress would not seat them.

20 MR. MURRAY: Other than the example I gave,
21 no, but, again, Your Honor, that's not surprising
22 because there wouldn't have been -- states certainly
23 wouldn't have the authority to remove a sitting
24 federal officer.

25 JUSTICE THOMAS: So what's the purpose of

1 the -- what was the purpose of the -- of Section 3?
2 The states were sending people -- the concern was
3 that the former Confederate states would continue
4 being bad actors, and the effort was to prevent them
5 from doing this.

6 And you're saying that, well, this also
7 authorized states to disqualify candidates. So what
8 I'm asking you for, if you are right, what are the
9 examples?

10 MR. MURRAY: Well, Your Honor, the examples
11 are states excluded many candidates for state office,
12 individuals holding state offices. We have a number
13 of published cases of states concerning that.

14 JUSTICE THOMAS: I understand that. I -- I
15 understand the states controlling state elections and
16 state positions. What we are talking about here are
17 national candidates.

18 The -- I understand. You look at Foner or
19 Foote, Shelby Foote, or McPherson, they all talk
20 about, of course, the conflict after the Civil War,
21 and there were people who felt very strongly about
22 retaliating against the South, the radical
23 Republicans, but they did not think about authorizing
24 the South to disqualify national candidates.

25 And that's the argument you're making, and

1 what I would like to know is you give -- is do you
2 have any examples of this?

3 MR. MURRAY: Many of those historians have
4 filed briefs in our support in this case, making the
5 point that the -- the -- the idea of the Fourteenth
6 Amendment was that both states and the federal
7 government would ensure rights and that if states
8 failed to do so, the federal government certainly
9 would also step in.

10 But I think the reason why there aren't
11 examples of states doing this is an idiosyncratic one
12 of the fact that elections worked differently back
13 then. States have a background power under Article
14 II and the Tenth Amendment to run presidential
15 elections. They didn't use that power to police
16 ballot access until about the 1890s. And by the
17 1890s, everyone had received amnesty and these issues
18 had become moot. So I don't think the history tells
19 us --

20 CHIEF JUSTICE ROBERTS: Counsel, I'd like
21 to sort of look at Justice Thomas's question sort of
22 from the 30,000-foot level. I mean, the whole point
23 of the Fourteenth Amendment was to restrict state
24 power, right? States shall not abridge privilege of
25 immunity, they won't deprive people of property

1 without due process, they won't deny equal
2 protection. And on the other hand, it augmented
3 federal power under Section 5. Congress has the
4 power to enforce it.

5 So wouldn't that be the last place that
6 you'd look for authorization for the states,
7 including Confederate states, to enforce --
8 implicitly authorize to enforce the presidential
9 election process? That -- that seems to be a
10 position that is at -- at war with the whole thrust
11 of the Fourteenth Amendment and very ahistorical.

12 MR. MURRAY: No, Your Honor. First, we
13 would locate the states' authority to run
14 presidential elections not in the Fourteenth
15 Amendment but in Article II. And that power is
16 nearly plenary to determine the means --

17 CHIEF JUSTICE ROBERTS: Yeah, but you're
18 relying on -- you have no reliance on Section 3, is
19 that what you're saying?

20 MR. MURRAY: No, Your Honor. Certainly, we
21 have reliance on Section 3 insofar as Article II
22 gives states this broad power to determine how their
23 electors are selected, and that broad power implies
24 the narrower power to enforce federal constitutional
25 qualifications like mentioned in the brief.

1 CHIEF JUSTICE ROBERTS: Well, but the
2 narrower power you're looking for is the power of
3 disqualification, right? That is a very specific
4 power in the Fourteenth Amendment. And you're saying
5 that was implicitly extended to the states under a
6 clause that doesn't address that at all?

7 MR. MURRAY: We would say that nothing in
8 the Fourteenth Amendment takes away from the states
9 their broad and nearly plenary power to determine the
10 manner of selecting their electors in the manner that
11 they see fit. As this Court said in *Chiafalo*, that
12 power is nearly plenary unless something in the
13 Constitution tells states they can't do it.

14 And -- and the structure of the Fourteenth
15 Amendment certainly was intended to expand federal
16 power and certainly to restrict state power in some
17 ways, but states are bound to enforce and apply, for
18 example, Section 1 of the Fourteenth Amendment. And
19 so it's hard to see why states wouldn't be similarly
20 bound or at least authorized --

21 JUSTICE KAVANAUGH: But that's -- that's a
22 --

23 JUSTICE KAGAN: Well, just --

24 JUSTICE KAVANAUGH: -- "greater includes
25 the lesser" argument. The -- the states have the

1 power, the legislature has the power to choose
2 electors. Granted. But just because there's one
3 authorized means in the Constitution to a particular
4 end does not mean that there's any means to that end.

5 And so I think you're taking that electors
6 argument and bringing it into Section 3, where, as
7 the Chief Justice says, there's just no -- and
8 Justice Thomas, there's no historical evidence to
9 support kind of the theory of Section 3, nor the
10 overall -- to explain the overall structure of -- of
11 the Fourteenth Amendment.

12 MR. MURRAY: We certainly have a long
13 history in this country of states using their power
14 to determine the manner of selecting presidential
15 electors to enforce other qualifications in the
16 Constitution. I don't -- I don't take it there's a
17 great debate about whether or not states are allowed
18 to exclude underaged or foreign-born candidates or,
19 if President Bush or Obama wanted to run for a third
20 term, that they could be excluded under that broad
21 Article II power.

22 I don't see why Section 3 should be treated
23 any differently. Section 3 speaks in the same
24 mandatory terms.

25 JUSTICE KAVANAUGH: Well, when you look at

1 Section 3, the term "insurrection" jumps out, and the
2 question is -- the questions are: What does that
3 mean? How do you define it? Who decides? Who
4 decides whether someone engaged in it? What
5 processes -- as Justice Barrett alluded to, what
6 processes are appropriate for figuring out whether
7 someone did engage in that?

8 And that's all what Chief Justice Chase
9 focused on a year after the Fourteenth Amendment to
10 say these are difficult questions and you look right
11 at Section 5 of the Fourteenth Amendment, as the
12 Chief Justice said, and that tells you Congress has
13 the primary role here.

14 I think what's different is -- is the
15 processes, the definition, who decides questions
16 really jump out at you when you look at Section 3.

17 MR. MURRAY: Cert --

18 JUSTICE KAVANAUGH: Your response to that?

19 MR. MURRAY: Well, certainly, Justice
20 Kavanaugh, there has to be some process for
21 determining those questions, and then the question
22 becomes, does anything in the Fourteenth Amendment
23 say that only Congress can create that process? And
24 Section 5 very clearly is not an exclusive provision.
25 It says Congress shall have power. And --

1 JUSTICE KAGAN: But maybe put most baldly,
2 I think that the question that you have to confront
3 is why a single state should decide who gets to be
4 president of the United States. In other words, you
5 know, this question of whether a former president is
6 disqualified for insurrection to be president again
7 is, you know, just say it, it sounds awfully national
8 to me. So whatever means there are to enforce it
9 would suggest that they have to be federal, national
10 means.

11 Why does -- you know, if you weren't from
12 Colorado and you were from Wisconsin or you were from
13 Michigan and it really -- you know, what the Michigan
14 secretary of state did is going to make the
15 difference between, you know, whether Candidate A is
16 elected or Candidate B is elected, I mean, that seems
17 quite extraordinary, doesn't it?

18 MR. MURRAY: No, Your Honor, because,
19 ultimately, it's this Court that's going to decide
20 that question of federal constitutional eligibility
21 and settle the issue for the nation. And, certainly,
22 it's not unusual that questions of national
23 importance come up through different states.

24 JUSTICE KAGAN: Well, I suppose this Court
25 would be saying something along the lines of that a

1 state has the power to do it. But I guess I was -- I
2 was asking you to go a little bit further in saying
3 why should that be the right rule. Why should a
4 single state have the ability to make this
5 determination not only for their own citizens but for
6 the rest of the nation?

7 MR. MURRAY: Because Article II gives them
8 the power to -- to appoint their own electors as they
9 see fit. But, if they're going to use a federal
10 constitutional qualification as a ballot access
11 determinant, then it's creating a federal
12 constitutional question that then this Court decides
13 and other courts, other states -- if this Court
14 affirms the decision below, determining that
15 President Trump is ineligible to be president, other
16 states would still have to determine what effect that
17 would have on their own state's law and state
18 procedure --

19 JUSTICE BARRETT: Well, if we --

20 MR. MURRAY: -- in terms of ballot access.

21 JUSTICE BARRETT: -- if we affirmed and we
22 said he was ineligible to be president, yes, maybe
23 some states would say, well, you know, we're going to
24 keep him on the ballot anyway, but, I mean, really,
25 it's going to have, as Justice Kagan said, the effect

1 of Colorado deciding. And it's true, I just want to
2 push back a little bit on, well, it's a national
3 thing because this Court will decide it.

4 You say that we have to review Colorado's
5 factual record with clear error as the standard of
6 review. So we would be stuck. The first mover
7 state, here, Colorado, we're stuck with that record.
8 And, you know, I -- I -- I don't want to get into
9 whether the -- the record -- I mean, maybe the record
10 is great, but what if the record wasn't? I mean,
11 what if it wasn't a fulsome record? What if, you
12 know, the -- the hearsay rules are, you know,
13 one-offs? Or what if this is just made by the
14 secretary of state without much process at all?

