STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT LaBRANT, ANDREW BRADWAY, NORAH MURPHY, and **WILLIAM NOWLING,**

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant,

and

DONALD J. TRUMP,

Proposed-Intervenor.

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Case No. 23-000137-MZ
Hon. James Robert Redford

PLAINTIFFS' BRIEF IN OPPOSITION TO INTERVENING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND IN RESPONSE TO INTERVENING DEFENDANT'S *AMICUS BRIEF*

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I. Introduction

Donald Trump is constitutionally disqualified from serving as President because he engaged in insurrection to extend his tenure in office, violating his oath to uphold the U.S. Constitution. This action to enjoin the Michigan Secretary of State from including him on the 2024 presidential primary election ballot is ready for adjudication by this Court. States may exclude constitutionally ineligible candidates from presidential primary ballots; the question is not committed exclusively to Congress; plaintiffs have standing; Section 3 does not require federal implementing legislation; bars an insurrectionist from the presidency, and applies to a person who previously took an oath as president of the United States; and the complaint pleads conduct that triggers Section 3. Trump's motion fails. The Court has subject-matter jurisdiction over the case, plaintiffs' pleadings state a claim on which relief may be granted, and plaintiffs have established genuine issues of material fact. MCR 2.116(C)(4), (8), (10).[1]

II. States May Exclude Ineligible Presidential Candidates From Primary Election Ballots.

Under the U.S. Constitution's Electors Clause, each state has the plenary power to appoint its presidential electors "in such Manner as the Legislature thereof may direct." US Const, art II, § 1, cl 2; *see also Moore v Harper*, 600 US 1, 37; 143 S Ct 2065; 216 L Ed 2d 729 (2023) ("[I]n choosing Presidential electors, the Clause 'leaves it to the legislature exclusively to define the method of effecting the object.'" (citation omitted)); *Chiafalo v Washington*, 591 US ___; 140 S

[1] MCR 2.116(C)(10) motions "*must be supported* by affidavits, depositions, admissions, or other documentary evidence." *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994) (*per curiam*) (emphasis added). The "[o]pinions, conclusionary denials, unsworn averments, and inadmissible hearsay" disallowed by *SSC Assoc Ltd Partnership v Gen Retirement Sys of City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991), in fact refers to the evidence that *defendants* are required to file with their motion. Trump has not provided *any* evidence to support his motion. *See Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998) (*en banc*) (where review is on the pleadings, subrule (C)(8) and not (C)(10) is appropriate).

Ct 2316, 2324; 207 L Ed 2d 761 (2020) (Electors Clause gives states "far-reaching authority over presidential electors").

States may restrict for whom electors may vote, *Chiafalo*, 140 S Ct at 2326, and ensure that the state's electoral votes are only cast for constitutionally eligible candidates. Muller, *Scrutinizing Federal Election Qualifications*, 90 Ind L J 559, 604 (2015) ("[B]ecause the legislature[] may choose the manner by which it selects its electors, it follows that it may restrict the discretion of the election process through an ex ante examination of candidates' qualifications."). That includes primary elections. *See Ray v Blair*, 343 US 214, 227; 72 S Ct 654; 96 L Ed 894 (1952).

States routinely adjudicate presidential candidates' qualifications before elections, ruling on the merits to exclude ineligible candidates and authorize inclusion of eligible candidates. *See, e.g.*, *Hassan v Colorado*, 495 F Appx 947 (CA 10, 2012) (upholding exclusion of naturalized citizen candidate); *Lindsay v Bowen*, 750 F3d 1061 (CA 9, 2014) (upholding exclusion of underage candidate); *Socialist Workers Party v Ogilvie*, 357 F Supp 109 (ND Ill, 1972) (*per curiam*) (same); *Elliott v Cruz*, 137 A3d 646 (Pa Commw, 2016), *aff'd* 635 Pa 212; 134 A3d 51 (2016) (*per curiam*) (finding that presidential candidate was natural born); *Ankeny v Governor of Ind*, 916 NE2d 678 (Ind App, 2009) (similar); *see also* Muller, *"Natural Born" Disputes in the 2016 Presidential Election*, 85 Fordham L Rev 1097, 1103–1106 (2016) (collecting cases); *Scrutinizing Federal Election Qualifications*, 90 Ind L J at 603 & n 355 (noting that 44 states and District of Columbia excluded noncitizen candidates).

Federal courts have affirmed this stated authority. As then-Judge (now Justice) Gorsuch explained for the Tenth Circuit, 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 Appx at 948; *accord Lindsay*, 750 F3d at 1064 ("[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." (internal quotation marks and citation omitted)).[2] This includes Section 3 of the U.S. Constitution. *See Greene v Raffensperger*, 599 F Supp 3d 1283, 1319 (ND Ga, 2022) (recognizing 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 F4th 907 (CA 11, 2022) (*per curiam*); *Louisiana ex rel Sandlin v Watkins*, 21 La Ann 631, 632 (1869) (holding that the State has "a great interest" and "clear right" to enforce Section 3).

The "narrow" political question doctrine does not bar states from adjudicating presidential candidates' constitutional qualifications. *See Zivotofsky ex rel Zivotofsky v Clinton*, 566 US 189, 195; 132 S Ct 1421; 182 L Ed 2d 423 (2012). The qualifications question has not been constitutionally committed to Congress, and Trump's reliance on the Twelfth and Twentieth Amendments to argue the contrary is unavailing. The Twelfth Amendment instructs Congress to *count votes*, not to *judge candidates. Compare* US Const, Am XII *with* US Const, art I, § 5, cl 1 ("Each House [of Congress] *shall be the Judge* of . . . Qualifications of its own Members[.]" (emphasis added)). And while the Twentieth Amendment provides an emergency contingency plan "if the President elect shall have failed to qualify," US Const, Am XX, § 3, it does not commit evaluation of eligibility to Congress nor force states to create emergencies by keeping ineligible

[2] The state interest in ensuring that the state's electoral votes are appointed only for constitutionally eligible candidates is different from purely local interests that may not justify limiting ballot access. *See, e.g., Anderson v Celebrezze*, 460 US 780, 795–806; 103 S Ct 1564; 75 L Ed 2d 547 (1983).

candidates on the ballot. *See Elliott*, 137 A3d at 651 ("Significantly, no Constitutional provision places such power in Congress to determine Presidential eligibility," and "determination of the eligibility of a person to serve as President has not been textually committed to Congress"). Even if these amendments implicitly *allow* Congress to adjudicate presidential qualifications, they do not grant Congress exclusive authority to do so. *See Lindsay*, 750 F3d at 1065 ("[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] that it precludes state authorities from excluding a candidate with a known ineligibility from the presidential ballot.").[3] Adjudication of this matter does not "demand that a court move beyond areas of judicial expertise." *Makowski v Governor*, 495 Mich 465, 472; 852 NW2d 61 (2014) (*en banc*), *amended* 497 Mich 862; ___ NW2d ___ (2014). Courts have long adjudicated eligibility questions and have been adjudicating questions of "insurrection" and "engage[ment]" for more than a century. *See infra* Part VI.A.1, VI.B.1.

Trump cannot rely on the speculative possibility of amnesty, *see* Br, p 18, to deprive this court of its adjudicatory authority.[4] Trump has not asked Congress for amnesty, Compl, ¶ 277, and this hypothetical future amnesty by a congressional supermajority does not remove his *present* constitutional disability or vitiate the state's legitimate interest in enforcing it to protect the integrity of its ballots and election processes.

Trump cites profoundly irrelevant cases. Most involve federal court challenges dismissed for lack of Article III standing, involve post-election challenges to annul election results, or both. *See, e.g.*, *Berg v Obama*, 586 F3d 234 (CA 3, 2009) (post-election suit dismissed for lack of

[3] *Lindsay* supersedes the prior California federal district court cases that Trump cites. *See* Intervenor's Br Supp Mot for Summ Disposition, p 6.

[4] Trump wisely does *not* argue that the Amnesty Act of 1872, Act of May 22, 1872, ch 193, 17 Stat 142, applied prospectively. *See Cawthorn*, 35 F4th at 248 (holding that it does not); *Greene*, 599 F Supp 3d at 1312–1316 (same).

standing);[5] *Robinson v Bowen*, 567 F Supp 2d 1144, 1146 (ND Cal, 2008);[6] Br, p 9 n 3 (citing cases). They do not govern state court *pre-election* challenges, where state standing law controls.

