State of Minnesota
In Supreme Court

Joan Growe, Paul Anderson, Thomas Beer, David Fisher, Vernae Hasbargen, David Thul, Thomas Welna, and Ellen Young,

Petitioners,

v.

Steve Simon, Minnesota Secretary of State,

Respondent,

v.

Republican Party of Minnesota,

Respondent.

PETITIONERS' REPLY BRIEF

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I. THE PETITION IS RIPE AND PETITIONERS HAVE STANDING.

Respondent Secretary of State Steve Simon agrees the Petition is ripe for adjudication. Neither the Republican Party of Minnesota ("RPM") nor Donald Trump ("Trump") (together, "Intervenor-Respondents") disagree. This Court should not delay resolving Petitioners' claims. The parties are present, the issues are joined, and this Court may resolve the conflicting interests through a specific judgment. *See Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617-18 (Minn. 2007).

Similarly, no one seriously contests Petitioners' standing under § 204B.44. The statute broadly confers standing upon "any individual" to file a petition to correct an error, omission, or wrongful act with respect to the conduct of an election for a state or federal office. Minn. Stat. § 204B.44; *see also League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 645 n.7 (Minn. 2012). Petitioners are Minnesota voters and undoubtedly qualify for this broad grant of standing. RPM argues petitioners lack standing because § 204B.44 does not "create a cause of action based on presidential eligibility or permit a challenge based on a Section 3 disability." RPM Br. at 18-19. This contention fails as explained below.

II. THE PETITION PRESENTS A JUSTICIABLE CONTROVERSY.

A. This Court may address a presidential candidate's eligibility.

1. *The Petition is not barred by the political question doctrine.*

Intervenor-Respondents assert the political question doctrine bars adjudicating Trump's eligibility. But the political question doctrine provides only narrow exceptions

to the judiciary's responsibility to decide cases properly before it; none apply here. These include when "[1] there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving" it. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012). Other circumstances may raise a political question including: "[3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Intervenor-Respondents contend that: the Constitution commits the issue to Congress (factor one) and different state courts may decide the issue differently (factor six). Trump also suggests that, under factors four and five, the Senate's acquittal of Trump in the 2021 impeachment proceedings forecloses any inquiry into whether he is ineligible under Section 3 of the Fourteenth Amendment ("Section 3"). None of these arguments relieve the Court from deciding this case.

2. *Determining whether Section 3 disqualifies an individual from the Office of President is not expressly reserved to Congress.*

Section 3 does not suggest that presidential eligibility must be decided by Congress. Rather, it gives Congress a role at the back-end—to decide whether to remove Section 3 disabilities. Intervenor-Respondents do not argue otherwise. Instead, they assert

Section 5 of the Fourteenth Amendment, and the Twelfth and Twentieth Amendments commit this issue to Congress. This is wrong.

Section 5 empowers Congress to enact legislation implementing Sections 1 to 4: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." This power to legislate does not mean *only* Congress may enforce these Sections. As discussed in Petitioners' opening brief and *infra* Part III.A, States enforce the Fourteenth Amendment as a matter of course, often without federal authorizing legislation. If Section 5 demonstrated a textual commitment to Congress regarding Section 3, that same textual commitment would exist as to Section 1, which states have enforced with and without legislation for over a century.[1] Section 5 does not commit this issue solely to Congress.

The Twelfth and Twentieth Amendments also do not demonstrate a textual commitment to Congress. The Twelfth Amendment instructs Congress to count votes, not judge candidates' eligibility. *Compare* U.S. Const. amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted"), *with* U.S. Const. art. I, § 5, cl. 1

[1] *Katzenbach v. Morgan*, 384 U.S. 641 (1966), is inapposite. It held Section 5 empowered Congress to enact legislation expanding the protections in Section 1, and preempted conflicting state legislation. Nothing in *Katzenbach* suggests Section 1 was ineffective without legislation. Instead, the Court said: "of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution." *Id.* at 647. Put differently, states must adhere to and enforce the Fourteenth Amendment, regardless of whether Congress passes legislation. *Ex parte Virginia* addresses the same question—whether legislation enforcing the Fourteenth Amendment was a constitutional exercise of Congress's power. 100 U.S. 339 (1879).

("[e]ach House [of Congress] shall be the Judge of … Qualifications of its own Members"). *See also Chiafalo v. Washington*, 140 S. Ct. 2316, 2324-25 (2020) ("The Twelfth Amendment … tells electors to meet in their States, to vote for President and Vice President separately, and to transmit lists of all their votes to the President of the United States Senate for counting. Appointments and procedures and ... that is all.") (citing *Ray v. Blair*, 343 U.S. 214, 225 (1952)).

The Twentieth Amendment provides an emergency contingency plan, "if the President elect shall have failed to qualify," U.S. Const. amend. XX, § 3, for example because of a failure to obtain the minimum number of electoral votes, *see e.g.*, Brian C. Kalt, *The Twentieth Amendment, the Presidential Succession Act of 1947, and Pre-Inaugural Problems*, 91 Fordham L. Rev. Online 29, 30 (2022). It does not commit evaluation of eligibility to Congress. *See Elliott v. Cruz*, 137 A.3d 646, 651 (Pa. Commw. Ct. 2016) ("Significantly, no Constitutional provision places such power in Congress to determine Presidential eligibility," and concluding that Constitution's lack of specification of a "Judge" of presidential qualifications reinforces that the eligibility question "has not been textually committed to Congress"), *aff'd*, 635 Pa. 212 (2016). Even if the Amendment implicitly allows Congress to adjudicate presidential qualifications, such authority is not exclusive. *See Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2014) ("[N]othing in the Twentieth Amendment states or implies that Congress has the exclusive authority to pass on the eligibility of candidates for president … [or] precludes state authorities from excluding a candidate with a known ineligibility from the presidential ballot."); *Cawthorn v. Amalfi*, 35 F.4th 245, 262-63 (4th

Cir. 2022) (Wynn, J., concurring) (noting that even for congressional candidates, where Congress is vested with authority to judge the qualifications "'of its own Members, ... [n]othing in the text of that clause says anything about 'candidates,' 'prospective Members,' 'would-be [M]embers,' and the like"). Furthermore, reserving the authority to evaluate a presidential candidate's eligibility for Congress under the Twelfth Amendment (on January 6, 2025) or the Twentieth Amendment (on January 20, 2025), could lead to uncertainty and chaos like that of January 6, 2021. Petitioners challenged Trump's eligibility now, before anyone votes, to avoid that outcome. Although a court may "gladly avoid" addressing the Petition's merits, the political question doctrine does not provide that escape route. *Zivotofsky*, 566 U.S. at 195.[2]

3. *States frequently consider the eligibility of presidential candidates.*

Intervenor-Respondents cite cases where, they assert, courts avoided determining a presidential candidate's eligibility based on the political question doctrine. But most involve federal-court challenges dismissed for lack of Article III standing.[3] Section 204B.44 grants Petitioners standing in this state-court proceeding. And nearly all

[2] The Twenty-Fifth Amendment and the Impeachment provisions do not help Intervenor-Respondents. The Twenty-Fifth Amendment mandates that upon the President's death, resignation, or removal, the Vice-President becomes President. The Impeachment provisions cut against Intervenor-Respondents because those clauses use language committing certain acts to Congress—the House has "the sole power of impeachment" and the Senate has "the sole power to try all Impeachments." Section 5 of the Fourteenth Amendment contains no such language.