15 How do we review those factual findings?
16 Why should clear error review apply? And doesn't
17 that just kind of buckle back into this point that
18 Justice Kagan was making, you know, that -- that we
19 made with Mr. Mitchell too that it just doesn't seem
20 like a state call?

21 MR. MURRAY: Three points, Your Honor. The
22 first is that ordinarily, of course, this Court
23 reviews factual findings for clear error, but
24 President Trump made the point in -- in his reply
25 brief that sometimes on constitutional questions that

1 require a uniform resolution, this Court can do more,
2 something more like a Bose Corp. style independent
3 review of the factual record.

4 And we would have no objection to that
5 given that the record here -- really -- really, the
6 facts that are disputed here are incredibly narrow.
7 The essence of our case is President Trump's own
8 statements that he made in public view for all to
9 see.

10 JUSTICE BARRETT: But then that's saying
11 that in this context, which is very high stakes, if
12 we review the facts essentially de novo, you want us
13 all to just watch the video of the Ellipse and then
14 make a decision without any deference to or guidance
15 from lower court fact finding? That's unusual.

16 MR. MURRAY: Well, ultimately, President
17 Trump himself urges this Court to decide the merits
18 of his eligibility on the factual record here at page
19 2 of his brief. He's never at any point in this
20 proceeding suggested there was something else that
21 needed to be in the factual record, any other
22 witnesses that he wanted to call to present his case.

23 And, again, the essence of our case is his
24 own statements and -- and -- and, in particular, his
25 own videotaped statements on the Ellipse --

1 JUSTICE GORSUCH: Mr. Murray, just to
2 circle back to -- I'm sorry to interrupt. But I
3 wanted to -- before we left it, I wanted to circle
4 back to where Justice Kagan was.

5 Do you agree that the state's powers here
6 over its ballot for federal officer election have to
7 come from some constitutional authority?

8 MR. MURRAY: Members of this Court have
9 disagreed about that.

10 JUSTICE GORSUCH: I'm asking you.

11 (Laughter.)

12 MR. MURRAY: The -- the majority of this
13 Court has said that those powers come from Article
14 II. But we think that the result is the same whether
15 the Court locates it in Article II or in a reserved
16 power under the Tenth Amendment.

17 JUSTICE GORSUCH: Okay. But you accept
18 that this Court has held, you're not contesting this
19 or asking us to revisit that decision in Thornton or
20 Term Limits or whatever you want to call it that it
21 has to come from some federal constitutional
22 authority?

23 MR. MURRAY: No, we are not, Your Honor.

24 JUSTICE GORSUCH: Okay. And -- and -- and,
25 here, we're not talking about the Qualifications

1 Clause, right? Nobody's talking about whether he's
2 35 years old or a natural born, whatever, right, not
3 -- not at issue, okay?

4 We're talking about something under the
5 Fourteenth Amendment and Section 3, so that's where
6 you have to find your authority, right?

7 MR. MURRAY: We find our authority in
8 Article II in states' plenary power to run their
9 elections.

10 JUSTICE GORSUCH: Federal election -- but
11 this is for a federal office. It has to come from
12 the Constitution. And you're seeking to enforce
13 Section 3?

14 MR. MURRAY: We're suggesting that in their
15 broad power to determine the -- to select
16 presidential electors in any manner they see fit,
17 they can take account of Section 3 and apply Section
18 3 --

19 JUSTICE GORSUCH: Could they do it without
20 Section 3? Could they disqualify somebody for -- you
21 know, on whatever basis they wanted outside of the
22 Qualifications Clause?

23 MR. MURRAY: That would run into Term
24 Limits, I think, Your Honor.

25 JUSTICE GORSUCH: Yeah, I would think so,

1 right? So it has to come back to Section 3. And if
2 that's true, how does that work given that Section 3
3 speaks about holding office, not who may run for
4 office. It was a point Mr. Mitchell was making
5 earlier and I just wanted to give you a chance to
6 respond to it because it seems to me that -- that,
7 you know, that you're asking to enforce in an
8 election context a provision of the Constitution that
9 speaks to holding office. So it's different than the
10 Qualifications Clause, which is all about who can run
11 and then serve, yeah.

12 MR. MURRAY: I -- I don't know that it is
13 different.

14 JUSTICE GORSUCH: Okay.

15 MR. MURRAY: Other qualifications for
16 office similarly talk about eligibility for the
17 office. There's nothing unconstitutional about a
18 30-year-old trying to get on the ballot.

19 JUSTICE GORSUCH: Except for this
20 disability can be removed, right, under Section 3.
21 That's what's different about it. So thoughts on
22 that?

23 MR. MURRAY: Well, the fact that there's an
24 extraordinary provision for removing the disability
25 does not negate the fact that the disability exists

1 today and it's existed since January 6th, 2021, when
2 President Trump engaged in insurrection against the
3 Constitution.

4 JUSTICE GORSUCH: So were his actions after
5 that date, before he left office, ultra vires? Is
6 that -- is that where your theory leads?

7 MR. MURRAY: Well, that would raise the
8 separate question of whether one can collaterally
9 attack the actions of a de facto officer. And that
10 may be the one place in Griffin's Case at the very
11 end where we would agree, which is -- which is when
12 Justice Chase said, I've talked to my Supreme Court
13 colleagues and we unanimously agree that you can't
14 collaterally attack all official actions of an
15 officer who's holding -- who's, in fact, holding the
16 position under --

17 JUSTICE GORSUCH: All right. But just
18 circle back to where we started, right? This is
19 Section 3. Your authority has to come from there.
20 And it's about holding office and it's a particular
21 kind of disability that can be removed by Congress
22 and it's the only one like that, right? They can't
23 remove age or citizenship.

24 How should that inform our thoughts about a
25 state's efforts to regulate the ballot for a federal

1 office?

2 MR. MURRAY: The colloquy that my friend
3 had with Justice Alito earlier, I think, is
4 illustrative here. The fact that Congress has an
5 extraordinary removal power does not negate that the
6 disability exists today and exists indefinitely into
7 the future, much like the fact that Congress -- that
8 the president can pardon somebody for a criminal
9 conviction doesn't make that conviction somehow --
10 somehow contingent.

11 And -- and I would note that if President
12 Trump were appointed to an office today, if he were
13 appointed as a state judge, he could not hold that
14 office, which shows that the disability exists now.

15 And -- and the fact that Congress has a
16 power to remove the disability doesn't negate the
17 present qualification, nor does it implicitly bestow
18 on President Trump a constitutional right to run for
19 offices that he cannot hold in violation of state law
20 and state procedure under Article II.

21 JUSTICE SOTOMAYOR: In fact, there was a --
22 a congressional action to permit Confederate officers
23 or people who supported the Confederacy to hold
24 office before the Fourteenth Amendment, correct? So
25 there must have been a thought that there was a -- a

1 preexisting disqualification.

2 MR. MURRAY: That's absolutely right.
3 There were a flood of amnesty requests even before
4 Section 3 went into effect because everybody
5 understood at the time that those people would be
6 disqualified the moment that Section 3 was enacted
7 forever unless they received amnesty.

8 JUSTICE JACKSON: Can I --

9 CHIEF JUSTICE ROBERTS: Counsel, what do
10 you do with the -- what would seem to me to be plain
11 consequences of your position? If -- if Colorado's
12 position is upheld, surely, there will be
13 disqualification proceedings on the other side, and
14 some of those will succeed.

15 Some of them will have different standards
16 of proof. Some of them will have different rules
17 about evidence. Maybe the Senate report won't be
18 accepted in others because it's hearsay. Maybe it's
19 beyond a reasonable doubt, whatever.

20 In very quick order, I would expect,
21 although my predictions have never been correct --

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: -- I would expect
24 that, you know, a goodly number of states will say,
25 whoever the Democratic candidate is, you're off the

1 ballot, and others for the Republican candidate,
2 you're off the ballot. It'll come down to just a
3 handful of states that are going to decide the
4 presidential election. That's a pretty daunting
5 consequence.

6 MR. MURRAY: Well, certainly, Your Honor,
7 the fact that there are potential frivolous
8 applications of a constitutional provision isn't a
9 reason that would --

10 CHIEF JUSTICE ROBERTS: Well, no, hold on.
11 I mean, you might think they're frivolous, but the
12 people who are bringing them may not think they're
13 frivolous. Insurrection is a broad, broad term, and
14 if there's some debate about it, I suppose that will
15 go into the decision and then, eventually, what, we
16 would be deciding whether it was an insurrection when
17 one president did something as opposed to when
18 somebody else did something else? And what do we do?
19 Do we wait until near the time of counting the
20 ballots and sort of go through which states are valid
21 and which states aren't?

22 MR. MURRAY: There's a reason Section 3 has
23 been dormant for 150 years, and it's because we
24 haven't seen anything like January 6th since
25 Reconstruction.

1 Insurrection against the Constitution is
2 something extraordinary. And --

3 CHIEF JUSTICE ROBERTS: It seems to me
4 you're avoiding the question, which is other states
5 may have different views about what constitutes
6 insurrection.