Section 3 is no different from the presidential qualifications of Article II and the Twenty-Second Amendment, which also prohibit holding office (rather than seeking it). *See* US Const, art II, § 1, cl 5; US Const, Am XXII, § 1.[7] Just as state law can authorize pre-election challenges under those qualifications, so too here state law—MCL 168.614a and MCL 168.615a—limits the Secretary to only listing eligible candidates for office.

Trump incorrectly claims that pre-primary state evaluation of candidates' constitutional eligibility may lead to "chaotic results," *see* Br, p 8, quoting *Keyes v Bowen*, 189 Cal App 4th 647, 660; 117 Cal Rptr 3d 207 (2010). But his proposed post-election congressional "solution" would *maximize* chaos by barring adjudication of a candidate's constitutional qualifications until either January 6, 2025 (under the Twelfth Amendment) or January 20, 2025 (under the Twentieth Amendment). Patently unqualified individuals—e.g., former President Obama (who has served two terms) or athlete Lionel Messi (a non-citizen)—could declare their candidacies for president, force Michigan to include them on the ballot, and evade resolution until the eve of inauguration.

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[5] Trump incorrectly claims that *Berg* ruled on the basis of the political question doctrine. Br, p 5. But the opinion mentions that doctrine only briefly in its procedural history recitation, noting that the plaintiff's post-election emergency motion to stay action of the Electoral College and of Congress "seemed to present a non-justiciable political question." *Berg*, 586 F3d at 238. The case discussion and holding focus *entirely* on standing. *See id.* at 237–242.

[6] After concluding *both* that the plaintiff lacked standing *and* that the challenged candidate was actually eligible, the *Robinson* court further mused that the Twelfth and Twentieth Amendments provide the exclusive means for resolving candidate qualifications. *See Robinson*, 567 F Supp 2d at 1147. The Ninth Circuit later implicitly rejected this dictum in *Lindsay*. *See* 750 F3d at 1065.

[7] Trump also cites nineteenth century cases that predated procedures for *pre-election* challenges. *See* Br, pp 18–19. None turned on Section 3, and two involved post-election remedies that do not exist for federal elections. *See Privett v Bickford*, 26 Kan 52, 53 (1881) (quo warranto removal); *Sublett v Bedwell*, 47 Miss 266, 273–274 (1872) (voiding election entirely). In *Sublett*, the passing reference to Section 3 is *specifically described* in the synopsis as "obiter dictum." *Id.* at 266.

"It is hard to believe the State legislatures that ratified the Constitution signed up for such a charade." *Cawthorn*, 35 F.4th at 265 (Wynn, J., concurring). They have not. This Court—subject to appellate review—can adjudicate this question before any primary votes, avoiding disruption and ensuring that voters can vote for and be represented by eligible candidates only.

III. Plaintiffs Have Standing.

Trump argues, without citation of authority, that Michigan's broad standing rule in election cases—allowing ordinary citizens to enforce the election law without showing a special interest distinct from the public—applies only in mandamus cases. Br, p 10. Because the plaintiffs seek declaratory and injunctive relief, Trump argues that they lack standing. *Id*. He is wrong because he ignores controlling Michigan Supreme Court precedent. The Michigan Supreme Court has recognized that private citizens have standing to enforce the election laws through declaratory relief, as long as there is a "present legal controversy," as there is here. Speaking for the Court, Justice VIVIANO stated:

> [T]he bar for standing is lower when a case concerns election law. The Court of Appeals noted in *Deleeuw v State Bd of Canvassers* that "[e]lection cases are special . . . because without the process of elections, citizens lack their ordinary recourse. For this reason we have found that ordinary citizens have standing to enforce the law in election cases."

League of Women Voters of Mich v Secretary of State, 506 Mich 561, 587; 957 NW2d 731 (2020), citing *Deleeuw v State Bd of Canvassers*, 263 Mich App 497; 688 NW2d 847 (2004) (*per curiam*); *Helmkamp v Livonia City Council*, 160 Mich App 442; 408 NW2d 470 (1987) (*per curiam*).

Deleeuw involved presidential candidate access to the ballot, while *Helmkamp* considered the propriety of a candidate election. Justice VIVIANO correctly characterized both *Deleeuw* and *Helmkamp* as allowing citizens to enforce the election law through declaratory relief, as well as mandamus, as long as those citizens meet the declaratory relief requirement of a "present legal

controversy," *League of Women Voters of Mich*, 506 Mich at 586, an interpretation of those cases the Supreme Court sanctioned. There is a "present legal controversy" here over Trump's eligibility to appear on the Michigan ballot. Therefore, plaintiffs have standing to seek declaratory and injunctive relief keeping him off the ballot.

Even before *League of Women Voters of Mich*, the Court of Appeals had long recognized that the broad citizen standing doctrine of *Deleeuw* and *Helmkamp* applied in election cases seeking declaratory and injunctive relief. For example, in *Fleming v Macomb Co Clerk*, unpublished per curiam opinion of the Court of Appeals, issued June 26, 2008 (Docket No. 279966) (attached), individual plaintiffs sought declaratory and injunctive relief against the Macomb County Clerk. *Id* at 2. They asserted that the unsolicited mailing of absentee voter ballot applications violated constitutional and statutory law. *Id* at 3. In granting declaratory and injunctive relief, the Court of Appeals held that the plaintiffs had standing, writing:

> Defendant contends that even if the mass mailing violated state law or the constitution, plaintiffs are not entitled to relief because they failed to show any injury or harm. However, plaintiffs are not required to show a substantial injury distinct from that suffered by the public in general in order to establish standing in an election case. *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987). . . . Defendant's actions undermined the constitutional right of the public to participate in fair, evenhanded elections and, therefore, constituted an injury. Consequently, plaintiffs had standing to bring a cause of action to remedy this injury.

Id at 24–25. The caselaw makes clear that Michigan courts apply the broad voter standing rules to election actions seeking declaratory and injunctive relief. Thus, because plaintiffs are ordinary voters seeking such relief in this "present legal controversy," they have standing in this case.

IV. Section 3 Does Not Require New Federal Legislation.[8]

A. State Courts Do Not Need Congressional Permission To Enforce the Fourteenth Amendment.

1. State Courts Are Obligated To Adjudicate Federal Constitutional Questions.

State courts *must* apply the Constitution; they need not and cannot wait for congressional approval. *See* US Const, art VI, cl 2 (the U.S. Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby"). Long before the Fourteenth Amendment, the Supreme Court confirmed that state courts are competent to adjudicate questions under the U.S. Constitution. *See Martin v Hunter's Lessee*, 14 US (1 Wheat.) 304, 339–342; 4 L Ed 97 (1816); *see also Robb v Connolly*, 111 US 624, 637; 4 S Ct 544; 28 L Ed 542 (1884) (constitutional enforcement lies "[u]pon the State courts, equally with the courts of the Union").

2. State Courts Routinely Adjudicate Fourteenth Amendment Claims Without Federal Statutory Authorization.

When plaintiffs in state court civil actions raise federal constitutional claims, courts do not wait for Congress to authorize consideration of the claims. *See Testa v Katt*, 330 US 386, 389; 67 S Ct 810; 91 L Ed 967 (1947) (holding that, when federal law applies to a cause of action, state courts must apply it). Instead, state courts review the constitutional claims on their merits. Indeed, state courts began adjudicating Fourteenth Amendment claims—including claims seeking affirmative relief—soon after the amendment's passage, without special authorization from Congress. *See, e.g.*, *Van Valkenburg v Brown*, 43 Cal 43 (1872). Today, state courts routinely enforce the Fourteenth Amendment without citing any "authorizing" federal statute. *See, e.g.*, *Crego v Coleman*, 463 Mich 248; 615 NW2d 218 (2000); *O'Donnell v State Farm Mut Auto Ins*

[8] The present question is not whether Section 3 can be enforced without *any* legal framework. Rather, the present question is whether, even where (as here) a proper action for injunctive and declaratory relief has been filed under state law, some unwritten principle requires *congressional* action before the state may apply its laws to enforce Section 3.

Co, 404 Mich 524; 273 NW2d 829 (1979).[9]

B. Nothing In the Fourteenth Amendment Says Section 3 Requires Federal Legislation.

1. Section 3 States a Direct Prohibition, Not an Authorization.

Section 3 states the disqualification as a direct prohibition: "*No person shall be* a Senator or Representative in Congress, or elector of President and Vice-President, *or hold* any office" if they previously took an oath as a covered official and then engaged in insurrection or rebellion. "It lays down a rule by saying what shall be. It does not *grant a power* to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself." Baude & Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U Pa L Rev (forthcoming 2024), pp 17–18 (attached). Its language parallels other qualification clauses in the Constitution, which direct that "[n]o person shall be" a Representative, Senator, President, or Vice President if they do not meet age, citizenship, and residency requirements, and which do not require federal legislation. *See* US Const, art I, § 2, cl 2 and § 3, cl 3; art II, § 1, cl 5; Am XII.