[3] *See, e.g.*, *Berg v. Obama,* 586 F.3d 234 (3d Cir. 2009) (affirming dismissal on standing grounds); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146 (N.D. Cal. 2008) (same). In *Robinson*, after concluding plaintiff lacked standing *and* the challenged candidate was eligible, the court mused that the Twelfth and Twentieth Amendments provide the exclusive means for resolving candidate qualifications. 567 F. Supp. 2d at 1147. The Ninth Circuit implicitly rejected this dictum in *Lindsay*, 750 F.3d at 1065.

involve post-election efforts to annul election results.[4] They have no bearing on pre-election challenges where state law authorizes such challenges.[5]

Intervenor-Respondents also ignore numerous cases where courts decided factual questions regarding eligibility. Indeed, states routinely adjudicate presidential candidates' qualifications before elections. Derek T. Muller, *"Natural Born" Disputes in the 2016 Presidential Election*, 85 Fordham L. Rev. 1097 (2016) (collecting cases); Muller, *Scrutinizing Federal Election Qualifications*, 90 Ind. L. J. 559 (2015) (similar). And states properly exclude ineligible candidates. *See, e.g.*, *Lindsay*, 750 F.3d 1061 (underage); *Hassan v. Colorado*, 495 F. App'x 947 (10th Cir. 2012) (Gorsuch, J.) (naturalized citizen); *Socialist Workers Party v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (underage); Muller, *Scrutinizing Federal Election Qualifications*, 90 Ind. L. J. at 603 & n.355 (noting that 44 states excluded noncitizen candidate). As the Ninth Circuit held, "nothing in the Twentieth Amendment states or implies that Congress has the exclusive authority to pass on the eligibility of candidates for president." *Lindsay*, 750 F.3d at 1065; *Socialist Workers Party*, 357 F. Supp. at 113 (same).

Intervenor-Respondents attempt to distinguish these cases because the candidates were indisputably ineligible. But if states cannot exclude ineligible candidates, that must

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[4] *See Berg*, 586 F.3d at 238 (3d Cir. 2009) (post-election suit to enjoin formalizing election results); *Grinols v. Electoral Coll.*, 2013 WL 2294885, at *1 (E.D. Cal. May 23, 2013) (suit to annul election results), *aff'd*, 622 F. App'x 624 (9th Cir. 2015); *Strunk v. N.Y. State Bd. of Elections*, 950 N.Y.S.2d 722 (Sup. Ct. 2012) (same).

[5] *Jordan v. Reed*, No. 12-2-01763-5, 2012 WL 4739216 (Wash. Super. Ct. Aug. 29, 2012), is distinguishable because Washington law did not permit challenges to a candidate's eligibility. The court's analysis focused on whether the *Secretary of State* had an obligation to investigate a candidate's eligibility; rather than the *Court's* power to do so.

be so in all cases, not just when eligibility is disputed. Moreover, Intervenor-Respondents ignore cases where states *have* adjudicated eligibility disputes. In *Elliott v. Cruz*, the court held the political question doctrine did not apply, rejecting the argument that the Twelfth Amendment committed the issue to Congress. 137 A.3d at 650-51. The court analyzed whether Ted Cruz was a natural-born citizen and concluded he is. *Id*. at 658; *see also Ankeny v. Governor of Indiana*, 916 N.E.2d 678, 688 (Ind. App. 2009) (affirming dismissal of complaint challenging McCain and Obama's eligibility, holding both were natural born citizens). *Purpura v. Obama*, 2012 WL 1949041 (N.J. Super. App. Div. May 31, 2012) (similar). A Colorado District Court, following *Hassan*, has also so far declined to dismiss a Section 3 challenge to Trump's eligibility. *See Anderson v. Griswold*, No. 2023-cv-32577, slip op. at 17-21 (Co. Dist. Ct. Oct. 20, 2023) (available at: https://www.courts.state.co.us/Courts/County/Case_Details.cfm?Case_ID=5240).

Federal courts affirmed this state authority. As then-Judge (now Justice) Gorsuch explained, a state's "legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot [presidential] candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F. App'x at 948; *accord Lindsay*, 750 F.3d at 1064 ("no doubt that 'a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies'") (citation omitted); *Socialist Workers Party*, 357 F. Supp. at 109. This includes Section 3. *Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1319 (N.D. Ga. 2022) (recognizing, in Section 3 context, the states' "legitimate interest" in "enforcing existing constitutional requirements to ensure that candidates meet the threshold

requirements for office and will therefore not be subsequently disqualified, thereby causing the need for new elections"), *remanded as moot*, 52 F.4th 907 (11th Cir. 2022); *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 632 (1869) ("the State has obviously a great interest in" enforcing Section 3 "and a clear right to" do so). Likewise, this Court can decide whether Trump is eligible.[6]

4. *The possibility of conflicting decisions should be given no weight.*

Intervenor-Respondents assert this Court should dismiss this case because state courts may decide the issue differently. But *Baker* says nothing about courts deciding matters differently. The doctrine protects coordinate branches from each other. If the doctrine prevented resolution wherever sister courts may decide a matter differently, no case would ever be decided. That is why appellate courts exist. As a practical matter, if any state court decides Trump is disqualified, the U.S. Supreme Court can resolve the issue. The possibility that another court may decide this matter differently does not relieve this Court of its obligation to decide the case before it.

5. *The issues were not resolved by the Senate impeachment trial.*

Trump's final argument invokes res-judicata-like principles to argue that the Senate's failure to convict Trump forecloses this matter. To the extent the Senate impeachment vote has any relevance, it *supports* the conclusion that Trump engaged in insurrection and therefore is disqualified under Section 3. First, a clear bipartisan

[6] For these reasons, and as more fully explained in Petitioners' forthcoming supplemental brief, this Court's unpublished dicta in *Oines v. Ritchie*, A12-1765 (Minn. 2012) that "under federal law it is Congress that decides challenges to the qualifications of an individual to serve as president" is erroneous and unpersuasive and provides no basis to deny the Petition in this case.

majority of 57 Senators concluded, as did the House, that Trump incited insurrection, and should be convicted. Second, 22 Senators voted to acquit based expressly on their belief that the Senate lacked jurisdiction to try a former official (an issue unrelated to the merits under Section 3) and either criticized him or stated no view on the merits. *See* Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JustSecurity (Feb. 15, 2021), https://bit.ly/3uUZA1A. A clear majority, and a likely two-thirds majority, of Senators agreed that Trump is guilty of incitement to insurrection. In any case, more evidence is now available than the Senate had in 2021.

B. Excluding Trump from the ballot would not interfere with RPM's nomination process or associational rights.

While voting and association are central to our system of government, "[i]t does not follow … that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). RPM makes three arguments to undermine this long-established principle: that Minnesota's political question doctrine "delegates" authority to the parties to choose candidates; that the Fourteenth Amendment cannot be construed to conflict with the First Amendment; and that this proceeding interferes with the Party's and voters' associational rights. These arguments all relate to the constitutionality of ballot access restrictions and must be analyzed under the *Anderson-Burdick* interest-balancing test. To determine the proper level of scrutiny, the Court:

> must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth

> Amendments that the [proponent] seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the [proponent's] rights.

Org. for Black Struggle v. Ashcroft, 978 F.3d 603, 607 (8th Cir. 2020) (cleaned up). When the burden to the proponent's rights is severe, state restriction must be "narrowly tailored and advance a compelling state interest." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). "Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id*. (cleaned up). The *Anderson-Burdick* standard applies equally whether a challenge to ballot exclusion is raised by a candidate,[7] voter, or party. *See De La Fuente v. Simon*, 940 N.W.2d 477, 493 (Minn. 2020) ("The associational rights and interests of [these actors] are often intertwined.").