7 And now you're saying, well, it's all right
8 because somebody, presumably us, are going to decide,
9 well, they said they thought that was an
10 insurrection, but they were wrong. And maybe they
11 thought it was right. And we'd have to develop rules
12 for what constitutes an insurrection.

13 MR. MURRAY: Yes, Your Honor. Just like
14 this Court interprets other constitutional
15 provisions, this Court can make clear that an
16 insurrection against the Constitution is something
17 extraordinary.

18 And, in particular, it really requires a
19 concerted group effort to resist through violence not
20 some ordinary application of state or federal law but
21 the functions mandated by the Constitution itself.

22 JUSTICE KAVANAUGH: On -- on your point
23 that it's been dormant for 155 years, I think the
24 other side would say the reason for that is Chief
25 Justice Chase's opinion in 1869 in Griffin's Case to

1 start, which says that Congress has the authority
2 here, not the states. That's followed up by the
3 Enforcement Act of 1870, in which Congress acts upon
4 that understanding, which is followed -- and there's
5 no history contrary in that period, as Justice Thomas
6 pointed out, there's no history contrary in all the
7 years leading up to this of states exercising such
8 authority.

9 I think the reason it's been dormant is
10 because there's been a settled understanding that
11 Chief Justice Chase, even if not right in every
12 detail, was essentially right, and the branches of
13 the government have acted under that settled
14 understanding for 155 years.

15 And Congress can change that. And Congress
16 does have Section 2383, of course, the Insurrection
17 Act, a criminal statute. But Congress could change
18 it, but they have not in 155 years in relevant
19 respects for what you want here today at least.

20 MR. MURRAY: No, Justice Kavanaugh. The
21 reason why it's been dormant is because, by 1876,
22 essentially, all former Confederates had received
23 amnesty. And we haven't seen anything like an
24 insurrection since then.

25 I'd like to address your point --

1 JUSTICE ALITO: Well, you know, we didn't

2 --

3 JUSTICE SOTOMAYOR: Can I go to that

4 point --

5 JUSTICE ALITO: -- after the --

6 JUSTICE SOTOMAYOR: Sorry.

7 CHIEF JUSTICE ROBERTS: Justice Alito?

8 JUSTICE ALITO: I don't know how much we
9 can infer from the fact that we haven't seen anything
10 like this before and therefore conclude that we're
11 never -- we're not going to see something in the
12 future.

13 From the time of the impeachment of
14 President Johnson until the impeachment of President
15 Clinton more than a hundred years later, there were
16 no impeachments of presidents, and in fairly short
17 order, over the last couple of decades, we've had
18 three. So I don't know how much you can infer from
19 that.

20 MR. MURRAY: Certainly, but if this Court
21 affirms, this Court can write an opinion that
22 emphasizes how extraordinary insurrection against the
23 Constitution is and how rare that is because it
24 requires an assault not just on the application of
25 law but on constitutionally mandated functions

1 themselves, like we saw on January 6th, a coordinated
2 attempt to -- to disrupt a function mandated by the
3 Twelfth Amendment and essential to constitutional
4 transfer of presidential power.

5 JUSTICE ALITO: Well, let me ask you a
6 question about whether the power that you've
7 described as plenary really is plenary.

8 Suppose that the outcome of an election for
9 president comes down to the vote of a single state,
10 how the electors of the vote of a single state are
11 going to vote. And suppose that Candidate A gets a
12 majority of the votes in that state, but the
13 legislature really doesn't like Candidate A, thinks
14 Candidate A is an insurrectionist, so the legislature
15 then passes a law ordering its electors to vote for
16 the other candidate.

17 Do you think the state has that power?

18 MR. MURRAY: I think there may be
19 principles that come into play in terms of after the
20 people have voted that Congress -- that the state
21 can't change the rules midstream. I'm not sure
22 because I'm not aware of this Court addressing it.
23 And, certainly, as the --

24 JUSTICE ALITO: Well, let's change it so
25 that it's not after the election; it's three days

1 before the election based on the fact that the polls
2 in that state look bad. Can they do it?

3 MR. MURRAY: I think they probably could
4 under this Court's decision in Chiafalo, where this
5 Court emphasized that for much of American history,
6 state legislatures picked their -- their own electors
7 and assigned their own electors themselves. But, of
8 course, that would be much more extraordinary than
9 what we have here, which is simple application of
10 normal state ballot access principles to say that
11 we're only going to put on the ballot an individual
12 who is qualified to assume the office.

13 JUSTICE ALITO: Can I ask you again the
14 question that Justice Gorsuch asked, and you -- to
15 which you responded by citing the de facto officer
16 doctrine. But suppose we look at that going forward
17 rather than judging the validity of an act committed
18 between the time when a president allegedly engages
19 in an insurrection and the time when the president
20 leaves office.

21 During that interim period, would it be
22 lawful for military commanders and other officers to
23 disobey orders of the -- of the -- the president in
24 question?

25 MR. MURRAY: I'm not sure that anything

1 gives military officers the authority to adjudicate
2 effectively the -- the -- the legality of the
3 presidency.

4 JUSTICE GORSUCH: Why -- why -- why -- why
5 not? You say he's disqualified from the moment it
6 happens. Now I understand the de facto officer
7 doctrine might be used to prohibit people from
8 seeking judicial remedies for decisions that take
9 place after the date he was disqualified.

10 But, if he is, in fact, disqualified, from
11 that moment, why would anybody have to obey a
12 direction from him?

13 MR. MURRAY: Well, ultimately, there still
14 has to be some kind of procedure in place to
15 adjudicate the disqualification. Certainly, Congress
16 could impeach a sitting president, but that's the
17 only remedy I'm aware of that exists for -- for
18 removal or otherwise negating the authority of a
19 sitting president.

20 JUSTICE GORSUCH: Why?

21 MR. MURRAY: Well, the --

22 JUSTICE GORSUCH: On what theory? Because
23 Section 3 speaks about disqualification from holding
24 office. You say he is disqualified from holding
25 office from the moment it happens.

1 MR. MURRAY: Correct. But, nevertheless --

2 JUSTICE GORSUCH: So -- so it operates --
3 you say there's no -- no legislation necessary -- I
4 thought that was the whole theory of your case -- and
5 no procedure necessary -- it happens automatically.

6 MR. MURRAY: Well, certainly, you need a
7 procedure in order to have any remedy to enforce the
8 disqualification, which is different --

9 JUSTICE GORSUCH: I -- that's a whole
10 separate question. That's the de facto -- doesn't
11 work here, okay? Put that aside.

12 He's disqualified from the moment.
13 Self-executing, done. And I would think that a
14 person who would receive a direction from that
15 person -- president, former president in your view,
16 would be free to act as he or she wishes without
17 regard to that individual.

18 MR. MURRAY: I don't think so because I
19 think, again, the --

20 JUSTICE GORSUCH: Why?

21 MR. MURRAY: -- de facto officer doctrine
22 would nevertheless come into play to say this is the
23 --

24 JUSTICE GORSUCH: No, de facto -- that --
25 that doesn't work, Mr. Murray, because de facto

1 officer is to ratify the conduct that's done
2 afterwards and -- and -- and insulate it from
3 judicial review. Put that aside. I'm not going to
4 say it again. Put it aside, okay?

5 I think Justice Alito is asking a very
6 different question, a more pointed one and more
7 difficult one for you, I understand, but I think it
8 deserves an answer.

9 On your theory, would anything compel a
10 lower official to obey an order from, in your view,
11 the former president?

12 MR. MURRAY: I'm imagining a situation
13 where, for example, a former president was -- you
14 know, a -- a president was elected and they were 25
15 and they were ineligible to hold office --

16 JUSTICE GORSUCH: No. No.

17 MR. MURRAY: -- but, nevertheless, they
18 were put into that office --

19 JUSTICE GORSUCH: No. No. We're talking
20 about Section 3.

21 MR. MURRAY: And --

22 JUSTICE GORSUCH: Please don't change the
23 hypothetical, okay?

24 MR. MURRAY: I'm --

25 JUSTICE GORSUCH: Please don't change the

1 hypothetical. I know. I like doing it too, but
2 please don't do it, okay?

3 MR. MURRAY: Well, the -- the point I'm
4 trying to make is that --

5 JUSTICE GORSUCH: He's disqualified from
6 the moment he committed an insurrection, whoever it
7 is, which -- whichever party. It -- that -- that
8 happens. Boom. It happened.

9 What would compel -- and I'm not going to
10 say it again, so just try and answer the question.
11 If you don't have an answer, fair enough, we'll move
12 on. What would compel a lower official to obey an
13 order from that individual?

14 MR. MURRAY: Because, ultimately, we have
15 -- we have statutes and rules requiring chains of
16 command. The person is in the office, and even if
17 they don't have the authority to hold the office, the
18 only way to get someone out of the office of the
19 presidency is impeachment, and so I think, if you
20 interpreted Section 3 in light of other provisions in
21 the Constitution like impeachment, while they hold
22 office, impeachment's the only way to validate that
23 they don't have the ability to hold that office and
24 should be removed.

25 JUSTICE JACKSON: Mr. Murray, can I -- oh.

1 Can I just ask you about something Justice Kagan
2 brought up earlier, which is the concern about
3 uniformity and the lack thereof if states are
4 permitted to enforce Section 3 in presidential
5 elections, and I -- I guess I -- I didn't really
6 understand your argument or your response to her
7 about that.