Section 3's prohibitory language also resembles the self-executing language of Section 1. No federal legislation is needed to enforce the Due Process Clause or Equal Protection Clause in state court. *See* US Const, Am XIV, § 1. *See supra* Part IV.A.2. Indeed, the drafters intended to constitutionalize these protections so that they did *not* depend on the whims of Congress. *See*, *e.g.*, Cong Globe, 39th Cong, 1st Sess, p 1095 (1866) (Rep. Hotchkiss) (arguing for constitutional protections because "[w]e may pass laws here to-day, and the next Congress may wipe them out"). Likewise, Congress did not leave Section 3 to the whims of the bare majority of "the next Congress"; rather, Section 3 applies until *two-thirds* of each chamber grants amnesty.

[9] State courts decide Fourteenth Amendment defenses and claims under 42 USC 1983, but as illustrated here, they also decide *affirmative* Fourteenth Amendment civil claims absent legislation.

Section 3's self-executing prohibition stands in sharp contrast to constitutional provisions that *authorize* congressional action without establishing a mandatory rule or prohibition. For example, Article I authorizes Congress "[t]o provide for the Punishment of counterfeiting." US Const, art I, § 8, cl 6. That mere authorization neither prohibits counterfeiting, nor establishes a punishment. *See also* US Const, art III, § 3 (defining treason and authorizing Congress to establish the punishment). Authorizing language typically uses formulations such as Congress "may" "by Law" act, *e.g.*, *id.* § 2, cl 3; *id.* § 4, cl 1–2, or that Congress "shall have Power" to do something, *e.g.*, *id.* § 8; US Const, art III, § 3, cl 2; US Const, art IV, § 3, cl 2. Similarly, the Impeachment Clause defines impeachable offenses, US Const, art II, § 4, but the Constitution leaves the decision to impeach or convict to the House and Senate, US Const, art I, § 2, cl 5; *id.* § 3, cl 6.

In contrast, Section 3 enacts its own disqualification and, like Section 1, sets no requirement of congressional action before a state may implement it. The only exclusive role Section 3 confers upon Congress is to *waive* disqualification, which it has not done for Trump.

2. Section 5's Authorization of Congressional Legislation Does Not Make Section 3 Unenforceable Without Similar Legislation.

Section 5 authorizes, but does not require, federal legislation. US Const, Am XIV, § 5. Indeed, as the U.S. Supreme Court recognized in 1883—in analyzing the scope of Congress's enforcement power under Section 5—"the Fourteenth [Amendment], is undoubtedly self-executing without any ancillary legislation." *Civil Rights Cases*, 109 US 3, 20; 3 S Ct 18; 27 L Ed 835 (1883). Section 5 applies to the entire Fourteenth Amendment. If Section 5 meant states could not adjudicate questions under Section 3 without congressional legislation, then it would *also* mean states could not adjudicate Due Process or Equal Protection Clause questions without congressional legislation. Yet courts in every state routinely do. *See supra* Part IV.A.2. Section 3, like Section 1, also is enforceable in state court even without federal legislation.

C. History Confirms That States May Enforce Section 3 Without Special Federal Legislation.

Nothing in Section 3's original public meaning—in congressional debates, state ratification debates, or public discussion—supports the argument that congressional action is required for enforcement. To the contrary, the crucial period between ratification in July 1868 and May 1870, when the first federal enforcement legislation passed, confirms that virtually everyone involved understood that Section 3 applied without special federal legislation.[10]

1. Congress Assumed Section 3 Took Immediate Effect.

Congress enacted the Fourteenth Amendment in 1866, and state ratification was perfected in July 1868. If Congress—which passed a dizzying array of constitutional amendments and Reconstruction acts within months of each other—had thought that Section 3 required special federal legislation, then it would have promptly passed such a law. Yet Congress did not pass a federal statute providing for government enforcement of Section 3 until May 1870.[11]

Prior to May 1870, Congress also enacted many private bills granting ex-Confederates amnesty from Section 3, which would have been unnecessary if Section 3 required enforcement legislation.[12] Congress understood that, absent amnesty, states could directly enforce Section 3 without federal legislation to bar those individuals from holding office. *See infra* Part IV.C.4.

Trump's reliance on two badly out-of-context quotes from Representative Thaddeus Stevens is misplaced. *See* Br, p 14. Stevens' May 10, 1866 quote pertained to a *different* proposed constitutional provision, a version of Section 3 that would have banned *all* ex-Confederates

[10] For more on why Section 3 is self-executing, see *The Sweep and Force of Section 3*, 172 U Pa L Rev at 17–49.
[11] *See* Act of May 31, 1870, ch 114, § 14, 16 Stat 140, 143 (repealed 1948).
[12] Examples of amnesty acts can be found at 16 Stat 632 (April 1, 1870); 16 Stat 614–630 (March 7, 1870); 16 Stat 613 (December 18, 1869); 16 Stat 607–613 (December 14, 1869); 15 Stat 436 (1869).

(including conscripts and private citizens) from *voting* until 1870. *See* Cong Globe, 39th Cong, 1st Sess (1866), p 2460. Stevens admitted that this voter-disenfranchisement draft would require implementing legislation. *Id.* at 2544. But Congress abandoned that draft—partly due to that very concern—and substituted *the current* Section 3, which avoided that problem. *See id.* at 2869. Stevens' June 13, 1866 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.

2. The Public Knew Section 3 Took Immediate Effect.

Private amnesty bills required an affirmative request by the disqualified individuals. *See* 2 Blaine, *Twenty Years of Congress: From Lincoln to Garfield* (Norwich: Henry Bill Publishing Co, 1886), p 512. To avoid being excluded from office by state law and courts, thousands of ex-Confederates began requesting amnesty as early as 1868, two years before federal enforcement legislation, and both national party platforms that year addressed amnesty. *See* Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const Commentary 87, 112 (2021). If these individuals could only be excluded through non-existent federal legislation, they would have had nothing to gain, and much to lose, by putting their fates in the hands of Congress.

Trump relies instead on the remarks of Pennsylvania state representative Thomas Chalfant. Br, p 15. But Chalfant *opposed* the Fourteenth Amendment—his remarks on Section 3 concluded with a rant 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[13]—and is not a reliable source on its meaning.

3. Reconstruction-Era State Constitutions Confirm That Section 3 Requires No Special Federal Legislation.

[13] *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 (January 30, 1867), LXXXIII (February 6, 1867).

Three contemporaneous state constitutions ratified by ex-Confederate states confirm that disqualification is imposed by Section 3 itself and does not require further congressional action. For example, the Florida Constitution of 1868 provides:

> Any person debarred from holding office in the State of Florida by the third section of the fourteenth Article of the proposed amendment to the Constitution of the United States . . . is hereby debarred from holding office in this state; *Provided*, That whenever such disability from holding office be removed from any person by the Congress of the United States, the removal of such disability shall also apply to this State . . . .

Fla Const 1868, art XVI, § 1; *accord* SC Const 1868, art VIII, § 2 (similar); Tex Const 1869, art VI, § 1 (similar).

On Trump's view, these pre-1870 constitutional provisions were meaningless when enacted. But that is absurd. Rather, these pre-1870 constitutions necessarily recognized that disqualification was imposed by the Constitution itself.

4. Reconstruction-Era State Courts Used State Law in Civil Cases To Enforce Section 3 Without Special Federal Legislation.

The practice of multiple state courts during the Reconstruction era demonstrates that they enforced Section 3 without federal legislation, as well. *See Worthy v Barrett*, 63 NC 199, 200 (1869) (holding that sheriff-elect was disqualified under Section 3). The *Worthy* Court said nothing about needing a federal statute to enforce Section 3. Instead, the court quoted a *state* statute providing that "no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Art. XIV, shall qualify under this act or hold office in this State." *See id.* (citation omitted); *see also In re Tate*, 63 NC 308, 309 (1869) (citing *Worthy* as controlling authority). That same year, the Louisiana Supreme Court adjudicated a state official's Section 3 eligibility. *State ex rel Downes v Towne*, 21 La 490, 492 (1869). While the court concluded that Downes was not disqualified, the court did not question its authority to decide

the issue absent congressional legislation.