The fact "[t]hat a particular individual may not appear on a ballot as a particular party's candidate does not severely burden that party's associational rights," because, *e.g.*, "[a] particular candidate might be ineligible for office." *Timmons*, 520 U.S. at 359. As discussed above, multiple courts have recognized a state's interest in regulating ballot access to protect against "frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *see also Timmons*, 520 U.S. at 364-65; *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 697 (8th Cir. 2011); *Greene*, 599 F. Supp. 3d at 1311-12; *Lindsay*,

[7] Trump does not appear to make a First Amendment argument. If he had, the Supreme Court has held that appearing on a ballot is not a fundamental right, and the mere existence of barriers to ballot access does not compel close scrutiny. *Clements v. Fashing*, 457 U.S. 957, 963 (1982).

750 F.3d at 1063-64; *Hassan*, 495 F. App'x at 949; *see also Anderson,* slip op. at 17-21 ("if a political party puts forth a constitutionally ineligible candidate" it does not violate the First Amendment for the "State to disqualify the candidate on the grounds of his ineligibility" and "to find otherwise would be to permit the political parties to disregard the requirements of the law and the constitution whenever they decided as a matter of 'political expression' or 'political choice' that they did not apply.").

RPM's cases do not hold differently. Several involve a state's interference with a party's nominating convention and delegate selection or caucuses; these are not controlled by the state. *See Cousins v. Wigoda*, 419 U.S. 477 (1975); *O'Brien v. Brown*, 409 U.S. 1 (1972); *DFL State Cent. Comm. v. Holm*, 33 N.W.2d 831 (Minn. 1948) (involving competing slates of delegates from party convention); *Irish v. Democratic-Farmer-Labor Party of Minn.*, 399 F.2d 119 (8th Cir. 1968) (interference with precinct caucus procedures). The Supreme Court has distinguished between a state's right to control the presidential primary itself, to preserve the integrity of the election process, from interfering with a party's nominating convention or selection of delegates. *See Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 125-26 (1981). Nothing in this Petition prevents the Republican Party's National Nominating Convention from choosing Trump as its candidate—regardless of whether Trump is on all states' primary ballots. But Minnesota has a recognized interest in regulating ballot access.

Other cases cited by RPM involve the Party's right to exclude individuals who were not affiliated with the Party. *See, e.g.*, *California Democratic Party v. Jones*, 530 U.S. 567, 568 (2000) (holding a blanket primary violated the party's associational rights).

Likewise, *De La Fuente* focused on RPM's right to exclude a candidate with whom it did not wish to associate. Even if the Secretary of State may not exclude or add candidates to a party's slate of presidential primary nominees, § 204B.44 authorizes the *Court* to exclude a candidate from the ballot, if, *e.g.*, the candidate is ineligible for the office they seek. *De La Fuente* did not address the State's right to exclude a candidate from the ballot to protect the integrity of the election and keep frivolous or fraudulent candidates off the ballot. *Bullock*, 405 U.S. at 145; *Timmons*, 520 U.S. at 364-65. Political parties have never had unfettered access to state-printed ballots.

Finally, RPM does not argue that the process under § 204B.44 burdens the Party's First Amendment Rights. The mere process of adjudication does not violate the First or Fourteenth Amendments; the *Anderson-Burdick* test is grounded in the Due Process Clause. And this Court's proceedings provide due process of law. This Court has ensured that RPM, Trump, his campaign, and the National Republican Party each can be heard. Should these proceedings later include an evidentiary hearing, the mere need to participate in such proceedings does not create any burden "beyond the merely inconvenient." *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in the judgment).

C. The Court may hear the Petition under § 204B.44.

1. *"Filing" for office is not a prerequisite.*

RPM advances a constrained view of this Court's jurisdiction based on the language in § 204B.44(a)(1) which provides that the Court may correct an error or omission "in the placement or printing of the name … on any official ballot, *including the*

placement of a candidate on the official ballot who is not eligible to hold the office for which the candidate has filed." Minn. Stat. § 204B.44(a)(1) (emphasis added). The Court need not determine whether § 204B.44(a)(1) allows it to hear the Petition because Petitioners also allege that Trump is barred from the ballot may under the catch-all provision of § 204B.44(a)(4), which encompasses "any wrongful act, omission, or error of … the secretary of state, or any other individual charged with any duty concerning an election." Pet. ¶ 316. This provision gives the Court broad authority to control access to the ballot.

Even if the Court were to consider RPM's argument, the italicized language above, added in 2015, does not deprive the Court of jurisdiction to address a petition where a candidate is not required to "file" for the office. Use of the term "including" to introduce the new phrase suggests it is intended to identify a partial, non-exhaustive list of errors or omissions relating to the placement of the name or description of a candidate on an official ballot. In *Matter of Welfare of H.B.*, this Court analyzed the use of "including," noting that the ordinary meaning suggests it "is used to suggest that what follows is a partial and not exhaustive list of the content to which the subject refers." 986 N.W.2d 158, 168 (Minn. 2022). The Court explained, however, that precedent was split on whether the word is meant as an enlargement or a limitation. *Id*. at 168-69. Thus, the Court must analyze the context. *Id*. Here, the term "including" can only be construed to introduce a non-exhaustive list of potential errors which may be addressed through a § 204B.44 petition. It precedes a single example of an error or omission subject to challenge. The word "including" would be superfluous if it were meant to introduce an

exhaustive list of a single example. Moreover, this Court has recognized the preceding phrase encompasses errors unrelated to eligibility, such as errors regarding party affiliation, incumbent status, or the name to appear on the ballot. *See, e.g.*, *In re Roseau County Ballot for November 8, 2022 General Election*, 980 N.W.2d 809 (Minn. 2022) (failure to include political party affiliation and failure to include "incumbent" next to judicial candidates); *Weiler v. Ritchie*, 788 N.W.2d 879 (Minn. 2010) (addressing appearance of candidate's name on the ballot).

This conclusion is supported by legislative history. *See Welfare of H.B.*, 986 N.W.2d at 169 (if a statute is ambiguous, "the next step is to look beyond the statute's text to ascertain the intent of the Legislature."). The phrase was added through 2015 Minn. Laws Ch. 70 which, in part, addressed the procedure for filling a "vacancy in nomination" which occurs when a major political party candidate "is determined to be ineligible … pursuant to a court order issued under § 204B.44." 2015 Minn. Laws Ch. 70 § 21 (amending § 204B.13 addressing vacancies in nomination); § 31 (amending § 204B.44(a)(1)). The context of the § 204B.44 amendment suggests it was intended to specifically reference challenges triggering a vacancy in nomination–not to constrain the Court's ability to hear challenges to candidate eligibility only where a candidate "has filed" for office.[8] The Court may consider this petition pursuant to § 204B.44(a)(1) to correct "an error or omission in the placement or printing of the name … of any candidate … on any official ballot."

[8] Candidates nominated under § 204B.13, subd. 2 do not "file" for office; the party files a certificate of nomination. No one would argue that candidates so nominated are inoculated from eligibility challenges simply because they do not "file" anything.

2. *Statutory provisions governing state candidates do not constrain the Court's authority.*

RPM erroneously asserts that "related statutory provisions" demonstrate the Court's authority to adjudicate eligibility does not extend to presidential candidates. RPM Br. at 14-15. None of the cited provisions support RPM's conclusion.

The first provision directs the filing officer "not [to] certify the person's name to be placed on the ballot" after receiving "a certified copy of a final judgment or order" that the person (1) was convicted of a felony and has not been restored to civil rights, (2) is under guardianship and whose voting rights were revoked; or (3) has been found legally incompetent. RPM Br. at 14 (citing Minn. Stat. § 204B.10, subd. 10). RPM relies on the fact that § 204B.10, subd. 10 does not apply to presidential and other federal candidates. This is unremarkable. This provision implements Article VII, § 6 of the Minnesota Constitution, relating to state-candidate qualifications. Naturally, it does not extend to federal candidates.