8 MR. MURRAY: Well, certainly, if Congress
9 is concerned about uniformity, they can provide for
10 legislation and they can preempt state legislation.

11 JUSTICE JACKSON: Yes --

12 MR. MURRAY: But --

13 JUSTICE JACKSON: -- but you say that's not
14 necessary.

15 MR. MURRAY: But it's not necessary in the
16 absence of federal enforcement legislation. These
17 questions come up to this Court in the same way that
18 other federal questions come up to this Court, which
19 is that a state adjudicates them. If the state
20 hasn't provided sufficient process to comport with
21 due process and notice and opportunity to be heard,
22 one can make those challenges. But assuming, as
23 here, we have a full evidentiary record, an
24 opportunity to present evidence --

25 JUSTICE JACKSON: No, I understand -- I

1 understand that we could resolve it so that we have a
2 uniform ultimate ruling on it.

3 I guess my question is why the Framers
4 would have designed a system that would -- could
5 result in interim disuniformity in this way, where we
6 have elections pending and different states suddenly
7 saying you're eligible, you're not, on the basis of
8 this kind of thing?

9 MR. MURRAY: Well, what they were concerned
10 most about was ensuring that insurrectionists and
11 rebels don't hold office. And so, once one
12 understands the sort of imperative that they had to
13 ensure that oath-breakers wouldn't take office, it
14 would be a little bit odd to say that states can't
15 enforce it, that only the federal government can
16 enforce it, and that Congress can essentially rip the
17 heart out of Section 3 by a simple majority just by
18 failing to pass enforcement legislation.

19 Federalism creates redundancy. And, here,
20 the fact that states have the ability to enforce it
21 as well, absent federal preemption, provides an
22 additional layer of safeguards around what really
23 Section 3 --

24 JUSTICE JACKSON: Yeah, and I'll --

25 MR. MURRAY: -- supports.

1 JUSTICE JACKSON: -- ask you about the
2 history when I get a chance again. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Justice Thomas?

5 Justice Alito?

6 JUSTICE ALITO: Suppose there's a country
7 that proclaims again and again and again that the
8 United States is its biggest enemy and suppose that
9 the president of the United States for diplomatic
10 reasons think that it's in the best interests of the
11 United States to provide funds or release funds so
12 that they can be used by that -- by that country.

13 Could a state determine that that person
14 has given aid and comfort to the enemy and,
15 therefore, keep that person off the ballot?

16 MR. MURRAY: No, Your Honor. This Court
17 has never interpreted the aid and comfort language,
18 which also is present in the Treason Clause, but
19 commentators have suggested -- it's been rarely
20 applied because treason prosecutions are so rare, but
21 commentators have suggested that, first of all, that
22 aid and comfort really only applies in the context of
23 a declared war or at least an adversarial
24 relationship where there is, in fact, a war between
25 two countries.

1 And, second, the intent standard would do a
2 lot of work there because, under Section 3, whatever
3 the underlying conduct is, engaging in insurrection
4 or aid and comfort, has to be done with the intent to
5 further the unlawful purpose of the insurrection or
6 -- or to aid the enemies in their pursuit of war
7 against the United States.

8 JUSTICE ALITO: Let me come back to the
9 question of what we would do if we were -- if
10 different states had adjudicated the question of
11 whether former President Trump is an insurrectionist
12 using a different record, different rulings on the
13 admissibility of evidence, perhaps different
14 standards of proof. Then what would we do?

15 MR. MURRAY: Ultimately, this Court would
16 -- first of all, if there were deficiencies in the
17 record, the Court could either refuse to hear the
18 case or it could decide on the basis of deficiencies
19 of the record.

20 JUSTICE ALITO: Well, would we have to
21 decide what is the appropriate rule of evidence that
22 should be applied in this -- in this case? Would we
23 have to decide what is the appropriate standard of
24 proof? Would we give any deference to these findings
25 by state court judges, some of whom may be elected?

1 Would we have to have our own trial?

2 MR. MURRAY: No, Your Honor. This Court
3 takes the evidentiary record as -- as it's given.
4 And, here, we have an evidentiary record that all the
5 parties agree is sufficient for a decision in -- in
6 this case.

7 And then, as -- as I discussed earlier,
8 there's a possibility of a Bose Corp. independent
9 review of the facts, but, ultimately, what we have
10 here is an insurrection that was incited in plain
11 sight for all to see.

12 JUSTICE ALITO: Yeah, but you're really not
13 answering my question. It's not helpful if you don't
14 do that.

15 We have -- suppose we have two different
16 records, two different bodies of evidence, two
17 different rulings on questions of admissibility, two
18 different standards of proof, two different sets of
19 fact findings by two different judges or maybe
20 multiple judges in multiple states.

21 Then what do we do?

22 MR. MURRAY: Well, first, this Court would
23 set the legal standard, and then it would decide
24 which view of the record was -- was correct, I think,
25 under that -- if -- if this Court had two cases --

1 JUSTICE ALITO: Which view of -- which view
2 of what record?

3 MR. MURRAY: If this Court --

4 JUSTICE ALITO: Of which record?

5 MR. MURRAY: If this Court had two cases
6 before it and both of the records were sufficient
7 insofar as both sides had the opportunity to present
8 their case and -- and the essential facts in the
9 record that everyone agreed was sufficient for a
10 decision, then this Court would have to look at
11 the -- the evidence -- the evidence presented and
12 decide which -- which holding was correct and then
13 decide that issue for the country.

14 And, certainly, here, when -- when there is
15 a complete record, lower courts then will be applying
16 that decision, and I think it's unlikely that any
17 court would say we're going to reach a different
18 decision than the U.S. Supreme Court did,
19 particularly if the Court relies on the facts, the
20 indisputable facts, of what President Trump said on
21 video and in his Twitter feed, which is really the
22 essence of our case here.

23 JUSTICE ALITO: Well, you had an expert --
24 just take -- let's just take that example -- had an
25 expert testify about the meaning of what President

1 Trump said. But do you -- do you think it's possible
2 that a different state court would apply Daubert
3 differently and say that this person should not be
4 allowed to express an expert opinion on that
5 question? Do you think that's beyond the realm of
6 imagination?

7 MR. MURRAY: Not -- not at all, Your Honor.
8 Two points on that. Number one, President Trump
9 didn't appeal the admission of that evidence in this
10 case, but, number two, you know, the second point is
11 that Professor Simi really -- he didn't opine on the
12 meaning of President Trump's words.

13 He opined on the effect that those words
14 had on violent extremists, and the essence of his
15 testimony was built around videotaped statements of
16 President Trump himself encouraging, inciting, and
17 praising political violence when --

18 JUSTICE ALITO: Well, I -- I'm not taking a
19 position one way or the other about whether the
20 expert's testimony should have been admitted or
21 anything like that or the meaning of President
22 Trump's words.

23 I'm just trying to get you to grapple with
24 what some people have seen as the consequences of the
25 argument that you're advancing, which is that there

1 will be conflicts in decisions among the states, that
2 different states will disqualify different
3 candidates, but I -- I'm not getting a whole lot of
4 help from you about how this would not be an
5 unmanageable situation.

6 MR. MURRAY: If this Court writes an
7 opinion affirming on the basis of the indisputable
8 facts of what President Trump said on January 6th and
9 in the weeks leading up to it and his virtual
10 confession on Twitter after the fact, then it would
11 be reversible error for any other state to conclude
12 otherwise on that question of federal law, or -- or,
13 at the very least, this Court could address that when
14 those issues come up, but it seems unlikely.

15 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

16 JUSTICE SOTOMAYOR: There's two sides to --
17 to the other side's position. The first is that it's
18 not self-executing. I want to put that aside.

19 Deal with if we were to hold that states
20 don't have the right to enforce or create a cause of
21 action in this situation. They want the flip to say
22 that nobody -- even Congress can't do it because they
23 need implementing legislation. Address that
24 argument.

25 MR. MURRAY: That -- that --

1 JUSTICE SOTOMAYOR: Because assume we rule
2 that states don't have it. What would you have us
3 say for the other side of the argument? One of my
4 colleagues says you need or what -- what not -- not
5 then Chief Justice but Circuit Court Justice Chase
6 said, which is that somehow you need implementing
7 legislation, like the 1870 Act.

8 You seem to say that's not true because
9 they could decide not to seat the -- seat a
10 candidate, et cetera. So I don't know that
11 legislation's necessary.

12 MR. MURRAY: And, certainly, there are
13 historical examples of member -- members of Congress
14 under their Article -- under Congress's Article I
15 power to judge the qualifications of its members, of
16 members of Congress refusing to seat ineligible
17 candidates under Section 3 who have won election.

18 In the context of the presidency, I think
19 it would create a number of really difficult issues
20 if the Court says there's no procedure for
21 determining President Trump's eligibility until after
22 the election.

23 And then what happens when members of
24 Congress on January 6th, when they count the
25 electoral votes, say we're not going to count

1 electoral votes cast for President Trump because he's
2 disqualified under Section 3 under the Electoral
3 Count Reform Act.