D. The Only Case Demanding Federal Legislation To Enforce Section 3 Is Erroneous Or, At Minimum, Does Not Apply To Functional State Governments.

Trump cannot rely on *Griffin's Case*, 11 F Cas 7 (CCD Va, 1869), to support his claim that state courts are unable to enforce Section 3 without specific congressional action. Caesar Griffin, a Black man, was convicted in the then-unreconstructed state of Virginia. *Id.* at 22. In a federal habeas petition challenging his conviction, he argued only that the Virginia judge presiding over his trial was disqualified under Section 3. *Id.* at 22–23. Chief Justice Chase, acting as Circuit Justice, presided over a two-judge panel, hearing Griffin's challenge. *See id.* at 22. Chase rejected the petition, opining that Section 3 required federal enforcement legislation. *Id.* at 22, 26. His decision has been described as "confused and confusing," *see Cawthorn*, 35 F.4th at 278 n 16 (Richardson, J., concurring in the judgment), and cannot support this claim for several reasons.

First, *Griffin's Case* cannot overcome the plain meaning of Section 3. In fact, Chief Justice Chase acknowledged that the "literal construction"—what today would be called plain meaning—of Section 3 would disqualify the Virginia judge. *Griffin*, 11 F Cas at 24. Instead, he claimed that applying its "literal construction" would be a "great inconvenience," given the "calamities which have already fallen upon the people of these [ex-Confederate] states." *Id.* at 24–25.[14] Prioritizing his policy preferences, he opined that Section 3 must be read narrowly to avoid "bring[ing] it into conflict or disaccord with the other provisions of the constitution." *Id.* at 25. But this analysis nullifies the purpose of constitutional amendments. *See The Sweep and Force of Section 3*, 172 U

[14] Judge Underwood, in the district court opinion that Chief Justice Chase reversed in *Griffin's Case* wrote, "Whatever inconvenience may result from the maintenance of the Constitution and the laws, I think the experience of the last few years shows that much greater inconvenience comes from attempting their overthrow." *The Sweep and Force of Section 3*, 172 U Pa L Rev at 40 n 144 (citation omitted).

Pa L Rev at 43 ("*Of course* constitutional amendments change prior constitutional law. That is their purpose and function.").

Griffin's Case noted that "[t]o accomplish this ascertainment [of who is disqualified] and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." 11 F Cas at 26. Chief Justice Chase never considered or explained why state court could not provide such proceedings. Instead, Chief Justice Chase summarily concluded that "these can only be provided for by congress." *Id.* Even if that is true in federal court, it does not explain why a state court would need federal legislation to enforce the Fourteenth Amendment.

Chief Justice Chase also relied on Section 5. *Id.* at 26. But Section 5 does not deprive states of their inherent authority and obligation to enforce the U.S. Constitution. *See supra* Part IV.B.2. Chief Justice Chase further asserted that the exclusive role for Congress in removing disqualifications "gives to [C]ongress absolute control of the whole operation of the amendment." *Griffin's Case*, 11 F Cas at 26. But this reasoning cannot be squared with Section 3's text. The drafters conspicuously granted exclusive authority to Congress only to *remove* the disqualification and gave Congress no role in the *disqualification itself*. Section 3's disqualification requirement, like other Fourteenth Amendment requirements, may (and must) be enforced by state courts with or without congressional action.

Second, *Griffin's Case* contradicts a different Virginia circuit case that Chief Justice Chase himself had *just* decided, ruling there that Section 3 *was* self-executing, when that (opposite) position benefited an ex-Confederate. In the treason prosecution of Jefferson Davis, Chief Justice

Chase concluded that Section 3 *was* self-enforcing.[15] *See Case of Davis*, 7 F Cas 63, 90, 102 (CCD Va, 1867); *Cawthorn*, 35 F4th at 278 n 16 ("These contradictory holdings . . . draw both cases into question and make it hard to trust Chase's interpretation."); *see also Amnesty and Section 3 of the Fourteenth Amendment*, 36 Const Commentary at 100–108 (providing a detailed analysis of *Davis* and *Griffin's Case*). *Griffin's Case* did not attempt to reconcile these conflicting views.[16]

Third, Chief Justice Chase was not an unbiased adjudicator. In June 1868, he told a newspaper interviewer that Section 3 should be removed from the Fourteenth Amendment, or if not, then "a general amnesty" was "absolutely necessary."[17] His *Griffin* decision appears to reflect his personal opposition to Section 3 as "too harsh on former Confederate officials." *See Cawthorn*, 35 F4th at 278 n 16 (quotation omitted). And it was immediately denounced.[18]

Fourth, *Griffin's Case* was substantially disregarded. *See Sandlin*, 21 La at 633 (four months after *Griffin's Case*, stating that "we are far from assenting to" the proposition that Section 3 required federal legislation, and ruling him disqualified); *Downes*, 21 La at 492 (after *Griffin's*

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[15] Chief Justice Chase suggested Davis's lawyers should argue that Section 3 disqualification was the *exclusive* sanction for ex-Confederates. *See Cawthorn*, 35 F4th at 278 n 16; *see also* Nicoletti, *Secession On Trial: The Treason Prosecution of Jefferson Davis* (Cambridge: Cambridge University Press, 2017), pp 294–296. After a pardon relieved Davis of criminal liability, Chief Justice Chase "instructed the reporter to record him as having been of opinion . . . that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment . . . ." *Case of Davis*, 7 F Cas at 102.

[16] Chief Justice Chase's divergent rulings cannot be reconciled by a post hoc distinction (never offered by Chase) between raising Section 3 as a *defense* to a criminal prosecution and as an *affirmative* argument in a habeas petition. Neither the ex-Confederates who petitioned Congress for amnesty nor the members of Congress who considered their requests ever recognized this theoretical distinction.

[17] NY Herald (June 3, 1868), p 3, col 3.

[18] *See, e.g.*, The Daily Republican (June 2, 1869), p 1, col 1–2 (decision "is of far greater consequence and if possible more odious, than . . . the Dred Scott case"); The Sentinel (May 17, 1869), p 1, col 1 (decision lets Congress "disregard and annul the entire [Constitution]"). In further repudiation, the provisional governor of Virginia pardoned Griffin three weeks after the decision. *See* Rockingham Register (May 20, 1869), p 2, col 3.

Case, adjudicating Section 3 claim on the merits). And Congress—presumably understanding that Section 3 was not just enforceable but *was actually being enforced*—continued passing amnesty bills after *Griffin's Case*. *See supra* n 12.

Finally, if it has any precedential value (as a decision by a circuit court with jurisdiction only over Virginia), it should be limited given its unusual context. In 1869, Virginia was an unreconstructed state with a provisional government operating under the control of a Union Army General and lacking the powers of ordinary state governments. *Griffin*, 11 F Cas at 26–27; First Military Reconstruction Act, ch 153, 14 Stat 428–430 (1867). The Court's conclusion that "proceedings, evidence, decisions, and enforcements of decisions . . . can only be provided for by [C]ongress," *Griffin*, 11 F Cas at 26, is arguably defensible if limited to that context. Put differently, Virginia was treated more like a federal territory, with limited autonomy. Moreover, Virginia ratified the Fourteenth Amendment *after* Chief Justice Chase decided *Griffin's Case*. So, Section 3 proceedings there could, for unique historical reasons, "only be provided for by Congress."[19]

E. Recent Decisions Regarding The January 2021 Insurrection Recognize Section 3 Enforcement Without Special Federal Legislation.

Since January 6, 2021, two state courts have applied Section 3 to the January 2021 insurrection. In 2022, a New Mexico state court applied Section 3 under the state *quo warranto* statute and removed a county commissioner from office for engaging in insurrection. *See New Mexico ex rel White v Griffin*, opinion of the First Judicial District Court of New Mexico, issued

[19] Alternatively, Chief Justice Chase claims he consulted *ex parte* with the full U.S. Supreme Court prior to judgment, who "unanimously concur[red] in the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, . . . can not be properly discharged upon habeas corpus." *Griffin*, 11 F Cas at 27; *see also The Sweep and Force of Section Three*, 172 U Pa L Rev at 45–49. That narrower ruling obviates the remainder of *Griffin's Case*, and is (if anything) the relevant precedent.