RPM turns next to § 204B.13, which provides a mechanism to fill certain nomination vacancies, but explicitly excludes presidential candidates from the process. RPM concludes this exclusion means the court cannot address the eligibility of a presidential candidate. This conclusion is illogical. Nothing in § 204B.13 purports to limit the Court's authority.

Finally, RPM cites § 204B.06, subd. 1b(b) which provides that, for offices with a residency requirement which must be satisfied at the time of filing, the filing officer, upon request, must review whether the provided address is within the area represented by

the office, and, if not, remove the candidate from the ballot. The fact that this provision does not apply to presidential or other federal candidates is unremarkable; such candidates are not subject to residency requirements that "must be satisfied by the close of the filing period."

The fact that a candidate excluded from the ballot pursuant to § 204B.06, subd. 10 or § 204B.10, subd. 1b(b), may seek review through § 204B.44 does not suggest that "an eligibility determination under Minn. Stat. § 204B.44 only applies to state-imposed candidate requirements." RPM Br. at 15. The judicial review referenced in these sections is not an eligibility challenge but rather a review of the decision to exclude an ineligible candidate from the ballot. Moreover, even if these provisions authorized an eligibility challenge under § 204B.44, nothing in their plain language or § 204B.44 itself suggests these are the *only* circumstances when an eligibility challenge can be made.

3. *Disqualification under Section 3 renders a candidate "ineligible."*

RPM asserts this Court's authority to review a candidate's eligibility does not apply to challenges under Section 3 because the enumerated disqualification is described as a "disability." RPM at 16. But eligible means "[f]it and proper to be selected or to receive a benefit; legally qualified for an office, privilege, or status." Eligible, BLACK'S LAW DICTIONARY (11th ed. 2019). Determining whether one is "eligible" to hold an office necessarily requires consideration of Constitutional provisions which would disqualify the individual from being "legally qualified for an office, privilege, or status."

Section 3's omission of the word "eligible" is irrelevant. The Minnesota Constitution does not use "eligible" when describing the qualifications for governor and

lieutenant governor. Art. V, Sec. 2. Yet no one disputes that being 25, a bona fide resident of Minnesota, and a U.S. citizen, are eligibility criteria and that a candidate's failure to satisfy such criteria may be addressed under § 204B.44. Similarly, the Twenty-Second Amendment does not use the word "eligible," but, again, no one doubts that a two-term President is ineligible to be President again.

This Court's statement that "[t]he Presidential Eligibility Clause serves as the exclusive source for the qualifications to serve as President" is imprecise. *See* RPM Br. at 17 (citing *De La Fuente*, 940 N.W.2d at 490). An individual may meet these qualifications but nonetheless be ineligible to hold office, by Section 3 of the Twenty-Second Amendment.

To the extent RPM suggests that the U.S. Supreme Court "has declined to equate Section 3 with a qualification for office" it mischaracterizes the Supreme Court's holdings. RPM Br. at 16. In *Powell v. McCormack*, the Court declined to decide whether various constitutional provisions, including Section 3, were "qualifications" because no one argued Powell was ineligible under these provisions. 395 U.S. 486, 520, n.41 (1969). *U.S. Term Limits, Inc. v. Thornton* involved a challenge to a law imposing congressional term limits. 514 U.S. 779 (1995). The Court cited *Powell* when noting that qualifications for serving in Congress may include more than those specified in Art. 1, § 2 (for the House) and Art. I, § 3, cl. 7 (for the Senate) but declined to reach that point because it had no bearing on whether Congress or the states could *add* qualifications beyond those specified in the Constitution. *Id.* at 787, n.2. These cases do not suggest that "Section 3's disability is distinguishable from an eligibility criterion."

Under § 204B.44, this Court may adjudicate whether Trump is ineligible to hold the Office of President and, thus, barred from appearing on Minnesota' ballot.

4. *The Court may bar Trump from the ballot notwithstanding the speculative possibility that Congress may lift his ineligibility.*

Trump asserts this Court cannot bar him from the ballot because his disqualification may be cured by a subsequent congressional act. But the remote, speculative possibility that two-thirds of each chamber may vote to remove the Section 3 disability does not preclude this Court from hearing the Petition.

Trump argues that because candidates who are ineligible to hold the office at the time the ballots are printed but ***will become eligible*** after the election and before assuming the office (*e.g.*, Joe Biden's election to the Senate "shortly before his Constitutionally-required 30th birthday), or who ***can by their own action become eligible*** by the time they take office (*e.g.*, a candidate who must resign from a conflicting office or satisfy a residency requirement to hold office) are entitled to appear on the ballot, it necessarily follows that ***any*** ineligible candidate who hypothetically ***could become eligible*** to hold the office by the time they take office must be included on the ballot. Trump Br. at 28-30.

But the conclusion does not follow from the premise. In the examples cited by Trump, the candidate may cure their *own* ineligibility: the officer-elect can resign from the conflicting office or establish residency and hold a Congressional office. But Trump cannot make himself eligible to hold the Office of President. Rather, the disqualification pursuant to Section 3 can only be removed "by a vote of two-thirds of each House."

Thus, the disqualification imposed by Section 3 is no less immutable than the disqualifications imposed by Art VII, § 6 of the Minnesota Constitution and which require removal from the ballot under § 204B.10, subd. 6.[9] A convicted felon could be pardoned, a ward of the state could have their right to vote restored, and an order finding an individual "legally incompetent" could be vacated. Although it is hypothetically possible that these candidates could become eligible to hold their offices, the legislature mandated their exclusion from the ballot. Likewise, the remote, speculative possibility that Congress may vote to remove Trump's disqualification by a two-thirds majority vote of each house neither deprives this Court of the power to exclude Trump from the ballot nor requires Minnesota to facilitate a potential constitutional crisis in January 2025 simply because he theoretically could be granted amnesty he has never sought.

III. SECTION 3 REQUIRES NO FEDERAL LEGISLATION.

A. Section 3, like Section 1 of the Thirteenth and Fourteenth Amendments, is self-executing.

Section 3 uses the same direct prohibitory language as Section 1 of the Thirteenth and Fourteenth Amendments. *Compare* U.S. Const. amend. XIV, § 3 ("*No person shall be ... or hold*") *with id.* § 1 ("*No State shall make or enforce*…; *nor shall any State deprive*…; *nor deny*…") *and id.* amend. XIII, § 1 ("*Neither* slavery nor involuntary servitude … *shall exist*").[10] Neither uses mere authorizing language, *e.g.*, that Congress

[9] Importantly, like Section 3, the requirement that a candidate be eligible to vote is a limitation on the eligibility ***to hold*** office, not a prohibition on the ability to seek election to an office. Minn. Const. Art. VII, § 1.

[10] Emphasis added throughout unless otherwise noted.

"may" "by Law" act. *Cf.* U.S. Const. art. I, § 4 ("Congress may at any time by Law"), 8 ("Congress shall have Power To"); *id.* Art. III, § 3 (Congress "shall have Power").

The U.S. Supreme Court—not one justice riding circuit—has confirmed Section 1 of the Thirteenth Amendment is self-executing. *See Jones v. Alfred H. Mayer Co*., 392 U.S. 409, 439 (1968) ("'By its own unaided force…,' the Thirteenth Amendment 'abolished slavery, and established universal freedom.'") (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)). So too Section 1 of the Fourteenth Amendment. *See City of Boerne v. Flores,* 521 U.S. 507, 522-24 (1997) ("Section 1 of the new draft Amendment imposed self-executing limits on the States … As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."); *Civil Rights Cases*, 109 U.S. at 20 ("[Thirteenth] amendment, *as well as the Fourteenth*, is undoubtedly self-executing without any ancillary legislation"); CREW Br. 3-6.[11] If "No *State* shall" is self-executing, then so is "No *person* shall."

