STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellants,

Court of Appeals No. 368628
Court of Claims No. 23-000137-MZ

v

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

Defendant-Appellee,

THIS APPEAL INVOLVES AN URGENT ELECTION MATTER RELATED TO THE FEBRUARY 27, 2024 PRESIDENTIAL PRIMARY

and

DONALD J. TRUMP,

Intervening Appellee.
_____/

ROBERT DAVIS,

Plaintiff-Appellant,

Court of Appeals No. 368615
Circuit Court No. 23-012484-AW

v

WAYNE COUNTY ELECTION COMMISSION,

Defendant-Appellee.
_____/

BRIEF ON APPEAL OF PLAINTIFFS-APPELLANTS LaBRANT ET AL.

ORAL ARGUMENT REQUESTED

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BASIS OF JURISDICTION

On November 14, 2023, the Court of Claims issued an Opinion and Order denying Plaintiffs-Appellants' request for declaratory relief. The Opinion and Order appealed from is attached hereto as Exhibit 1. This Court has jurisdiction over Plaintiffs-Appellants' appeal as of right under MCR 7.203(A)(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Claims wrongfully deprive Plaintiffs-Appellants of their right as voters to have only eligible candidates on the presidential primary ballot?

Plaintiffs-Appellants' Answer: Yes.

Defendant-Appellee's Answer: No.

Intervening Appellee's Answer: No.

2. Did the Court of Claims incorrectly hold that this case involving the eligibility of a candidate to appear on the presidential ballot was not ripe?

Plaintiffs-Appellants' Answer: Yes.

Defendant-Appellee's Answer: Unknown.

Intervening Appellee's Answer: No.

3. Did the Court of Claims improperly apply the political question doctrine in finding that the courts have no role in deciding the eligibility of presidential candidates to appear on Michigan's presidential primary ballot?

Plaintiffs-Appellants' Answer: Yes.

Defendant-Appellee's Answer: Unknown.

Intervening Appellee's Answer: No.

CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Material Facts

The material facts concerning Trump's ineligibility to be a candidate under Section 3 of the Fourteenth Amendment are set forth in Plaintiffs-Appellants' Verified Complaint for Declaratory Judgment and Permanent Injunction, attached hereto as Exhibit 2.

The presidential primary election calendar is as follows. On November 13, 2023, Defendant-Appellee Benson issued her list of candidates for the February 27, 2024 presidential primary, which included Trump. Additional candidates could be added by the political parties by November 14, 2023, or by petition until December 8, 2023. Ballots must be ready for overseas and military voters 45 days before the February 27, 2024 primary, or by January 13, 2024.

B. Proceedings

Plaintiffs-Appellants filed their Verified Complaint on September 29, 2023, in the Court of Claims seeking an expedited Court order:

> 1. Declaring that Donald J. Trump is disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment to the Constitution of the United States;
>
> 2. Permanently enjoining the Secretary of State from including Donald J. Trump on the ballot for the 2024 presidential primary election;
>
> 3. Permanently enjoining the Secretary of State from including Donald J. Trump on the ballot for the November 5, 2024, general election as a candidate for the office of Present of the United States[.]

Compl, Prayer for Relief (Ex 2, p 94).

Trump moved to intervene as a defendant, which was denied. However, his proposed motion to dismiss and brief in support were essentially treated as *amicus curiae* pleadings and were considered by the Court of Claims. Trump's lawyers were also granted the same amount of time as the parties to argue on the merits at the November 9, 2023 hearing. After the hearing in

this and two related cases on November 9, 2023, the Court of Claims issued an Opinion and Order on November 14, 2023, denying Plaintiffs-Appellants requested relief.

An appeal was filed in the Court of Appeals on November 15, 2023. On November 16, 2023, Plaintiffs-Appellants filed an Emergency Bypass Application with the Michigan Supreme Court, Docket No. 166373, which is pending before that Court. On November 20, 2023, Donald Trump's Motion to Intervene as Appellee was granted in this case. On November 22, 2023, the Court of Appeals consolidated this case, Docket No. 368628, with *Davis v Wayne Co Election Comm*, Docket No. 368615.

INTRODUCTION

Donald Trump is constitutionally disqualified from running for and serving as President of the United States because he engaged in rebellion and insurrection against the Constitution that he swore an oath to defend.

The Court of Claims incorrectly dismissed this case seeking to bar Trump from the 2024 Michigan presidential primary and general election ballots. It did so by ignoring the right of Michigan voters to have only eligible candidates appear on the ballot, improperly finding the case not ripe, and misapplying the political question doctrine on the basis of overruled case law and discredited analysis, while ignoring the clear authority demonstrating that Section 3 can and must be enforced by state courts.

The Court of Claims should be promptly reversed, and the case remanded for an evidentiary hearing on the question of whether Trump violated Section 3 of the Fourteenth Amendment.

STANDARD OF REVIEW

When considering declaratory judgment actions, questions of law are reviewed de novo. *Reed-Pratt v Detroit City Clerk*, 339 Mich App 510, 516; 984 NW2d 794 (2021) (*per curiam*). Such questions of law include the interpretation or application of statutory and constitutional provisions. *Moses, Inc v Southeast Mich Council of Gov't*s, 270 Mich App 401, 411; 716 NW2d 278 (2006).