September 6, 2022 (Docket No. D-101-CV-2022-00473), *app dis* ___ NM ___ (2022) (Docket No. S-1-SC-39571), *cert filed* May 18, 2023. Similarly, Georgia adjudicated a Section 3 ballot challenge against Representative Marjorie Taylor Greene. *See Rowan v Greene*, initial decision of the Georgie Office of State Admin Hearings, issued May 6, 2022 (Docket No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot) (hereinafter *Rowan I*) (attached). While the administrative law judge overseeing the state proceeding (like the Louisiana Supreme Court in *Downes*) found there was insufficient evidence to establish that Greene personally engaged in insurrection, he followed *Worthy* and adjudicated the Section 3 question on the merits. Neither the administrative law judge, nor the state courts on appellate review, *see Rowan v Raffensperger*, order of the Superior Court of Georgia, issued July 25, 2022 (Docket No. 2022-CV-364778) (attached), nor the federal court that rejected Greene's efforts to enjoin the state proceeding, *see Greene v Raffensperger*, 599 F Supp 3d 1283 (ND Ga, 2022), questioned the state's authority to adjudicate and enforce Section 3. *See, e.g.*, *id.* at 1319 ("Plaintiff has pointed to no authority holding that a state is barred from evaluating whether a candidate meets the constitutional requirements for office or enforcing such requirements").[20]

These decisions comport with the holding of Judge (now Justice) Gorsuch that "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F Appx at 948; *Greene*, 599 F Supp 3d at 1319 (finding that the state's "legitimate interest includes enforcing existing constitutional requirements [including Section 3]

[20] In one Arizona decision, though one county trial judge determined that Section 3 is not self-executing (among other findings), the state supreme court affirmed on a technical question of Arizona election law and expressly *declined* to decide or endorse the county judge's constitutional theory. *See Hansen v Finchem*, ___ Ariz ___; ___ P3d ___ (2022) (Docket No. CV-22-0099-AP/EL).

to ensure that candidates meet the threshold requirements for office").

Nothing materially differentiates Section 3 from other constitutional qualifications for office, nor other questions under the U.S. Constitution that state courts routinely adjudicate.

V. Trump Swore An Oath As An "Officer Of The United States" Under Section 3.

A. The Presidency Is An "Office" Under The United States Constitution.

The 1787 Constitution and antebellum (1803) Twelfth Amendment repeatedly label the presidency an "office." *See, e.g.*, US Const, art. II, § 1, cl 1. The antebellum Constitution repeatedly uses that term in *eligibility* provisions. *See, e.g.*, *id.* § 1, cl 5 ("No Person . . . shall be eligible to the *Office* of President . . . ." (emphasis added)); US Const, Am XII ("[N]o person constitutionally ineligible to the *office* of President . . . ." (emphasis added)).

The congressional debates over Section 3 specifically addressed that the presidency is covered. Senator Johnson was initially confused by the specific enumeration of certain offices:

> I do not see but that any one of those gentlemen [ex-Confederates] may be elected President or Vice President of the United States, and why did you omit to exclude them? I do not understand them to be excluded from the privilege of holding the two highest offices in the gift of the nation.

Cong Globe, 39th Cong, 1st Sess (1866), p 2899. But Senator Morrill interrupted him:

> Let me call the Senator's attention to the words "or hold any office, civil or military, under the United States."

Id. Senator Johnson acknowledged there was "no doubt" he had been wrong, and that he had been "misled by noticing the specific exclusion in the case of Senators and Representatives." *Id*.

During the ratification period, the public debated the merits of Section 3 itself by raising the prospect of Jefferson Davis becoming president. *See* Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit J Am Legal Stud (forthcoming 2024), pp 7–10 (attached); *see also, e.g.*, *Democratic Duplicity*, Indianapolis Daily Journal (July 12, 1866), p 2, col 1 (three days after congressional enactment, explaining that Section 3's opponents believed "that ROBERT E. LEE

is as eligible to the Presidency as Lieut. General GRANT"). This debate would have been pointless if the presidency was not covered.

B. The Plain Meaning Of "Officer Of The United States" Includes The President For At Least Some Purposes.

The simplest meaning of "officer" is one who holds an office. *See* Bailey, *An Universal Etymological English Dictionary* (20th ed, 1763) ("[O]ne who is in an Office."); *see also United States v Maurice*, 26 F Cas 1211, 1214 (CCD Va, 1823) ("[H]e who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States." (internal quotation marks omitted)).

This plain meaning is widely used today by the U.S. Supreme Court and the executive branch in referring to the President as an officer. *See, e.g.*, *Nixon v Fitzgerald*, 457 US 731, 750; 102 S Ct 2690; 73 L Ed 2d 349 (1982) (referring to president as "the chief constitutional officer of the Executive Branch"); *Cheney v US Dist Court for DC*, 541 US 913, 916; 124 S Ct 1391; 158 L Ed 2d 225 (2004) (referring to "the President and other officers of the Executive"); *Motions Sys Corp v Bush*, 437 F3d 1356, 1368 (CA Fed, 2006) (*per curiam*) (Gajarsa, J., concurring in part and concurring in the judgment) (cataloguing multiple presidential executive orders wherein the president refers to himself as an "officer"); *id*. at 1371–1372 ("The Constitution repeatedly designates the Presidency as an 'Office,' which surely suggests that its occupant is, by definition, an 'officer.'")

The 1787 Constitution used the term "officer . . . of the United States" in multiple ways. Some unquestionably include the president, *see, e.g.*, US Const, art I, § 8, while others may not. The phrase is not an "indivisible term of art." *See* Mascott, *Who Are "Officers of the United States"?*, 70 Stan L Rev 443, 471 (2018). Rather, the text, drafting history, and Founding-era debates demonstrate that "Officers of the United States" is a phrase "indicating that the officers

are federal, and not state or private, actors." *Id*. at 471–483; *cf* Cong Globe, 39th Cong, 1st Sess (1866), p 3939 ("'[O]fficers of' and 'officers under' the United States are . . . 'indiscriminately used in the Constitution.'" (citation omitted)). Here, the point is simply that an "officer . . . of the United States" *can* include the president—and in the case of Section 3—does.

C. Trump Has Argued In Court That He Was An "Officer Of The United States" During His Term In Office.

In multiple lawsuits, Trump has argued that he was an "officer of the United States" under the federal officer removal statute. *See* 28 USC 1442(a)(1) ("any officer . . . of the United States" may remove a case to federal court if the action concerns "any act under color of such office"). And barely four months ago, Trump argued in federal court that he *is* a former "officer of the United States." *See* Trump's Mem Opp Mot to Remand, *People v Trump*, No. 23-cv-3773 (SDNY, June 15, 2023) ("Trump Remand Opp"), pp 2–9, available at https://bit.ly/TrumpRemandOpp. There, Trump correctly argued 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 dismissed their views as "idiosyncratic," in conflict with the "views of numerous scholars," and "of limited use to this Court." *Id.* at 3 n 1. Plaintiffs agree.

Trump also aptly distinguished Appointments Clause cases, such as *Free Enterprise Fund v Pub Co Accounting Oversight Bd*, 561 US 477, 497–98; 130 S Ct 3138; 177 L Ed 2d 706 (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 that clause. Trump Remand Opp, p 4.[21] Trump added: "*Free Enterprise Fund* says nothing about the meaning of 'officer of the United States' in other

[21] Trump also correctly distinguished *United States v Mouat*, 124 US 303, 307; 8 S Ct 505; 31 L Ed 463 (1888), which held that a naval paymaster's clerk was not an officer of the United States.

contexts[.]" *Id.*; *cf* Br, p 21 (now taking opposite position on the same case).

Federal courts have agreed with Trump that the president *is* an officer of the United States. *See K&D LLC v Trump Old Post Office LLC*, 445 US App DC 286, 288; 951 F3d 503 (2020); *New York v Trump*, opinion of the United States District Court for the Southern District of New York, issued July 19, 2023 (Docket No. 23-cv-03773-AKH), p 11. Maybe the *statutory* and *constitutional* definition of "officer of the United States" could differ in other contexts. But if a statute can use the term to include the president, then Section 3 can too.

D. The President Is An "Officer Of The United States" Under Section 3.

1. The Original Public Meaning Of "Officer Of The United States" Included The President.

By the 1860s—the relevant period for ascertaining the original public meaning of the Fourteenth Amendment—"officer of the United States" was widely understood to include the president, and original public understanding of Section 3 applied to an insurrectionist ex-president. Intuitively, someone who takes a constitutionally required oath to "preserve, protect and defend" the Constitution before he can "enter on the Execution of His Office," US Const, art II, § 1, cl 8, is, in plain language, an "officer of the United States." Presidents, members of Congress, Supreme Court justices, and the public referred to the president this way.