4 A number of the amicus briefs, such as
5 those of Professor Ginsburg, Hassan, and Foley, have
6 made the point that that is kind of a
7 disenfranchisement and constitutional crisis in the
8 making and is all the more reason to address those
9 issues now in a judicial process on a full
10 evidentiary record so that everybody can have
11 certainty on those issues before they go to the
12 polls.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: Mr. Murray, you talked --
15 you relied on the states' extensive powers under the
16 Electors Clause. You talked about the states having
17 a role in enacting, you know, typical ballot access
18 provisions.

19 I -- I guess, you know, it strikes me that
20 we've put some limits on that, and I'll just give you
21 Anderson versus Celebrezze as an example of that,
22 where we said, in fact, states are limited in who
23 they can take off a ballot, and that was a case about
24 minor party candidates, but the reason was that one
25 state's decision to take a candidate off the ballot

1 affects everybody else's rights.

2 And we talked about the pervasive national
3 interest in the selection of candidates for national
4 office. We talked about how an individual state's
5 decision would have an impact beyond its own borders.
6 So, if that goes for minor political party
7 candidates, why doesn't it go a fortiori for the
8 situation in this case?

9 MR. MURRAY: Well, certainly,
10 constitutional principles like Section 3 apply to
11 everybody, but in Celebrezze, the issue there was a
12 First Amendment question, and, certainly, there's no
13 doubt that states' exercise of their power under
14 Article II is constrained by First Amendment
15 principles.

16 And -- and in -- in that case, the -- the
17 state law deadlines for when a minor party candidate
18 got on the ballot just came too soon to be reactive
19 to what major parties had done and, therefore, risked
20 disenfranchising people who were disillusioned with
21 who the major parties had picked, and it raised First
22 Amendment problems. Here, there's no real First
23 Amendment problem and -- and a state is just trying
24 to enforce an existing qualification that's baked
25 into our constitutional fabric.

1 JUSTICE KAGAN: Yeah, I -- I guess, you
2 know, it -- it did come up in the First Amendment,
3 but there's a broader principle there and it's a
4 broader principle about who has power over certain
5 things in our federal system, and, you know, within
6 our federal system, states have great power over many
7 different areas. But that there's some broader
8 principle about that there are certain national
9 questions that -- that -- that -- that, you know,
10 states -- where states are not the repository of
11 authority. And I took a lot -- First Amendment, not
12 First Amendment -- a lot of Anderson's reasoning is
13 really about that. Like, what's a state doing
14 deciding who gets to -- who other citizens get to
15 vote for for president?

16 MR. MURRAY: Colorado is not deciding who
17 other states get to vote for for president. It's
18 deciding how to assign its own electors under its
19 Article II power. And the Constitution grants them
20 that broad power as --

21 JUSTICE KAGAN: Well, but the effect of
22 that is obvious, yes?

23 MR. MURRAY: No, Your Honor, because
24 different states can have different procedures. Some
25 states may allow insurrectionists to be on the

1 ballot. They may say we're not looking past the
2 papers; we're not going to look into federal
3 constitutional questions. It's the sort of -- even
4 in this election cycle, there are -- there are
5 candidates who are on the ballot in some states even
6 though they're not natural-born citizens and off the
7 ballot in other states. And that's just a function
8 of states' power to enforce -- to preserve their own
9 electors and avoid disenfranchisement of their own
10 citizens.

11 JUSTICE KAGAN: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Gorsuch?

13 JUSTICE GORSUCH: You haven't had a chance
14 to talk about the officer point, and I just want to
15 give you an opportunity to do that. Mr. Mitchell
16 makes the argument that particularly in the
17 Commissions Clause, for example, all officers are to
18 be commissioned by the president, seems to be
19 all-encompassing, that language. And I'm curious,
20 your response to that.

21 And along the way, if you would, I -- I --
22 I poked a little bit at the difference between
23 "office" and "officer" in the earlier discussion, you
24 may recall, but I -- I think one point your -- your
25 friends on the other side would make is, well, that's

1 just how the Constitution uses those terms. So, for
2 example, we know that the President Pro Tem of the
3 Senate and the Speaker of the House are officers of
4 the United States because the Constitution says they
5 are, but we also know that they don't hold an office
6 under the United States because of the
7 Incompatibility Clause that says they can't.

8 So maybe the Constitution to us today, to a
9 lay reader, might look a little odd in distinguishing
10 between "office" and "officer," not prepositions,
11 nouns, a distinction, but maybe that's exactly how it
12 works. Thoughts?

13 MR. MURRAY: Well, I'd start with the idea
14 that the meaning of "officer" in the 1780s was the
15 same meaning that it has today, which is a person who
16 holds an office. And, certainly, in particular
17 contexts like the Commissions Clause, it appears that
18 that's referring -- you know, that that is referring
19 to a narrower class of officers because we know that
20 there are --

21 JUSTICE GORSUCH: Except it says "all."

22 MR. MURRAY: Well, we know that there are
23 classes of officers, like the President Pro Tem, who
24 don't get their commissions from the president.

25 JUSTICE GORSUCH: Well, that's because the

1 Constitution elsewhere says that.

2 MR. MURRAY: We know that the Appointments
3 Clause refers to a class of officers who get their
4 appointment from the Constitution itself --

5 JUSTICE GORSUCH: Mm-hmm.

6 MR. MURRAY: -- rather than from
7 presidential appointment. People who get their
8 commissions from the president himself are not
9 commissioned by the president. And so, if you read
10 the Appointments Clause in line with the Commissions
11 Clause, then the Commissions Clause is really talking
12 about the president's power. If one needs a
13 commission, it's the president who grants it.

14 But I think it's important to bring us back
15 to Section 3 in particular because that was 80 years
16 --

17 JUSTICE GORSUCH: But, before -- before we
18 get to that, though, just the distinction between
19 "office" and "officer," do you -- do you agree that
20 the Constitution does make that distinction,
21 particularly with respect to the Speaker and
22 President Pro Tem?

23 MR. MURRAY: The Constitution makes that
24 distinction, but the -- at least in Section 3, an
25 officer of the United States is a person who swears

1 an oath and holds an office. Now the President Pro
2 Tem and the Speaker of the House, they don't swear a
3 constitutional oath in that capacity. They swear a
4 constitutional oath if they are a senator or
5 representative in Congress in that separate
6 non-official capacity. But I think that narrow --

7 JUSTICE GORSUCH: You agree they are
8 officers who don't hold an office?

9 MR. MURRAY: They're officers who -- who
10 may hold an office but don't swear an oath under
11 Article VI in that official capacity.

12 JUSTICE GORSUCH: Well, how can they hold
13 an office? Under the Incompatibility Clause, it says
14 they can't.

15 MR. MURRAY: Well, I think that's a fair
16 point, and I think that that may be an exception to
17 the general rule, and one might consider them perhaps
18 officers of the House and Senate because they are
19 appointed by those bodies and preside over those
20 bodies.

21 JUSTICE GORSUCH: Well, no, the
22 Constitution says they're officers of the United
23 States -- so -- so there are some instances when you
24 have an officer but not an office?

25 MR. MURRAY: Those may be an exceptional

1 circumstance.

2 JUSTICE GORSUCH: Okay. Okay.

3 MR. MURRAY: But I would --

4 JUSTICE GORSUCH: Thank you.

5 MR. MURRAY: You're welcome.

6 CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

7 JUSTICE KAVANAUGH: The concerns of some
8 questions have been the states having such power over
9 a national office, other questions about different
10 states having different standards of proof, and they
11 seem underscored by this case, at least the
12 dissenting opinion below. Justice Samour said, "I've
13 been involved" -- "I've been involved in the justice
14 system for 33 years now, and what took place here
15 doesn't resemble anything I've seen in a courtroom"
16 and then added, "What transpired in this litigation
17 fell woefully short of what due process demands."

18 Now I don't know whether I agree or not.
19 I'm not going to take a position on that. But the --
20 the fact that someone's complaining not about the
21 bottom-line conclusion but about the very processes
22 that were used in the state would seem to -- and that
23 that would be permitted seems to underscore the
24 concerns that have been raised about state power.
25 Just wanted to give you a chance to address that

1 because that was powerful language. Again, not
2 disagreeing about the conclusion but about the very
3 fairness of the process.

4 MR. MURRAY: Yes, Your Honor, but that
5 language was, with respect to Justice Samour, just
6 not correct. President Trump had a five-day trial in
7 this case. He had the opportunity to call any
8 witnesses that he wanted. He had the opportunity to
9 cross-examine our witnesses. He had the opportunity
10 to testify if he wanted to testify. And, of course,
11 the process was expedited because ballot access
12 decisions are always on a fast schedule.

13 But, in this whole case, from the trial
14 court all the way up to this Court, President Trump
15 has never identified a single process, other than
16 expert depositions, that he wanted to have that he
17 didn't get. He had the opportunity for fact witness
18 depositions. He had the opportunity to call
19 witnesses remotely. He didn't use all of his time at
20 trial. There was ample process here, and this is how
21 ballot access determinations in election cases are
22 decided all the time.

23 JUSTICE KAVANAUGH: Okay. Second question,
24 some of the rhetoric of your position -- I don't
25 think it is your position, but some of the rhetoric

1 of your position seems to suggest, unless the states
2 can do this, no one can prevent insurrectionists from
3 holding federal office. But, obviously, Congress has
4 enacted statutes, including one still in effect.
5 Section 2383 of Title 18 prohibits insurrection.
6 It's a federal criminal statute. And if you're
7 convicted of that, you are -- it says, "shall be
8 disqualified" from holding any office.