As discussed above, Trump's argument from Section 5 proves too much. *Supra* Part II.A.2. Section 5 applies to Section 1 to the same extent that it applies to Section 3. If Section 5 rendered Section 3 non-self-executing, it would also render Section 1, and the Thirteenth Amendment, non-self-executing. *See* U.S. Const. amend. XIII, § 2 (similar clause authorizing legislation). Under Trump's logic, the Constitution's ban on slavery is subject to the whims of Congress.

[11] RPM and ACLJ cite a county trial court decision in Arizona, but the state supreme court expressly declined to decide that issue on appeal. *See* Pet. Br. 28 n.15.

The Supreme Court rejected this view. *See City of Boerne*, 521 U.S. at 522-26 (while Section 1 of the Fourteenth Amendment "imposed self-executing limits," Section 5 authorizes Congress to enact additional "remedial and preventive measures"); *Jones*, 392 U.S. at 439 ("[Section 2 of the Thirteenth] Amendment empowered Congress to do *much more*" than what Section 1 prohibits); *Civil Rights Cases*, 109 U.S. at 20 (noting that while Thirteenth Amendment "[b]y its own unaided force … abolished slavery," nonetheless "legislation *may* be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation") (all emphases added). Thus, Minnesota courts—*without* relying on congressional legislation—have adjudicated cases under Section 1 of the Fourteenth Amendment, *e.g.*, *In re Candidacy of Independence Party Candidates Moore v. Kiffmeyer*, 688 N.W.2d 854 (Minn. 2004) (arising under § 204B.44), or even Section 1 of the Thirteenth Amendment, *see Warwick v. Warwick*, 438 N.W.2d 673, 679 (Minn. App. 1989).

B. ***Griffin* is not authoritative.**

Trump claims *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869), is "authoritative precedent" and merits "*stare decisis*" deference. But the Circuit Court for the District of Virginia was a court with less jurisdiction than the current Fourth Circuit. And just because Chase was a Supreme Court justice riding circuit does not make it more authoritative than any other circuit decision; *Griffin's Case* is not even binding authority in the Fourth Circuit. *See Cawthorn*, 35 F.4th at 278 n.16 (Richardson, J., concurring in

the judgment) ("Because he was acting as a circuit judge, his opinions are not binding on us.").

Furthermore, when the case's central problem—were official government decisions by ex-Confederate officials all void?—was presented to the full U.S. Supreme Court, the Court unanimously agreed on the answer (no) for an *entirely different reason*: the de facto officer doctrine. 11 F. Cas. at 27. The record does not reflect whether Chase first presented his theory that Section 3 requires implementing legislation to the full Court before deciding the case based solely on the de facto officer doctrine. But the Court dismissed an appeal of a case that *did* apply Section 3 without federal legislation. *See Worthy v. Comm'rs*, 76 U.S. 611 (1869). And the Court *did* later cite *Griffin* favorably—but *only* for the de facto officer ruling. *See Ex parte Ward*, 173 U.S. 452, 454–56 (1899).[12]

Likewise, Trump notes "the U.S. Supreme Court was not called upon to revisit Chief Justice Chase's conclusion." But the Union-appointed provisional governor pardoned Griffin just three weeks after the decision, Pet. Br. 23 n.11, so there was no appellant. And since the full U.S. Supreme Court unanimously endorsed the "de facto officer" doctrine, no similar cases arose.

C. ***Griffin* is not persuasive.**

Petitioners explained the logical flaws in Chase's opinion. Pet. Br. 12-29; *see also supra* Part III.A (refuting argument that Section 5 transforms Section 3's self-executing

[12] *In re Brosnahan* is irrelevant. The concurrence cited *Griffin* in passing to warn of "the spectacle of a single judge deciding such a question in such a [habeas] proceeding." 18 F. 62, 81 (C.C.W.D. Mo. 1883) (McCrary, J., concurring).

language into something requiring legislation). One was Chase's failure to explain why *state* law procedures could not enforce Section 3 and provide due process.

Trump claims the reason why *Griffin* never discussed *state* enforcement of Section 3 was "obvious"—southern state officials could not judge other southerners' qualifications. Trump Br. 14. This belies history—southern state officials routinely did judge other southerners' qualifications. *See Worthy v. Barrett*, 63 N.C. 199, *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869); *In re Tate*, 63 N.C. 308 (1869); *State ex rel. Downes v. Towne*, 21 La. Ann. 490 (1869); *Sandlin*, 21 La. Ann. at 631.[13] And in 1868, Georgia Governor's refused to certify the election of John Christy to the House of Representatives under Section 3. 1 Asher Hinds, *Hinds' Precedents of the House of Representatives of the United States*, ch. 14, at 470 (1907) (hereinafter *Hinds' Precedents*). Loyal officials adjudicated disqualification of insurrectionists then; Minnesota can now.

D. ***Griffin* was widely criticized.**

Trump's claim that "no record of any serious outcry or protest about this decision," Trump Br. 11 is ahistorical. Minnesota's Winona Daily Republican republished an editorial from the New York Sun:

> Chief Justice CHASE decided in effect that the fourteenth amendment was a mere dead letter, entirely dependent on Congressional legislation to give it any efficacy, and not to be enforced where its enforcement would occasion inconvenience.

[13] Unpublished judicial decisions also may exist.

> *We consider that decision of Chief Justice CHASE not only entirely erroneous in point of law, but the most immoral in its character and the most atrocious in its consequence ever pronounced by an American Judge.*

Winona (Minn.) Daily Republican, June 2, 1869, at 1 col. 1-2. (republishing N.Y. Sun, May 21, 1869, at 1 col. 1) (emphasis in original).

Newspapers praising the decision focused on its outcome (preventing the release of prisoners), not the interpretation of Section 3 as non-self-executing. *See, e.g.*, N.Y. Tribune, May 11, 1869, at 4 col. 2 (praising decision for avoiding "a general jail delivery" and noting that "the ineligibility of certain judges … does not go to the extent of *invalidating their official actions*, prior to their removal from office"). One editorial approved the outcome but excoriated Chase for "bas[ing] his decision on the worst possible grounds," noting that its "sweeping" basis would apply to the *entire* Thirteenth and Fourteenth Amendments, and so a future Congress "has only to repeal all laws for the enforcement of the amendment, and it is absolutely null." Milwaukee Sentinel, May 17, 1869, at 1 col. 1.

E. ***Griffin* is not reliable.**

Petitioners noted Chase's conflicting opinions in the *Griffin* and *Davis* cases. Pet. Br. 24-25. Trump tries to minimize Chase's hostility to Section 3 by citing his antislavery work. Trump Br. 15. But Chase—like the conservative Senate Republicans who opposed the Fourteenth Amendment, and most of President Johnson's cabinet—opposed *both* slavery *and* Reconstruction. On June 3, 1868, Chase wrote that if he were president, he would "proclaim a general amnesty to every body of all political offences committed

during the late rebellion." C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 Akron L. Rev. 1165, 1195 (2009) (citation omitted). That same day, a major newspaper published an extraordinary interview stating Chase's opposition to Section 3:

> There is no constitutional authority to hold [southern states] in subjugation, and if there were it would be alike unwise and unjust. [Chase] favors…removing the political disabilities of every man in the nation.
>
> …
>
> Furthermore he regards this as absolutely necessary, as the provisions of that amendment exclude thousands from office, both under the government and the States, and this will lead to complications which should be avoided.