Before the Civil War, both common usage and judicial opinions described the president as an "officer of the United States." As early as 1789, congressional debate referred to the president as "the *supreme Executive officer* of the United States." 1 Annals of Congress 487–488 (Joseph Gales ed, 1789) (Rep. Boudinot); *cf* The Federalist No. 69 (Hamilton) (Rossiter ed, 1961), p 422 ("The President of the United States would be an officer elected by the people . . . ."). Chief Justice Branch wrote in 1837 that "[t]he president himself . . . is but an officer of the United States." *United States ex rel Stokes v Kendall*, 26 F Cas 702, 752 (CCDDC, 1837), *aff'd Kendall v United*

States, 37 US 524; 9 L Ed 1181 (1838).

By the 1860s, this usage was firmly entrenched. *See Insurrection, Disqualification, and the Presidency*, 13 Brit J Am Legal Stud at 18–20. On the eve of the Civil War, President Buchanan called himself "the chief executive officer under the Constitution of the United States." *Id.* at 18 (citation omitted); *see also* Cong Globe, 37th Cong, 2d Sess (1862), p 431 (Sen. Davis) (referring to President Lincoln as "the chief executive officer of the United States"). In a series of widely reprinted 1865 official proclamations that reorganized the governments of former Confederate states, President Andrew Johnson referred to himself as the "chief civil executive officer of the United States."[22]

This usage continued throughout the Thirty-Ninth Congress, which enacted the Fourteenth Amendment, *e.g.*, Cong Globe, 39th Cong, 1st Sess (1866), p 335 (Sen. Guthrie), 775 (Rep. Conkling) (quoting Attorney General Speed), 915 (Sen. Wilson), 2551 (Sen. Howard) (quoting President Johnson), and during its two-year ratification period, *see, e.g.*, *Mississippi v Johnson*, 71 US (4 Wall) 475, 480; 18 L Ed 437 (1866) (counsel labeling the president the "chief executive officer of the United States"); Cong Globe, 39th Cong, 2d Sess (1867), p 335 (Sen. Wade) (calling president "the executive officer of the United States"); Cong Globe, 40th Cong, 2d Sess (1868), p 513 (Rep. Bingham) (calling the president the "executive officer of the United States"). It is clear that the original public meaning of the phrase in Section 3 necessarily included the president as an "officer of the United States."

An insurrectionist ex-president was hardly inconceivable. Former President John Tyler

[22] Andrew Johnson, Proclamation No. 135 (May 29, 1865); Proclamation No. 136 (June 13, 1865); Proclamation No. 138 (June 17, 1865); Proclamation No. 139 (June 17, 1865); Proclamation No. 140 (June 21, 1865); Proclamation No. 143 (June 30, 1865); Proclamation No. 144 (July 13, 1865), *all reprinted in* 8 *A Compilation of the Messages and Papers of the President*, 3510–3514, 3516–3523, 3524–3529 (James D. Richardson ed, 1897).

joined the Confederacy. Had he lived long enough to seek public office after the war, no reasonable interpretation of Section 3 would hold that his disqualification would turn on the fact that he also happened to serve as a *less powerful* covered official in the House.

2. The Generation That Ratified The Fourteenth Amendment Understood The President To Be An "Officer Of The United States."

Those charged with interpreting the term "officer" in Section 3—often in the context of the phrase "officer of any State"—interpreted it in a commonsense manner that does not distinguish elected from appointed office. They understood a state or federal "officer" to mean one who, by dint of office, must take an oath to support the Constitution. *See Worthy*, 63 NC at 204 ("The oath to support the Constitution is the test, the idea being that one who had taken an oath to support the Constitution, and violated it, ought to be excluded from taking it again . . . .").

Under this analysis, an "officer" under Section 3 is one who is "required to take . . . an oath to support the Constitution," in contrast to a "placeman" who is "simply required to take an oath to perform the particular duty required of him." *Id.* at 202–203 (enumerating state officers who satisfy this test, including apex elected officials such as governor, as well as minor officials such as "inspectors of flour, tobacco, etc." and "stray valuers"); *see also Powell*, 27 F Cas at 605–606 (holding elected constable was an "officer in the state" because he held "executive office"); *The* 12 US Op Att'y Gen 141, 158 (May 24, 1867) (defining covered officials as those "[h]olding the designated office, State or federal, accompanied by an official oath to support the Constitution of the United States"); *In re Executive Communication of 14th October, 1868*, 12 Fla 651, 651–52 (1868) (interpreting Section 3 as incorporated into Florida Constitution, and defining an "officer" simply as "a person commissioned or authorized to perform any public duty").

Just one month after sending the Fourteenth Amendment to the states for ratification, Congress explained its own interpretive methodology, rejecting distinctions between "officer of"

and "office under" the United States. A committee report explained: "[i]t is irresistibly evident that no argument can be based on the different sense of the words 'of' and 'under'" and that the words "are made by the Constitution equivalent and interchangeable." Cong Globe, 39th Cong, 1st Sess (1868), p 3939. The committee dismissed efforts to distinguish these terms, emphasizing that "[n]o method of attaining the Constitution is more unsafe than this one of 'sticking' in sharp verbal criticism." *Id.*; *see Insurrection, Disqualification, and the Presidency*, at 24–26.

Nor is there any material distinction between an oath to "support" the Constitution, as used in Section 3 and art VI, cl 3, and an oath to "preserve, protect and defend" the Constitution, as used in art II, § 1, cl 8. There is a long history of interchangeable usage of the phrases. In the 1860s, Congress used the verbs interchangeably in twice revising Article VI oaths. *See* Act of July 2, 1862, ch 128, 12 Stat 502 ("support and defend"); Act of August 6, 1861, ch 64, 12 Stat 326–327 ("support, protect, and defend"). Likewise, many states—mandated by Article VI to require officials to *support* the Constitution—then or now have specified an oath to "preserve, protect, and defend" the Constitution. *See, e.g.*, Ga Const 1868, art IV, § 1, cl 5; SC Const 1895, art III, § 26. Indeed, the definition of "defend" includes "support." *See, e.g.,* Johnson, *A Dictionary of the English Language* (4th ed, 1773). Finally, Section 3 refers to "an" oath to support the Constitution, not *the specific oath* described in Article VI.

3. The Framers And Public Did Not Understand Section 3 To Be Constrained By Technical Taxonomies.

Any reading of Section 3 that allows an insurrectionist president to return to power simply because he did not have any prior public service would make a mockery of the protective purpose and parallel structure of Section 3. Structurally, Section 3 pairs covered officials with barred offices. *See The Sweep and Force of Section 3*, 172 U Pa L Rev at 106–107. Except for presidential electors, who only appear in the "barred offices" list, these lists match, though it uses slightly

different terminology to mean the same thing. *See Insurrection, Disqualification, and the Presidency*, 13 Brit J Am Legal Stud at 22–27 (describing the "essential harmony" of "office" and "officer"). For example, the barred-offices list says, "Senator or Representative in Congress," while the covered-officials list says, "members of Congress." It strains credulity to suggest that the Framers of the Fourteenth Amendment relied on nonsensical textualism to give "member[] of Congress" and "Senator or Representative in Congress" different meanings. The same logic applies to the harmony of "any office, civil or military, under the United States" in the barred-offices list and "officer of the United States" in the covered-officials list.

Some commentators have developed elaborate schema in an attempt to distinguish officers of "the Government of the United States," US Const, art I, § 8, from officers of "the United States," claiming the president is only the former. *See* Barrett Tillman & Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S Tex L Rev 309 (2021) (the first in a planned ten-part series of articles they claim is necessary to explain their theory). But neither the Fourteenth Amendment's Framers nor the public understood the amendment to be controlled by byzantine taxonomies. *See The Sweep and Force of Section 3*, 172 U Pa L Rev at 105 ("[A] reading that renders the document a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one").[23]

Rather, the Framers understood the terms' common meanings for the intended purpose of protecting the republic. If "[t]he oath to support the Constitution is the test," *Worthy*, 63 NC at 204, then the president's oath—the only one explicitly specified in the Constitution itself—must qualify at least as much as those of "inspectors of flour, tobacco, etc." or "stray valuers." *See id*.