9 And so there is a federal statute on the
10 books, but President Trump has not been charged with
11 that. So what -- what are we to make of that?

12 MR. MURRAY: Two things, Your Honor.
13 Section 2383 was initially enacted about six years
14 before Section 3. It wasn't meant as implementing
15 legislation related to Section 3. And I would
16 emphasize that by the time that Section 3 was
17 ratified, most Confederates had already received a
18 criminal pardon.

19 JUSTICE KAVANAUGH: I guess the question is
20 --

21 MR. MURRAY: So --

22 JUSTICE KAVANAUGH: -- a little bit
23 different, which is, if the concern you have, which I
24 understand, is that insurrectionists should not be
25 able to hold federal office, there is a tool to

1 ensure that that does not happen, namely, federal
2 prosecution of insurrectionists. And if convicted,
3 Congress made clear you are automatically barred from
4 holding a federal office. That tool exists, you
5 agree, and could be used but has not -- could be used
6 against someone who committed insurrection. You
7 agree with that?

8 MR. MURRAY: That's absolutely right, Your
9 Honor. But I would just make the point that the
10 Framers of Section 3 clearly understood that criminal
11 prosecutions weren't sufficient because oftentimes
12 insurrectionists go unpunished, as was the case in
13 the Civil War, and that the least we can do is impose
14 a civil disqualification penalty so that even if we
15 don't have the stomach to throw someone in jail --

16 JUSTICE KAVANAUGH: Well, they had the quo
17 warranto provision that was in effect then from 18 --
18 1870 until 1948, but then, obviously, that dropped
19 out and hasn't been seen as necessary since then.

20 Last question. In trying to figure out
21 what Section 3 means and kind of to the extent it's
22 elusive language or vague language, what about the
23 idea that we should think about democracy, think
24 about the right of the people to elect candidates of
25 their choice, of letting the people decide? Because

1 your position has the effect of disenfranchising
2 voters to a significant degree.

3 And should that be something -- does that
4 come in when we think about should we read Section 3
5 this way or read it that way? What about the
6 background principle, if you agree, of democracy?

7 MR. MURRAY: I'd like to make three points
8 on that, Justice Kavanaugh. The first is that
9 constitutional safeguards are for the purpose of
10 safeguarding our democracy not just for the next
11 election cycle but for generations to come.

12 And, second, Section 3 is designed to
13 protect our democracy in that very way. The Framers
14 of Section 3 knew from painful experience that those
15 who had violently broken their oaths to the
16 Constitution couldn't be trusted to hold power again
17 because they could dismantle our constitutional
18 democracy from within, and so they created a
19 democratic safety valve. President Trump can go ask
20 Congress to give him amnesty by a two-thirds vote.
21 But, unless he does that, our Constitution protects
22 us from insurrectionists.

23 And, third, this case illustrates the
24 danger of refusing to apply Section 3 as written
25 because the reason we're here is that President Trump

1 tried to disenfranchise 80 million Americans who
2 voted against him, and the Constitution doesn't
3 require that he be given another chance.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Barrett?

6 JUSTICE BARRETT: So the general rule is
7 that, absent rare circumstances, state courts and
8 federal courts share authority. State courts have
9 authority to enforce the Constitution, but there are
10 certain limits to that, certain situations in which
11 the Constitution itself preempts the states' ability
12 to resolve constitutional questions.

13 And, you know, Tarble's Case is one. And
14 you said earlier that once a president is elected,
15 you accepted that a state couldn't do anything about
16 that, like you couldn't -- Colorado couldn't enact
17 its own say quo warranto provision and then use it to
18 get the secretary of state or the president or anyone
19 else out of office, and I -- I assume that's because
20 of this principle of structural preemption.

21 Am I right?

22 MR. MURRAY: Yes, Your Honor.

23 JUSTICE BARRETT: Okay. So I just want to
24 clarify what that means for your argument. That
25 means that your eggs are really in the basket of the

1 Electors Clause, really in the Article I basket,
2 because you're saying that even though all of the
3 questions that people have been asking have suggested
4 that there's a problem with giving a single state the
5 authority to render a decision that would have an
6 effect on a national election, but you're saying that
7 those structural concerns, which might otherwise lead
8 to the kind of result that you would accept after
9 someone is in office, are overcome by the Electors
10 Clause?

11 MR. MURRAY: Absolutely. States run
12 presidential elections. That's very clear from
13 Article II. Once states have selected the electors
14 and the electors have voted, states have no more
15 power over the -- the candidate who has been then
16 nominated for president. But, until then, the states
17 do have the power to adjudicate those issues.

18 JUSTICE BARRETT: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Jackson?

20 JUSTICE JACKSON: So, when I asked you
21 earlier about the uniformity concern and the
22 troubling potential disuniformity of having different
23 states enforce Section 3 with respect to presidential
24 elections, you seemed to point to history in a
25 certain way. You said, I think, that the Framers

1 actually envisioned states enforcing Section 3 at
2 least in some circumstances where there were
3 insurgents and Confederates.

4 And I guess, in my view of the history, I'm
5 wondering really whether presidential elections were
6 such a circumstance, that the Framers actually
7 envisioned states enforcing Section 3 with respect to
8 presidential elections as opposed to senatorial
9 elections, representatives, the sort of more local
10 concerns.

11 So can you speak to the argument that
12 really Section 3 was about preventing the South from
13 rising again in the context of these sort of local
14 elections as opposed to focusing on the presidency?

15 MR. MURRAY: Well, two points on that,
16 Justice Jackson. First is that, as I discussed
17 earlier, there isn't the same history of states
18 regulating ballot access at this time, so ballot
19 access rules to restrict presidential candidates
20 wouldn't have -- wouldn't have existed. They
21 wouldn't have been raised one way or another.

22 JUSTICE JACKSON: Right, but --

23 MR. MURRAY: So --

24 JUSTICE JACKSON: -- I'm not making a --

25 MR. MURRAY: But --

1 JUSTICE JACKSON: -- distinction between
2 ballot access and --

3 MR. MURRAY: No. My --

4 JUSTICE JACKSON: -- anything else. Yeah.

5 MR. MURRAY: Understood. But the more --

6 JUSTICE JACKSON: Yeah.

7 MR. MURRAY: -- the more broad point I want
8 to make is that what is very clear from the history
9 is -- is that the Framers were concerned about
10 charismatic rebels who might rise through the ranks
11 up to and including the presidency of the United
12 States.

13 JUSTICE JACKSON: But then why didn't they
14 put the word "president" in the very enumerated list
15 in Section 3? The thing that really is troubling to
16 me is I totally understand your argument, but they
17 were listing people that were barred and president is
18 not there.

19 And so I guess that just makes me worry
20 that maybe they weren't focusing on the president,
21 and, for example, the fact that electors of vice
22 president and president are there suggests that
23 really what they thought was, if we're worried about
24 the charismatic person, we're going to bar
25 insurrectionist electors and, therefore, that person

1 is never going to rise.

2 MR. MURRAY: This came up in the debates in
3 Congress over Section 3 where Reverdy Johnson said,
4 why haven't you included president and vice president
5 in the language? And Senator Moore responds, we
6 have. Look at the language, "any office under the
7 United States."

8 JUSTICE JACKSON: Yes. But doesn't that at
9 least suggest ambiguity? And this sort of ties into
10 Justice Kavanaugh's point.

11 In other words, we had a person right there
12 at the time saying what I'm saying, the -- the
13 language here doesn't seem to include president, why
14 is that?

15 And so, if there's an ambiguity, why would
16 we construe it to -- as Justice Kavanaugh pointed
17 out -- against democracy?

18 MR. MURRAY: Well, Reverdy Johnson came
19 back and agreed with that reading. "Any office" is
20 clear, the Constitution says about 20 times that the
21 presidency is an office and --

22 JUSTICE JACKSON: No, I'm not going to
23 that. So let me -- let me -- let me just say you --
24 so your point is that it -- that there's no ambiguity
25 with -- with -- with -- with having a list and not

1 having "president" in it, with having a history that
2 suggests that they were really focused on local
3 concerns in the South, with this conversation where
4 the legislators actually discussed what looked like
5 an ambiguity, you're saying there is no ambiguity in
6 Section 3?

7 MR. MURRAY: Let me take the point
8 specifically about electors and senators if I might
9 because I think that's --

10 JUSTICE JACKSON: Yes.

11 MR. MURRAY: -- important. Presidential
12 electors were not covered because they don't hold an
13 office. They vote. And this particular decision --

14 JUSTICE JACKSON: No, I'm talking about the
15 barred office part of this, right?

16 MR. MURRAY: Exactly. So the barred office
17 is, if you want to include everybody, first, you have
18 to specify presidential electors because they're not
19 offices, so they wouldn't fall under any office.

20 Second of all, senators and representatives
21 don't hold office either. The Constitution tells us
22 that under the Incompatibility Clause and refers to
23 them as holding seats, not offices. And so you want
24 to make sure that there is no doubt that senators and
25 representatives are covered. Given that the

1 Constitution suggests otherwise, you have to include
2 them.

3 The Constitution says the presidency holds
4 an office, as do members of this Court. And so other
5 high offices, the president, vice president, members
6 of this Court --

7 JUSTICE JACKSON: All right. Let me -- let
8 me ask you -- I -- I -- I appreciate that argument.

9 If we think that the states can't enforce
10 this provision for whatever reason in this context,
11 in the presidential context, what happens next in
12 this case? I mean, are -- is it done?