N.Y. Herald, June 3, 1868, at 3 col. 3.[14] When Congress did not pass a general amnesty soon enough for Chase's liking,[15] the "complications" he cited in June 1868 became the "difficulties" and "inconvenience" he cited in *Griffin*. 11 F. Cas. at 24.[16]

F. Actions from 1868 to 1870 show Congress understood Section 3 was self-executing.

Congress repeatedly passed amnesty bills (upon supplicants' requests) during the 22-month period between the amendment's ratification and the first federal enforcement legislation; Congress understood the amendment was both self-executing and being executed. Pet. Br. 18-20.

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[14] Chase's exact words were paraphrased by the interviewer and publisher. *See id*.

[15] In 1868, the Republican and Democratic national platforms called for broad amnesty—nonsensical if Section 3 was not in effect. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comm. 87, 112 & n.131 (2021).

[16] RPM's "sword and shield" reasoning cannot reconcile Chase's opposite positions in these cases. Pet. Br. 14 & n.7.

Trump claims that ex-Confederates sought amnesty, and Congress granted it, *in anticipation* of federal legislation. Trump Br. 16. But this is nonsensical, given that the 1866 Congress was specifically concerned with the possibility that they "may pass laws here to-day, and the next Congress may wipe them out," Cong. Globe, 39th Cong., 1st Sess., 1095 (1866) (Rep. Hotchkiss). Thus, it is impossible to conclude that Congress believed Section 3 was ineffective without legislation, yet decided to leave it to "the next Congress" to pass such legislation, even in light of *Griffin*. The simpler explanation: Congress wrote Section 3 as self-executing; knew it *was being executed* after ratification; disregarded *Griffin*; and eventually enacted the Ku Klux Klan Act when other developments (*e.g.*, the rise of the Klan) motivated implementing legislation. Indeed, Trump cites no mention of *Griffin* during debates over that act. Rather, Congress likely knew that states were enforcing Section 3, and that the Supreme Court had declined to stop them. *See Worthy v. Comm'rs*, 76 U.S. 611 (1869).

G. Amicus ACLJ garbles history.

ACLJ attributes a claim about "stigma" as a purpose of Section 3 to Senator Howard, a member of the Joint Committee on Reconstruction who introduced the original Fourteenth Amendment to the Senate, then led the charge to adopt the current Section 3. ACLJ Br. 12. But Senator Howard did not say ACLJ's quote; it belongs to Senator Trumbull, who played a much smaller role. Cong. Globe, 39th Cong., 1st Sess., 2901 (1866).

ACLJ also cites two badly out-of-context quotes from Rep. Thaddeus Stevens. ACLJ Br. 13. One pertained to an earlier version of Section 3 that would have banned *all*

ex-Confederates from *voting* until 1870. Cong. Globe, 39th Cong., 1st Sess., 2460 (1866). Stevens admitted this voter-disenfranchisement draft would require implementing legislation and Congress abandoned that draft. *See id.* at 2544, 2869. Stevens' second quote does not pertain to Section 3 at all, but to "enabling acts, which shall do justice to the freedmen and enjoin enfranchisement." *Id.* at 3149.

Finally, ACLJ cites Thomas Chalfant. But Chalfant *opposed* the Fourteenth Amendment—he concluded his remarks on Section 3 by accusing amendment supporters of "degrad[ing] the ballot-box by permitting the negro to participate in your elections," and warned of "the curses of a nation" if the amendment were adopted.[17] He is not a reliable source on its meaning.

IV. SECTION 3 APPLIES TO FORMER PRESIDENTS.

A. "Officer of the United States" can include presidents.

In the 1787 Constitution, "officer of the United States" can include the president in at least some contexts. Pet. Br. 36-38. Trump now says that "officer of the United States" can *never* include the president.[18] To distinguish the Necessary and Proper Clause (which clearly includes the president), Trump claims that the president is *not* an "officer," but he *is* a "Department." Trump Br. 25. But "the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008)

[17] Appendix to the Daily Legislative Record, Containing the Debates on the Several Important Bills Before the Legislature of 1867 (George Bergner, ed.) (Harrisburg, Pa. 1867), LXXXII (Jan. 30, 1867), LXXXIII (Feb. 6, 1867).

[18] Trump does not argue that the presidency is not an "office … under the United States." *See* Pet. Br. 29-36.

(quotation omitted); *Whitman v. Nat'l Bank of Oxford*, 176 U.S. 559, 563 (1900) ("The simplest and most obvious interpretation of a Constitution … is the most likely to be that meant by the people in its adoption."). No normal understanding of "department" includes the President.

Nor does Trump explain his about face from a federal court brief he filed just four months ago, arguing the precise opposite.[19] *See* Pet. Br. 38-39. There, Trump argued that he *is* a former "officer of the United States." *See* Memo. in Opp. to Mot. to Remand, ECF No. 34, *New York v. Trump*, No. 23-cv-3773 (S.D.N.Y. filed June 15, 2023) ("Trump Opp."), at 2-9, *available at* https://bit.ly/TrumpRemandOpp. He correctly argued there that Tillman and Blackman's position that elected officials are not officers of the United States has "never been accepted by any court" and is refuted by "contrary precedent." *Id*. at 2-3. He furthermore distinguished Appointments Clause cases like *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), explaining the "Supreme Court was not deciding that meaning of 'officer of the United States' as used in every clause in the Constitution," but rather was only describing the meaning of "other officers of the United States" in one clause, and "*Free Enterprise Fund* says nothing about the meaning of 'officer of the United States' in other contexts." Trump

[19] He incorrectly claims that Petitioners "concede" his (current) position and that "everyone in this case seems to agree that the phrase 'officers of the United States' in the Constitution *never* refers to the President." Trump Br. 20, 24 (citing Pet. Br. 39). Rather: in the 1787 Constitution, the phrase includes the president for at least some purposes, Pet. Br. 36-39, but even if it did not, the original public meaning when the Fourteenth Amendment was passed and ratified included the president controls, Pet. Br. 39-45.

Opp. at 4.[20] The court agreed with Trump that the president *is* an "officer of the United States." *New York v. Trump*, No. 23-cv-03773-AKH, 2023 WL 4614689, *5 (S.D.N.Y. July 19, 2023) (remanding on other grounds).

B. The original public meaning of the Fourteenth Amendment included the president as an "officer of the United States."

By 1866, the president was widely described as an "officer of the United States." Historical evidence demonstrates that, when the Fourteenth Amendment was enacted and ratified, Congress, presidents, the public, and the Supreme Court all called the president an "officer of the United States." Pet. Br. 39-43; Magliocca Br. 15-18; Const. Accountability Ctr. Br. 10-16. Trump's dismissal of these examples as not using the phrase "in the strict Constitutional sense," conflicts with the axiom that "the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *Heller*, 554 U.S. at 576 (quotation omitted).

This 1860s-era usage defines the original public meaning of the Fourteenth Amendment. *See McDonald v. City of Chicago*, 561 U.S. 742, 813 (2010) ("the objective of this inquiry is to discern what 'ordinary citizens' *at the time of ratification* would have understood" the words to mean) (cleaned up); *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993) (Scalia, J., concurring) ("I take it to be a fundamental principle of constitutional

[20] Trump also correctly distinguished *United States v. Mouat*, 124 U.S. 303, 307 (1888), which held a naval paymaster's clerk was not an officer of the United States, adding that Blackman and Tillman's views are "idiosyncratic … and of limited use to this Court." Trump Opp. at 2-3 n.1.

adjudication that the terms in the Constitution must be given the meaning ascribed to them *at the time of their ratification*.") (all emphases added).