[23] *Cf* Cong Globe, 39th Cong, 1st Sess (1866), p 1089 (Rep. Bingham) (asked to define "due process of law," replying that "the courts have settled that long ago, and the gentleman can go and read their decisions").

at 203. The theory that a deputy assistant undersecretary or Inspector of Flour who engages in insurrection is excluded from public office but a *president* is not, is completely untethered from the amendment's purpose to protect the republic from oath-breaking insurrectionists.[24]

VI. The Complaint Pleads Conduct Covered Under Section 3.

A. The January 6 Insurrection Was An "Insurrection" Under Section 3.[25]

1. An "Insurrection" Under Section 3 Is Combined, Forcible Resistance To Federal Authority Or The Constitution Itself.

Nineteenth-century definitions of "insurrection" varied in exact wording but converge on key elements. *See The Sweep and Force of Section 3*, 172 U Pa L Rev at 63–93 (canvassing definitions and usage). These elements are "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect," *id*. at 64, or "a) an assemblage, b) actual resistance to a federal law, c) force or intimidation, and d) a public purpose," Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers*, Univ Md Sch of Law Legal Studies Research Paper No. 2023-16 (October 3, 2023), p 24, available at https://ssrn.com/abstract=4591133; *see also Webster's Dictionary* (1830) ("[C]ombined resistance to . . . lawful authority . . . , with intent to the denial thereof[.]"); Bouvier, *Bouvier's Law Dictionary* (15th ed, 1883) (defining "insurrection" as "rebellion," and "rebellion" as "[t]he taking up arms traitorously against the government[; t]he forcible opposition and resistance to the laws and process lawfully issued"); *The Prize Cases (The Amy Warwick*), 67 US (2 Black) 635, 666; 17 L Ed 459 (1862) ("Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the

[24] For more on why the president is a covered official under Section 3, see *Insurrection, Disqualification, and the Presidency*, 13 Brit J Am Legal Stud at 13–27; *The Sweep and Force of Section Three*, 172 U Pa L Rev at 104–112.

[25] Additionally, the entire course of conduct leading up to January 6, 2021, constituted a "rebellion." *See The Sweep and Force of Section Three*, 172 U Pa L Rev at 115–116.

Government."); *Allegheny Co v Gibson*, 90 Pa 397, 417 (1879) ("A rising against . . . authority; the open and active opposition of a number of persons to the execution of law in a city or state; a rebellion; a revolt[.]"); President Lincoln, *Instructions for the Government of Armies of the United States in the Field*, General Orders No. 100 (April 24, 1863), art 149 ("Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.").[26]

The term as used in Section 3 is informed by previous insurrections against the United States, such as the Whiskey, Shays', and Fries Insurrections, which did *not* involve vast columns of uniformed troops, military equipment, or hundreds of deaths. *See The Sweep and Force of Section Three*, 172 U Pa L Rev at 88–90; Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789–1878* (US Army Center of Military History, 1996) (recounting well-known antebellum insurrections that involved loosely organized, lightly-armed groups and few deaths). Yet the Framers and interpreters of Section 3 explicitly cited them as precedent. *See* Cong Globe, 39th Cong, 1st Sess (1866), p 2534 (Rep. Eckley) (discussing approvingly the expulsions of representatives who supported the "small" Whiskey Insurrection); *see also* 12 US Op Att'y Gen at 160 (opining that, in similarly-worded statute, "[t]he language here comprehends not only the late rebellion, but every past rebellion or insurrection . . . in the United States").[27]

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[26] *United States v Greathouse*, 26 F Cas 18 (CCND Cal, 1963), does not define "insurrection." There, Justice Field—not, as Trump suggests, Chief Justice Chase, who was not involved in the case—noted that the indictment "charges the commission of acts, which, in the judgment of the court, amount to treason within the meaning of the constitution." *Id.* at 21. He then proceeded to charge the jury with the elements of treason.

[27] Section 3's phrase "insurrection or rebellion against *the same*" can be read broadly as an insurrection against the United States, or narrowly as applying to insurrections against the Constitution (i.e., to block exercise of core constitutional functions of the federal government). The January 6 insurrection satisfies both readings, so the distinction does not matter here.

To qualify as an insurrection, the uprising must be "so formidable as for the time being to defy the authority of the United States." *In re Charge to Grand Jury*, 62 F 828, 830 (ND Ill, 1894). No minimum level of violence or armament is required. *See id* ("It is not necessary that there should be bloodshed[.]"); *see also Case of Fries*, 9 F Cas 924, 930 (CCD Pa, 1800) ("[M]ilitary weapons (as guns and swords . . .) are not necessary to make such insurrection . . . because numbers may supply the want of military weapons, and other instruments may effect the intended mischief."). Even a failed attack with no chance of success can qualify as an insurrection. *See In re Charge to Grand Jury*, 62 F at 830 ("[I]t is not necessary that its dimensions should be so portentous as to insure probable success[.]").[28]

2. The January 6 Insurrection Satisfies All These Criteria.

The January 6 insurrection was an uprising against the United States (or against the Constitution of the United States) that sought to stop the peaceful transfer of power. Compl, ¶¶ 6, 24. It defied the authority of the United States by seizing the U.S. Capitol and preventing Congress from fulfilling its duty to certify the results of a presidential election. Though their success was short-lived, the insurrectionists claim distinctions that past insurrectionists cannot: their violent seizure of the Capitol obstructed an essential constitutional procedure. *See id.* ¶ 202. 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. *Id.* ¶¶ 198–202.

Multiple people died and 140 law enforcement officers were injured, some severely. *Id.* ¶ 245. The attack was as violent as the Whiskey and Shays Insurrections, to which the Disqualification Clause was understood to apply. *See* Cong Globe, 39th Cong, 1st Sess (1866), p 2534. Insurrectionists overwhelmed civil authorities and viciously attacked the Capitol police.

[28] Modern jurisprudence agrees. *See Home Ins Co of NY v Davila*, 212 F2d 731, 736 (CA 1, 1954) (an insurrection "is no less an insurrection because the chances of success are forlorn").

Compl, ¶ 179–202, Military and other federal agencies had to be called in by then-Vice President Pence, after Trump refused. *Id.* ¶ 238. 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." *See id.* ¶¶ 246–255.[29]

B. Trump's Misconduct Constituted "Engage[ment]" In The Insurrection.

1. Under The Governing Worthy-Powell *Standard, Any Voluntary Effort To Assist The Insurrection Constitutes Engagement.*

All four courts to construe "engage" under Section 3—two in the 1860s, two last year—have articulated the same standard. Under this *Worthy-Powell* standard, to "engage" in insurrection or rebellion means to provide voluntary assistance, either by service or contribution (except charitable contributions). *See Powell*, 27 F Cas at 607 (defining "engage" as "a voluntary effort to assist the Insurrection . . . and to bring it to a successful [from insurrectionists' perspective] termination"); *Worthy*, 63 NC at 203 (defining "engage" as "[v]oluntarily aiding the rebellion, by personal service or by contributions, other than charitable, of anything that was useful or necessary"); *see also In re Tate*, 63 NC 308 (applying *Worthy*); 12 US Op Att'y Gen at 161–62 ("engage" includes "persons who . . . have done any overt act for the purpose of promoting the rebellion"). Both 2022 decisions adopted the *Worthy-Powell* standard to construe "engage" under Section 3. *See White*, p 34; *Rowan I*, pp 13–14. No court has ever used a different standard under Section 3.

[29] The fact that the Senate's impeachment trial for incitement to insurrection only resulted in 57 votes to convict is irrelevant. First, more evidence is now available than the Senate had in 2021, partly due to Trump's efforts to conceal his involvement. Second, 22 Senators expressly based their vote to acquit on their belief that the Senate lacked jurisdiction to try a former official, and either criticized him or stated no view on the merits. *See* Goodman & Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JustSecurity (February 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.

Engagement does not require that an individual personally commit violence. *See Powell*, 27 F Cas at 607 (defendant paid to avoid serving in Confederate Army); *Worthy*, 63 NC at 203 (defendant simply served as county sheriff); *Rowan I*, p 13; *White*, p 35; 12 US Op Att'y Gen at 161 ("[P]ersons may have engaged in rebellion without having actually levied war or taken arms[.]"). Indeed, Jefferson Davis—the president of the Confederacy—never fired a shot and Section 3 clearly applied to him.

It is possible—and for leaders, even likely—to engage in insurrection via speech through order-giving or incitement. "[M]arching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding, would appear to constitute 'engagement' under the *Worthy-Powell* standard." *Rowan I*, p 14. With regard to incitement, "[d]isloyal sentiments . . . would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come under the disqualification." 12 US Op Att'y Gen at 182, 205; *see also Charge to Grand Jury*, 62 F at 830 ("When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force that the civil authorities are inadequate to put them down, and a considerable military force is needed to accomplish that result, they become insurgents; and every person who knowingly incites, aids, or abets them, no matter what his motives may be, is likewise an insurgent.").[30]

The First Amendment does not preclude disqualification based on speech. First, Section 3 is not a statute subject to First Amendment review. It is a coequal provision of the Constitution—in fact, a later-enacted and more specific provision. *See The Sweep and Force of Section Three*,

[30] That the 1862 Second Confiscation Act criminalized a longer list of verbs is irrelevant. *See* 12 Stat 589, 590 (1862). No evidence suggests that Congress's decision to streamline this statutory verbiage meant to *exclude* incitement or other forms of engagement. *See McCulloch v Maryland*, 17 US (4 Wheat) 316, 407; 4 L Ed 579 (1819) (denying that Constitution must "partake of the prolixity of a legal code").