13 MR. MURRAY: If this Court concludes that
14 Colorado did not have the authority to exclude
15 President Trump from the presidential ballot on
16 procedural grounds, I think -- I think this case
17 would be done, but I think it could come back with a
18 vengeance because, ultimately, members of Congress
19 would -- may have to make the -- the determination
20 after a presidential election if President Trump wins
21 about whether or not he is disqualified from office
22 and whether to count votes cast for him under the
23 Electoral Count Reform Act.

24 So President Trump himself urges this Court
25 in the first few pages of his brief to resolve the

1 issues on the merits, and we think that the Court
2 should do so as well.

3 JUSTICE JACKSON: And there is no federal
4 litigation you would say?

5 MR. MURRAY: Well, that's correct, because
6 there is no federal procedure for deciding these
7 issues, short of a criminal prosecution.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Ms. Stevenson.

11 MS. STEVENSON: Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Ms. Anderson -- no,
13 Stevenson. That's right. I'm sorry.

14 ORAL ARGUMENT OF SHANNON W. STEVENSON

15 ON BEHALF OF RESPONDENT GRISWOLD

16 MS. STEVENSON: Mr. Chief Justice, and may
17 it please the Court:

18 Exercising its far-reaching powers under
19 the Electors Clause, Colorado's legislature
20 specifically directed Colorado's courts to resolve
21 any challenges to the listing of any candidate on the
22 presidential primary ballot before Coloradans cast
23 their votes.

24 Despite this law, Petitioner contends that
25 Colorado must put him on the ballot because of the

1 possibility there would be a super majority act of
2 Congress to remove his legal disability.

3 Under this theory, Colorado and every other
4 state would have to indulge this possibility not just
5 for the primary but through the general election and
6 up to the moment that an ineligible candidate was
7 sworn into office.

8 Nothing in the Constitution strips the
9 states of their power to direct presidential
10 elections in this way. This case was handled capably
11 and efficiently by the Colorado courts under a
12 process that we've used to decide ballot challenges
13 for more than a century. And as everyone agrees, the
14 Court now has the record that it needs to resolve
15 these important issues.

16 I welcome your questions.

17 JUSTICE THOMAS: Is there an express
18 provision with respect to -- that defines what a
19 qualified candidate is?

20 MS. STEVENSON: No, Your Honor, there's not
21 an express provision. When the Colorado Supreme
22 Court looked at this, they looked at the need to be
23 qualified, plus the fact that the -- this part was --

24 JUSTICE THOMAS: So what does it say then
25 if -- if it's not express? How do we get to this

1 issue of qualified candidate?

2 MS. STEVENSON: What the court -- the
3 Colorado Supreme Court did -- and let me, if I could
4 have a standing objection, I do want to make the
5 argument that you shouldn't review the Court's
6 statutory interpretation.

7 JUSTICE THOMAS: No, I'm just looking at
8 the statute.

9 MS. STEVENSON: Right. What the Court did
10 was to say that we have three important provisions in
11 this section that show that candidates have to be
12 qualified. First, it requires that under 12032(a)
13 that a political party that wants to participate has
14 to have a qualified candidate.

15 It also looked at the fact that the
16 comparable write-in candidates also had to be
17 qualified, and --

18 JUSTICE THOMAS: I know, but this isn't a
19 write-in candidate. So we're actually talking about
20 the participation of a political party, right? We're
21 not talking about the participation of a candidate?

22 MS. STEVENSON: Sure. I think that the
23 fact that the write-in candidate also had to be
24 qualified was confirmatory of the fact that the
25 political party candidate also had to be qualified,

1 and it would be otherwise incongruous to read those
2 things differently.

3 JUSTICE THOMAS: So how is Section 3 a
4 qualification?

5 MS. STEVENSON: Under the reasoning of the
6 Colorado Supreme Court, a candidate --

7 JUSTICE THOMAS: No, just on the -- on its
8 face.

9 MS. STEVENSON: A -- a candidate must meet
10 all the criteria for eligibility. And I don't
11 perceive any distinction between being -- meeting the
12 --

13 JUSTICE THOMAS: Okay.

14 MS. STEVENSON: -- eligibility criteria and
15 not being disqualified. There -- I just don't see
16 any meaningful difference between those two things.

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: You -- you
19 represent the secretary of state, right?

20 MS. STEVENSON: That's correct, Your Honor.

21 CHIEF JUSTICE ROBERTS: If you're the
22 secretary of state somewhere and someone comes in and
23 says, I think this candidate should be disqualified,
24 what -- what do you do next?

25 MS. STEVENSON: Administratively and what

1 the deputy elections director testified to at the
2 hearing is that if they obtain objective --
3 objective, knowable information, the secretary can
4 act on that and inform the candidate --

5 CHIEF JUSTICE ROBERTS: So the secretary at
6 first decides whether that's objective, knowable
7 information?

8 MS. STEVENSON: In some instances. In this
9 case, the challenge was actually brought before the
10 candidate's paperwork had even been submitted, and
11 because there had already been a challenge asserted
12 and -- and put into the proper court procedure, the
13 secretary didn't even make that determination because
14 she didn't have the paperwork.

15 CHIEF JUSTICE ROBERTS: Well, what -- in
16 another case where that wasn't the procedure that was
17 filed, somebody comes in --

18 MS. STEVENSON: Sure.

19 CHIEF JUSTICE ROBERTS: -- maybe they've
20 got a stack of papers saying here's why I think this
21 person is guilty of insurrection, it's not a big
22 insurrection, something that, you know, happened down
23 -- down the street, but they say this is still an
24 insurrection, I don't know what the standard is for
25 when it arises to that.

1 MS. STEVENSON: I think anything that even
2 presented that level of controversy about one person
3 having a set of facts that they said proved this
4 would send this case to the 113 procedure that we use
5 to resolve ballot challenge issues like that, and if
6 -- if another elector or the individual who brought
7 the information didn't want to bring it, the
8 secretary herself could bring that action.

9 CHIEF JUSTICE ROBERTS: Is there a
10 provision for judicial review of the secretary of
11 state's action both in Colorado and perhaps what you
12 know about other states?

13 MS. STEVENSON: Well, certainly, in
14 Colorado, if -- any action that the secretary takes
15 that anyone wants to challenge, they can use the 113
16 process to do so. I think states have varying
17 degrees of that. There are certainly other states
18 that allow versions of that, and then I don't know
19 whether there are others that don't. I certainly
20 know that there are some that do.

21 JUSTICE ALITO: I think we're told that
22 there are states that do not provide for any judicial
23 review of a secretary of state's determination. Is
24 that incorrect?

25 MS. STEVENSON: No, no. I think that's

1 right, and I think there are some states that
2 actually have no mechanism, to come to, I think,
3 Justice Kagan's point, or there are some states that
4 don't have any mechanism to exclude a disqualified
5 candidate from the ballot at all. And I do want to
6 speak to that for just a minute about the -- the
7 actual thing that --

8 JUSTICE ALITO: Well, would that be
9 constitutional, if the -- the secretary of state's
10 determination was final?

11 MS. STEVENSON: I think so, under Article
12 II, the Electors Clause, Your Honor, that that be
13 would be constitutional. States get very broad
14 authority to determine how to run their presidential
15 elections.

16 JUSTICE ALITO: Could a state enact a
17 statute that provides different rules of evidence and
18 different rules of procedure and different standards
19 of proof for this type of proceeding than for other
20 civil proceedings?

21 MS. STEVENSON: Yes, Your Honor, I believe
22 it could under the same Electors Clause power.

23 JUSTICE SOTOMAYOR: That issue would be
24 determined under perhaps a different constitutional
25 provision, like the Due Process Clause, correct?

1 MS. STEVENSON: Correct. The bounds of the
2 Electors Clause are other constitutional constraints,
3 which would include due process, equal protection,
4 First Amendment.

5 JUSTICE BARRETT: What's the due process
6 right? Does the candidate have a due process right?
7 What's the liberty interest?

8 MS. STEVENSON: I think it's not very
9 precisely defined in the case law, but I think there
10 is a recognition that there is a liberty interest of
11 a candidate and -- and there is some due process
12 interest in being able to access the ballot.

13 JUSTICE BARRETT: I thought that was -- I
14 thought that was for voters. You -- you think for
15 the candidate too, that there's -- that it would be
16 taking something away from the candidate?

17 MS. STEVENSON: Certainly, yes. And I
18 think a lot of times you see that in the First
19 Amendment context, where candidates can have an issue
20 about being on the ballot, but it's sort of a hybrid
21 or oftentimes First Amendment, Fourteenth Amendment,
22 Qualifications Clause, all discussed together.

23 JUSTICE BARRETT: Let me ask you a question
24 about -- just follow-up to Justice Alito. You know,
25 these decisions might be made different ways in

1 different states. Maybe a secretary of state makes
2 it in one state with very little process, or a
3 process more like Colorado's could be followed by
4 others.