C. The presidential oath is an oath to support the Constitution.

In an equally far-fetched flight from ordinary meaning, Trump insists the presidential oath to "preserve, protect and defend" the Constitution is not an oath to "support" the Constitution under Section 3, dismissing historical evidence of interchangeable usage. *Cf.* Pet. Br. 42 n.23. These oaths are essentially equivalent:

> The President's oath is but an amplification of [the oath described in Article VI]; it enters into more detail, but does not add another compulsive clause. The solemn promise in particulars to "preserve, protect and defend the Constitution," does not imply more than the equally solemn promise "to support" it.

John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* (8th ed. 1885).[21] Indeed, the definition of "defend" includes "support," and vice versa. *See* Webster's Dictionary (1828) (defining "defend" to include "to support," and defining "support" to include "to defend"); Samuel Johnson, A Dictionary of the English Language (4th ed. 1773) (defining "[d]efend" as "[t]o stand in defence of; to protect; to support"). And Section 3 refers to "an" oath to support the Constitution, not the specific oath described in Article VI.

[21] Even if to "preserve, protect and defend" the Constitution, could be read to imply more than "to support" the Constitution, it certainly could not be read to imply less. Preserving, protecting, and defending the Constitution includes, at an absolute minimum, supporting the Constitution and anyone who has taken an oath to "preserve, protect, and defend" the Constitution has necessarily taken an oath to "support" the Constitution.

In 1870, a federal court enforcing Section 3 explained why the precise wording of an oath was irrelevant:

> The oath which shall have been taken need not be in the precise words of the amendment: "To support the Constitution of the United States." That instrument, Art. 6, Sec. 3, provides that all officers, executive and judicial, both of the States and United States, shall be sworn to support the Constitution of the latter. Under this provision there has [sic] been slight differences in the forms of these oaths, but all are conceded to comply with it when substantially, though not literally, they include an obligation to the Federal power.

Memphis Pub. Ledger, Dec. 2, 1870, at 3 col. 4. So too here.

D. Section 3 is not limited to the precise historical circumstances motivating its passage.

Trump argues that Section 3 does not include the president because, in 1866, no living ex-president had joined the Confederacy. He says that, as the "name" "The Civil War Amendments" indicates, "they emerged from the Civil War and the specific historical circumstances following it." Trump Br. 25. But the Fourteenth Amendment is not "named" a "Civil War Amendment," just as the First Amendment is not "named" a "Revolutionary War Amendment." The Fourteenth, like the First, is permanent. *See Griffin*, 11 F. Cas. at 24 ("The amendment applies … for all time present and future."). Its enduring nature was central to its purpose.

V. TRUMP ENGAGED IN INSURRECTION OR REBELLION.

At this preliminary stage, petitioners do not seek summary disposition; to the extent Intervenor-Respondents seek dismissal based on questions of disputed fact, this Court should appoint a referee to conduct an evidentiary hearing. For present purposes,

the factual allegations in the complaint establish that Trump engaged in insurrection or rebellion.

A. January 6 was an "insurrection."

Trump does not address the extensive nineteenth-century definitions of "insurrection" drawn from dictionaries, case law, and public usage. Pet. Br. 45-47. *United States v. Greathouse* does not purport to define "insurrection," nor does it state that the Insurrection Act only prohibits conduct amounting to treason. 26 F. Cas. 18 (C.C.N.D. Cal. 1863). It noted simply that the particular facts in the indictment "amount[ed] to treason within the meaning of the constitution." *Id*. at 21. The court's motivation was to ensure that the criminal defendants received the procedural protections of the Treason Clause. *Id.* at 26. That has no bearing on this civil matter.

Trump's citation to the statement: "'engaging in a rebellion and giving it aid and comfort,' amounts to a levying of war," *id.* at 26, does not help him, because in the 1860s, "levying war" included "insurrection":

> [T]he words 'levying war,' include not only the act of making war for the purpose of entirely overturning the government, but *also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law in pursuance of such combination*. The following elements, therefore, constitute this offence: (1) A combination, or conspiracy, by which different individuals are united in one common purpose. (2) This purpose being to prevent the execution of some public law of the United States by force. (3) The actual use of force, by such combination, to prevent the execution of that law.

In re Charge to Grand Jury - Neutrality L. & Treason, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851). These three elements map precisely to petitioners' definitions. *See* Pet. Br. 45-46; William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (revised Sept. 19, 2023), at 64, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 (summarizing all historical definitions as "[1] concerted, [2] forcible resistance to the authority of government to [3] execute the laws in at least some significant respect").

Accordingly, violent uprisings against federal authority comparable to January 6 were described as insurrections. *See* Robert Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789–1878* (U.S. Army Ctr. of Mil. Hist. 1996) (recounting antebellum insurrections involving loosely organized, lightly-armed groups and few deaths). None of these pre-1861 insurrections approached the scale of the Civil War. *See* Coakley, *supra*, at 6, 35-66, 74 (describing Shays, Whiskey, and Fries insurrections). For example, the Whiskey Insurrection initially boasted thousands, but virtually all fled before federal forces arrived and was "almost bloodless." *See id.* at 35-66. Yet, it was specifically cited during debate over Section 3 as an example of a previous insurrection. *See* Cong. Globe, 39th Cong., 1st Sess., 2534 (1866) (Rep. Eckley).

The January 6 Insurrection satisfies all these criteria. It sought to block Congress from executing the law. Further, it was unquestionably an "insurrection against" the Constitution of the United States, within the meaning of Section 3, in that it sought to prevent Congress from fulfilling its core constitutional duty to certify the results of a presidential election, thereby preventing the peaceful transfer of power. Pet. ¶¶ 107, 112.

It succeeded, temporarily. Its success may have been short-lived, but even a failed attack with no chance of success can qualify as an insurrection. *See In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894). In fact, the January 6 Insurrection claims something that *no past insurrection* achieved, its violent seizure of the Capitol, obstructed and delayed an essential constitutional procedure. *See* Pet. ¶ 199. Even the Confederates never attacked the heart of the nation's capital, prevented a peaceful and orderly presidential transition of power, or took the U.S. Capitol.

It was violent. Five people died and 150 law enforcement officers were injured, some severely. Pet. ¶ 242. The violence was so significant that civil authorities were unable to resist the attack; military and other federal agencies had to be called in. Pet. ¶ 234.

Congress, then-President Trump's own Department of Justice, federal courts, and even Trump's defense lawyer have all categorized January 6 as an "insurrection." Pet. ¶¶ 243-51.

B. Trump engaged in the January 6 Insurrection.

The petition recites extensive allegations of Trump's involvement in the insurrection, in a detailed timeline that lays out his culpability. So far, nine federal judges have ascribed responsibility for the January 6 Insurrection to Trump. Pet. ¶¶ 255-57.

1. *Trump "engaged" under the* Worthy-Powell *standard.*

The *only* judicial standard ever adopted for applying Section 3 is the *Worthy-Powell* standard: to "engage" in insurrection or rebellion means to provide voluntary assistance, either by service or contribution (except charitable contributions). *See United*

States v. Powell, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871); *Worthy*, 63 N.C. at 203. It has been used in federal court and by courts in three different states—two in 2022. *See* Pet. Br. 47-48 (citing cases). Trump does not cite the *Worthy-Powell* standard, instead relying on a risible inference from the Second Confiscation Act already refuted, *see* Pet. Br. 49 n.29; a 2019 law dictionary; and House exclusion practice.