172 U Pa L Rev at 57–61. By analogy, though all Americans have a First Amendment right to refuse to swear an oath to protect the Constitution, Article VI of the Constitution requires legislators to take an oath to protect the Constitution. *See* US Const, art VI. They cannot use the First Amendment as a shield to avoid taking this oath; Article VI controls. *See Bond v Floyd*, 385 US 116, 132; 87 S Ct 339; 17 L Ed 235 (1966). Likewise, the First Amendment does not protect Trump from disqualification. Section 3 controls.

Second, even if Section 3 were subject to First Amendment protections, those protections would not extend to speech that qualifies as engagement in insurrection. First, Section 3 proscribes disqualification from office and does not criminalize speech. If Congress may statutorily prohibit federal employees from taking active part in political campaigns, *see US Civil Serv Comm'n v Nat'l Ass'n of Letter Carriers*, 413 US 548, 550, 556; 93 S Ct 2880; 37 L Ed 2d 796 (1973), then *the Constitution itself* can disqualify from office individuals who engage in rebellion against the United States or its Constitution. And not all speech is protected by the First Amendment. *Virginia v Black*, 538 US 343, 358–359; 123 S Ct 1536; 155 L Ed 2d 535 (2003). Language that incites and is likely to incite imminent lawless action or furthers a crime is unprotected. *Brandenburg v Ohio*, 395 US 444, 447; 89 S Ct 1827; 23 L Ed 2d 430 (1969), and criminal plans or conspiracy, *see Giboney v Empire Storage & Ice Co*, 336 US 490, 502; 69 S Ct 684; 93 L Ed 834 (1949). The First Amendment is no bar to Section 3 disqualification, and speech that qualifies as engagement in insurrection is not protected by the First Amendment.

Nor does Section 3 require charging or conviction of any crime. *See, e.g.*, *Rowan I*, pp 13–14; *White*, p 26; *Powell*, 27 F Cas At 607 (defendant not charged with any prior crime); *Worthy*, 63 NC at 203 (same); *In re Tate*, 63 N.. 308 (same); *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const Commentary at 98–99 (describing 1868 special congressional action to

enforce Section 3 and remove Georgia legislators, none of whom had been charged criminally); *The Sweep and Force of Section Three*, 172 U Pa L Rev at 68, 83–84.[31] Indeed, the vast majority of ex-Confederates—including Worthy, most candidates-elect that Congress excluded, and the thousands who petitioned Congress for amnesty—were never charged with, or convicted of, any crimes.

Trump does not cite the *Worthy-Powell* standard—the *only* judicial definition of "engage" under Section 3. Instead, he relies on two House exclusion cases. *See* Br, p 27 (citing, without naming, cases of John M. Rice and Lewis McKenzie). The cases did not turn, as Trump suggests, on whether their speech qualified as engagement in insurrection. Rather, the House did not exclude them because, although they advocated for secession months before it started, Rice and McKenzie both took *immediate active efforts to defeat the insurrection once it began*.[32]

In fact, the House's exclusion practice was generous to men who repudiated initial disloyalty by immediately disavowing and fighting the insurrection, but strict to men who remained silent or supportive once the insurrection was underway. In its *first* Section 3 adjudication, "recognized by the House as of the highest importance," the House excluded John Young Brown for advocating forcible resistance to federal authority in a letter to the editor. 1 Hinds, *Hinds' Precedents of the House of Representatives of the United States*, ch 14, § 449 (1907), p 445–446; *see also id.* § 458, p 469 (excluding Philip Thomas, who gave "aid and comfort" by *allowing* his son to join Confederate Army and giving him $100); *id.* § 451, p 452 (explaining in

[31] Rather than require a criminal conviction as a prerequisite to a civil action to disqualify an officeholder, Congress instead imposed criminal penalties for those who held office in defiance of Section 3. *See* Act of May 31, 1870, ch 114, § 15, 16 Stat 140, 143.

[32] *See* Cong Globe, 41st Cong, 2nd Sess, (1870), pp 5442, 5445 (Rice actively dissuaded "whole companies of men" from joining the Confederate Army and induced them to fight for the Union); *Hinds' Precedents*, ch 14, § 462, p 477 (McKenzie changed his mind *before* Virginia seceded and became "an outspoken Union man").

John D. Young case that "'aid and comfort' may be given to an enemy by words of encouragement, or the expression of an opinion, from one occupying an influential position").[33] Crucially, the House's exclusion practice demonstrates the importance of an individual's conduct *during* the insurrection. That standard does not favor Trump.

2. Trump Spearheaded The Insurrection Through Words And Actions.

Plaintiffs' complaint recites extensive allegations of Trump's involvement in the insurrection, in a detailed timeline that lays out his culpability. In fact, nine federal judges have ascribed responsibility for the January 6 insurrection to Trump. Compl, ¶¶ 259–260.

Trump picks and chooses decontextualized examples of his conduct to evade responsibility for the whole, including citing a case decided two years before the insurrection. Br, pp 28–31, citing *Nwanguma v Trump*, 903 F3d 604, 610 (CA 6, 2018). But taken in context, his speech and actions establish that he purposefully engaged in insurrection both before and during the violent assault on the Capitol. A federal court has already held that Trump's Ellipse speech constituted incitement—notwithstanding his wink-and-nod passing parenthetical about "peacefully" marching on the Capitol. *See* Compl, ¶ 258, quoting *Thompson v Trump*, 590 F Supp 3d 46, 104, 118 (DDC, 2022).[34] Some of his speech constituted overt acts:

> [I]n certain circumstances words can constitute an "overt act," just as words may constitute an "overt act" under the Treason Clause, *e.g., Chandler v. United States*,

[33] Trump's argument that "aid or comfort" is restricted to *foreign* enemies, Br, p 32, is an outdated, antebellum view. The concept of a "domestic" enemy became part of American constitutional thinking no later than 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) (emphases added).

[34] Even if First Amendment doctrine governed Section 3 (it does not), a federal court has held that key Trump statements were "plausibly words of incitement not protected by the First Amendment." *Thompson*, 590 F Supp 3d at 115. And a federal court has found many of Trump's communications with his attorney to satisfy the crime/fraud exception to privilege doctrines. *See Eastman v Thompson*, 636 F Supp 3d 1078 (CD Cal, 2022), *app dis* ___ F4th ___ (CA 9, 2022) (Docket No. 22-56013), *cert den* ___ US ___; ___ S Ct ___; ___ L Ed 2d ___ (2023) (Docket No. 22-1138); *Eastman v Thompson*, 594 F Supp 3d 1156 (CD Cal, 2022).

> 171 F.2d 921, 938 (1st Cir. 1948) (enumerating examples, such as conveying military intelligence to the enemy), or for purposes of conspiracy law, *e.g., United States v. Donner*, 497 F.2d 184, 192 (7th Cir. 1974) (even "constitutionally protected speech may nevertheless be an overt act in a conspiracy charge").

Rowan I, p 14. "[M]arching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding, would appear to constitute 'engagement' under the *Worthy-Powell* standard." *Id.* That is *precisely* what Trump gave.

Trump "summoned the attackers to Washington, D.C. to 'be wild' . . . ; ensured that his armed and angry supporters were able to bring their weapons, incited them against Vice President Pence, Congress, the certification of electoral votes, and the peaceful transfer of power." Compl, ¶ 303. He ordered the attackers to march on the Capitol. Once the insurrection was underway, he actively aided and encouraged the insurrection to continue, *id.* ¶¶ 208–219, and deliberately refused to take steps to suppress or mitigate it, *id.* ¶¶ 207–233. Trump knew of, consciously disregarded the risk of, or specifically intended *all* of it. *Id.* ¶ 302.

CONCLUSION AND RELIEF SOUGHT

Trump's motion for summary disposition should be denied and an evidentiary hearing set.

Respectfully submitted,

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Proof of Service

The undersigned certifies that on October 23, 2023, the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
Elizabeth M. Rhodes

Dated: October 23, 2023