5 Would our standard of review of the record
6 vary depending on the procedure employed by the
7 state?

8 MS. STEVENSON: I think this Court has
9 tremendous discretion to decide its standard of
10 review, and it might be based on the process that was
11 employed by an individual state. I think you could
12 exercise the independent review of Bose Corp. that
13 Mr. Murray talked about, or you could give deference
14 where you have a full-blown proceeding like the one
15 here that had all the protections of Rules of
16 Evidence and cross-examination and things like that.

17 CHIEF JUSTICE ROBERTS: You -- I'm sorry.
18 You think we should give deference in reviewing the
19 factual record, the legal conclusions? What -- in
20 other words, we shouldn't undertake a de novo review?

21 MS. STEVENSON: I don't think the review
22 should be de novo. However, I -- I am amenable to
23 the suggestion that the Court would do the Bose Corp.
24 type independent review that might provide greater
25 certainty to states around the country as to what the

1 Court's position is on the factual record in this
2 case.

3 CHIEF JUSTICE ROBERTS: Of course, if it
4 were not de novo review, we could reach disparate
5 results even on the same record, right?

6 MS. STEVENSON: I -- I think that's
7 possible.

8 JUSTICE KAGAN: I take it your position is
9 that this disqualification is really the same as any
10 other disqualification, age or residence or what have
11 you.

12 MS. STEVENSON: That's correct.

13 JUSTICE KAGAN: And -- and -- and what if I
14 were to push back on that and say, well, this
15 disqualification, number one, it's in the Fourteenth
16 Amendment, and the point of the Fourteenth Amendment
17 was to take away certain powers from the states?
18 Number two, Section 3 itself gives Congress a very
19 definite role, which Mr. Mitchell says is interfered
20 with by the ability of states to take somebody off
21 the ballot? And maybe, number three, it's just more
22 complicated and more contested and, if you want, more
23 political? And why don't all of those things make a
24 difference in our thinking about this qualification
25 as opposed to any other?

1 MS. STEVENSON: And so, Your Honor, I think
2 the trouble with categorizing the insurrection issue
3 as -- as necessarily more difficult is it's just an
4 assumption that's coming up, I think, because of this
5 case.

6 And, again, back to the Chief Justice's
7 point, we could have a very easy case under the
8 Fourteenth Amendment with an avowed insurrectionist
9 who, you know, came in and wrote on his paperwork, I
10 engaged in an insurrection in violation of the
11 Fourteenth Amendment, and it would be a open-and-shut
12 case as to whether or not that person would meet the
13 qualifications to be on the Colorado ballot.

14 With respect to your other questions about
15 the Fourteenth Amendment, my positions are based on
16 the assumption that, under the Fourteenth Amendment,
17 the states have the power to enforce Section 3, just
18 like they do other presidential qualifications, and I
19 would defer to the electors arguments on those
20 points.

21 JUSTICE ALITO: Suppose a state that does
22 recognize non-mutual collateral estoppel makes a
23 determination using whatever procedures it decides to
24 adopt that a particular candidate is an
25 insurrectionist.

1 Could that have a cascading effect, and so
2 the decision by a court in one state -- the decision
3 by a single judge whose factual findings are given
4 deference, maybe an elected trial judge, would have
5 potentially an enormous effect on the candidates who
6 run for president across the country? Is that
7 something we should be concerned about?

8 MS. STEVENSON: I think you should be
9 concerned about it, Your Honor, but I think the
10 concern is not as high as maybe it's made out to be
11 in particularly some of the amicus briefs. And,
12 again, under Article II, there is a huge amount of
13 disparity in the candidates that end up on the ballot
14 on -- in different states in every election.

15 Just this election, there's a candidate who
16 Colorado excluded from the primary ballot who is on
17 the ballot in other states even though he is not a
18 natural-born citizen. And that's just a -- that's a
19 feature of our process. It's not a bug.

20 And then I think, with respect to the
21 decision-making and -- and -- you know, we're here so
22 that this Court can give us nationwide guidance on
23 some of the legal principles that are involved. I
24 think that reduces the potential amount of disparity
25 that would arise between the states.

1 And then, with respect to the factual
2 record and how that gets issued and implemented, the
3 states have processes for this, and I think we need
4 to let that play out and accept that there may be
5 some messiness of federalism here because that's what
6 the Electors Clause assumes will happen. And if
7 different states apply their principles of -- of
8 collateral estoppel and come to different results,
9 that's okay. And -- and Congress can -- can act at
10 any time if -- if it thinks that it's truly
11 federalism run amok.

12 CHIEF JUSTICE ROBERTS: Justice Thomas,
13 anything further?

14 Justice Alito?

15 JUSTICE ALITO: Well, just one further
16 question, and it's along the same lines of a lot of
17 other questions. We have been told that if what
18 Colorado did here is sustained, other states are
19 going to retaliate and they are going to potentially
20 exclude another candidate from the ballot. What
21 about that situation?

22 MS. STEVENSON: Your Honor, I think we have
23 to have faith in our system that people will follow
24 their election process -- processes appropriately,
25 that they will take realistic views of what

1 insurrection is under the Fourteenth Amendment.
2 Courts will review those decisions. This Court may
3 review some of them.

4 But I don't think that this Court should --
5 should take those threats too seriously in its
6 resolution of this case.

7 JUSTICE ALITO: You don't think that's a
8 serious threat?

9 MS. STEVENSON: I -- I think we have
10 processes --

11 JUSTICE ALITO: We should proceed on the
12 assumption that it's not a serious threat?

13 MS. STEVENSON: I think we have
14 institutions in place to handle those types of
15 allegations.

16 JUSTICE ALITO: What -- what are those
17 institutions?

18 MS. STEVENSON: Our -- our states, their
19 own electoral rules, the administrators who enforce
20 those rules, the courts that will review those
21 decisions, and up to this Court to ultimately review
22 that decision.

23 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

24 Justice Kagan?

25 Justice Gorsuch?

1 Justice Kavanaugh?
2 Justice Jackson, anything further?
3 Thank you, counsel.
4 MS. STEVENSON: Thank you.
5 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
6 Mitchell?

7 REBUTTAL ARGUMENT OF JONATHAN F. MITCHELL
8 ON BEHALF OF THE PETITIONER

9 MR. MITCHELL: Both Mr. Murray and Ms.
10 Stevenson rely heavily on the Electors Clause and the
11 authority that it gives the legislature of each state
12 to direct the manner of appointing presidential
13 electors.

14 But that prerogative under Article II must
15 be exercised in a manner consistent with other
16 constitutional provisions and restrictions. And
17 Justice Kagan alluded to one of those restrictions
18 that might be imposed by the First Amendment, but
19 there are others.

20 A state cannot use its power under Article
21 II's Electors Clause to instruct its presidential
22 electors only to vote for white candidates. That
23 would violate the Equal Protection Clause. But nor
24 can it exercise its power in a manner that would
25 violate the constitutional holding of U.S. Term

1 Limits against Thornton and they cannot use the
2 Electors Clause as an excuse to impose additional
3 qualifications for the presidency that go beyond what
4 the Constitution enumerates in Article II.

5 And the problem with what the Colorado
6 Supreme Court has done is they have in a way changed
7 the criteria in Section 3 by making it a requirement
8 that must be met before the candidate who is seeking
9 office actually holds the office, effectively moving
10 forward in time the deadline that the candidate has
11 for obtaining a congressional waiver.

12 There has still been no answer from the
13 Anderson litigants on how to distinguish the
14 congressional residency cases, where the courts of
15 appeals, not decisions from this Court, but the
16 courts of appeals in applying this Court's holding in
17 U.S. Term Limits have unanimously disapproved state
18 laws requiring congressional candidates to show that
19 they inhabit the state from which they seek election
20 prior to Election Day.

21 And there still in our view is no possible
22 way to distinguish those from the situation below in
23 the Colorado Supreme Court.

24 Mr. Murray also invoked the de facto
25 officer doctrine as a possible way to mitigate the

1 dramatic consequences that would follow from the
2 decision of this Court that rejects the rationale of
3 Griffin's Case and that also agrees with Mr. Murray's
4 contentions that President Trump is disqualified from
5 holding office on account of the events of January
6 6th and that he's covered by Section 3 as an officer
7 of the United States.

8 This Court's recent decisions in Lucia and
9 Arthrex held that officers who are unconstitutionally
10 appointed under Article II and that made decisions
11 under the APA that were attacked as invalid, those
12 decisions were still vacated and this Court did not
13 use any variant of the de facto officer doctrine to
14 salvage the decisions that were made by these
15 unconstitutionally appointed officers.

16 There is no way to escape the conclusion
17 that if this Court rejects Griffin's Case and also
18 agrees with Mr. Murray's construction of Section 3
19 that every executive action taken by the Trump
20 Administration during its last two weeks in office is
21 vulnerable to attack under the APA and, further, that
22 if President Trump is reelected and sworn in as the
23 next president, that any executive action that he
24 takes could be attacked in federal court by anyone
25 who continues to believe that President Trump is

1 barred from office under Section 3.

2 I'm happy to answer any other questions
3 that the Court may have.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MR. MITCHELL: Thank you.

6 CHIEF JUSTICE ROBERTS: The case is
7 submitted.

8 (Whereupon, at 12:17 p.m., the case was
9 submitted.)

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