In both exclusion cases Trump cites, the House emphasized that although the men initially advocated secession, they took *immediate active efforts to defeat the insurrection once it began*.[22] But the House applied a stricter standard to men who remained silent or supportive *during* the insurrection.[23] In its *first* Section 3 adjudication, the House excluded John Young Brown for writing a letter to the editor advocating forcible resistance to federal authority. *Hinds' Precedents*, ch. 14, § 449, at 445-46 (1907). That standard does not favor Trump.

Trump also attempts to limit one court's legal conclusion that "marching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding" satisfy the *Worthy-Powell* standard by inserting a supposed limitation to "rebel military commanders," Trump Br. 36, but nothing in the court's decision supports such a limitation. *See Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Ofc. of State Admin. Hrgs. May 6, 2022), at 14, *available at* https://freespeechforpeople.org/wp-content/uploads/2022/05/2222582.pdf.

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[22] *See* Cong. Globe, 41st Cong, 2nd Sess., 5442, 5445 (1870); *Hinds' Precedents*, ch. 14, § 462, at 477 (1907).

[23] Judicial opinions interpreting Section 3 are more authoritative than House exclusion practice. However, Trump opened the door, and petitioners respond in kind.

2. *Trump engaged through conduct.*

Trump argues that he did not "engage" in insurrection because his "speech" cannot amount to insurrection. *See* Trump Br. 34-42. First, as a matter of law, Trump's words encouraging and supporting the insurrection can and do constitute engaging in insurrection. *See* Pet. Br. at 49-50. Further, Trump did not just "speak." He directed the fraudulent-electors scheme, a key part of January 6 plans. Pet. ¶ 60. He helped plan a critical mustering event: the "wild" Ellipse Demonstration. Pet. ¶¶ 97, 106. His campaign and joint fundraising committees paid $3.5 million to its organizers. *Id.*; *see The Reconstruction Acts*, 12 U.S. Op. Atty. Gen. 182, 205 (June 12, 1867) ("voluntary contributions to the rebel cause, even such indirect contributions as arise from the voluntary loan of money to rebel authorities, … will work disqualification"). He planned a march on the Capitol to force Congress to stop the electoral vote certification. Pet. 107; *see Rowan*, *supra*, at 14 ("marching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding"). He ordered officials to remove magnetometers that were preventing armed people from joining the assembly, precisely so that they could bring weapons to the Capitol. Pet. 146-50. He told officials to transport him to the Capitol with the armed crowd; when they refused, he attempted to go anyway. Pet. ¶¶ 168-70.

Likewise, Trump did more than just "contest[] an election outcome." Trump Br. 37. Well before January 6, 2021, he had already lost every single lawsuit that could have changed the election outcome. *See* Pet. ¶¶ 17, 62-63, 90. After all possible legal contests had failed, Trump was not "contesting an election outcome." Instead, he was attempting

to overstay his four-year term, in violation of the Constitution. *See* U.S. Const. art. II, § 1 (the president "shall hold his Office during the Term of four Years"); *id.* amend. XX, § 1 ("The terms of the President and Vice President shall end at noon on the 20th day of January … ; and the terms of their successors shall then begin.").

3. *The First Amendment does not protect Trump's incitement.*

Much of Trump's speech constituted incitement—notwithstanding his wink-and-nod parenthetical about "peacefully" marching on the Capitol. Even if First Amendment doctrine limited Section 3, a federal court has already found that Trump's speech met the incitement test:

> Having considered the President's January 6 Rally Speech in its entirety and in context, the court concludes that the President's statements that, "[W]e fight. We fight like hell and if you don't fight like hell, you're not going to have a country anymore," and "[W]e're going to try to and give [weak Republicans] the kind of pride and boldness that they need to take back our country," immediately before exhorting rally-goers to "walk down Pennsylvania Avenue," are plausibly words of incitement not protected by the First Amendment. It is plausible that those words were implicitly "directed to inciting or producing imminent lawless action and [were] likely to produce such action."

Thompson v. Trump, 590 F. Supp. 3d 46, 115 (D.D.C. 2022), *appeal pending*, No. 22-7031 (D.C. Cir.). That context included an inflammatory video, Pet. ¶ 144, and calls by previous speakers for "trial by combat" and to "start taking down names and kicking ass" and sacrifice their "blood" and "lives" and "do what it takes to fight for America" by "carry[ing] the message to Capitol Hill," since 'the fight begins today," Pet. ¶ 139.

Ultimately, the court concluded, Trump's speech included "an implicit call for imminent violence or lawlessness":

> He called for thousands "to fight like hell" immediately before directing an unpermitted march to the Capitol, where the targets of their ire were at work, knowing that militia groups and others among the crowd were prone to violence. *Brandenburg*'s imminence requirement is stringent, and so finding the President's words here inciting will not lower the already high bar protecting political speech.

Thompson, 590 F. Supp. 3d at 117. The court found that Trump's "passing reference to 'peaceful[] and patriotic[]' protest cannot inoculate him against the conclusion that his exhortation, made nearly an hour later, to 'fight like hell' immediately before sending rally-goers to the Capitol, within the context of the larger Speech and circumstances, was not protected expression." *Id*.

4. *Trump's misconduct continued during the insurrection.*

As the Insurrection proceeded, Trump actively exacerbated it. At the height of violence, Trump tweeted an attack on Pence, correctly anticipating this tweet would exacerbate the violence at the Capitol. Pet. ¶¶ 205-09, 216. This constituted further engagement and/or "aid and comfort."[24]

For hours, Trump also refused to mobilize federal authorities or give his followers a clear instruction to disperse. He had a particular duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. But he deliberately stood by while *his armed*

[24] The concept of "domestic" enemies became part of American constitutional thinking by 1862, when Congress enacted the Ironclad Oath to "support and defend the Constitution of the United States, against all enemies, foreign and domestic." 12 Stat. 502 (1862).

supporters stormed the Capitol, when he was the only person who could give lawful[25] orders to mobilize federal authorities to repel the insurrection.

Trump's 3:13 P.M. tweet "asking for everyone at the U.S. Capitol to remain peaceful" was ineffectual and he knew it. Insurrectionists had taken the House and Senate chambers; the Vice President and Senate had been in hiding for an hour. Pet. ¶¶ 190-200. Asking a conquering force to "remain peaceful" *after it had temporarily achieved its objective through violence* is hollow.

But Trump *did* know how to call off the insurrection. His belated 4:17 P.M. speech included the crucial instruction to "go home." Pet. ¶ 228. The insurrectionists immediately understood this; most complied. Pet. ¶¶ 231-33. He could have said that 187 minutes earlier, before his supporters stormed the Capitol.

Trump summoned his supporters to Washington, D.C. to "be wild"; ensured that his armed and angry supporters could bring their weapons into the Capitol; incited them against Pence, Congress, the certification of electoral votes, and the peaceful transfer of power; ordered them to march on the Capitol; actively aided and encouraged the insurrection to continue; and deliberately refused to take steps to suppress or mitigate it. He knew of, consciously disregarded the risk of, or specifically intended all of this. Pet. ¶¶ 298-99. He engaged in insurrection.

[25] Pence—who was not in the chain of command—mobilized the National Guard. Pet. ¶¶ 223, 235.

CONCLUSION

These threshold matters satisfied, the Court should set a prompt schedule for an evidentiary hearing.

Dated: October 23, 2023

Respectfully submitted,

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this petition conforms to the requirements of Minn. R. Civ. App. P. 132, subd. 3, for a brief produced with a proportional 13-point font as modified by the Court's October 19, 2023 Order authorizing the filing of a reply brief of up to 11,000 words. The length of this brief is **10,928** words. This brief was prepared using Microsoft Word 2016.

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