ARGUMENT

THE COURT OF CLAIMS SHOULD BE REVERSED.

I. TRUMP IS DISQUALIFIED FROM OFFICE UNDER SECTION 3 OF THE FOURTEENTH AMENDMENT.

The interpretation and application of the Fourteenth Amendment's Disqualification Clause involves legal issues of major significance to Michigan's and the country's jurisprudence:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

US Const, Am XIV, § 3.

Trump satisfies every condition of Section 3 to be disqualified from the Michigan presidential primary ballot, as we now demonstrate.

A. Trump Took An Oath "As An Officer Of The United States" To Support The Constitution.

On January 20, 2017, Trump swore the presidential oath of office required by Article II, Section 1 of the Constitution: "I, Donald John Trump, do solemnly swear that I will faithfully execute the Office of President of the United States, and will do my best of my Ability preserve, protect, and defend the Constitution of the United States."

Trump took that oath as an "Officer of the United States" under Section 3 because the President is an officer of the United States.

1. Plain Meaning.

The plain meaning of "Officer of the United States" includes the President because the Constitution explicitly designates the presidency as an "Office," describing it as such no fewer than 25 times and the plain 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.").

This plain meaning is widely used today by the United States 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.'").

2. Common Understanding And Contemporaneous Interpretation.

By the 1860s—the relevant period for ascertaining the original meaning of the Fourteenth Amendment—"officer of the United States" was commonly understood to include the President, and the 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 Judge Cranch 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* Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit J Am Legal Stud (forthcoming 2024), pp 18–20; Chicago Tribune (January 14, 1864), p 3, col 3 ("The President is an officer of the United States . . . ."). On the eve of the Civil War, President Buchanan called himself "the chief executive officer under the Constitution of the United States." *Insurrection, Disqualification, and the Presidency*, 13 Brit J Am Legal Stud at 18; *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."[1]

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

[1] 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).

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 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.

The general public continued to characterize the president as an "officer of the United States" during President Johnson's impeachment, which overlapped with the Fourteenth Amendment's ratification period. *See, e g,* Cincinnati Commercial (April 18, 1868), p 4, col 4 (ridiculing the "absurd conclusion," drawn from "splitting constitutional hairs," that the president is not an officer of the United States); Louisville Courier-Journal (April 15, 1868), p 1, col 1 (conceding that it is "accepted doctrine[]" that "the President of the United States is an 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." Nor was the term considered a technical term of art that excluded the president. If it were, then it would be defined as such in contemporary legal dictionaries—it is not.

B. Trump Seeks Election To "An Office . . . Under The United States."

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 Constitution as a whole refers to the presidency as an "Office" 25 times.

The congressional debates over Section 3 specifically recognized that the presidency, as an office, is indeed covered by Section 3. 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 Insurrection, Disqualification, and the Presidency*, 13 Brit J Am Legal Stud at 7–10; *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.

C. Trump Engaged In Both Insurrection And Rebellion Against The Constitution Of The United States.

1. The January 6 Insurrection Was An "Insurrection" Under Section 3.[2]

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

Nineteenth-century definitions of "insurrection" converge on key elements. *See* Baude & Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U Pa L Rev (forthcoming 2024), pp 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 Government."); *Allegheny Co v Gibson's Son & Co*, 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*

[2] 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.

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.").

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 Att'y Gen Op, p 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").[3]

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

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

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 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[.]").[4]

b. 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 (Ex 2, pp 28, 31). 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 (Ex 2, p 68). Even the Confederates never attacked the heart of the nation's capital, prevented a peaceful and orderly presidential transition of power, or captured the U.S. Capitol. *Id* ¶¶ 198–202 (Ex 2, pp 67–68).

Multiple people died and 140 law enforcement officers were injured, some severely. *Id* ¶ 245 (Ex 2, p 75). 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. Compl, ¶¶ 179–202 (Ex 2, pp 64–68). Military and other federal agencies had to be called in by then-Vice President Pence, after Trump refused. *Id* ¶ 238 (Ex 2, pp 73–74). Congress, then-President Trump's own Department of Justice, federal courts, and even Trump's defense lawyer

[4] 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").

have all categorized January 6 as an "insurrection." *See id* ¶¶ 246–255 (Ex 2, pp 75–79).[5]

Most recently, a Colorado court, after a five-day bench trial in which Trump was a party, concluded that the events of January 6, 2021, constituted an insurrection under Section 3 of the Fourteenth Amendment. *See Anderson v Griswold*, order of the Colorado District Court, issued November 17, 2023 (Docket No. 2023-CV-32577), ¶¶ 225–244 (Ex 6, pp 216–221).

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

a. 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 United States v Powell*, 27 F Cas 605, 607 (CCD NC, 1871) (defining "engage" as "a voluntary effort to assist the Insurrection . . . and to bring it to a successful [from insurrectionists' perspective] termination"); *Worthy v Barrett*, 63 NC 199, 203 (1869) (defining "engage" as "[v]oluntarily aiding the rebellion by personal service or by contributions, other than charitable, of anything that was useful or necessary"), *app dis Worthy v Comm'rs*, 76 US (9 Wall) 611; 19 L Ed 565 (1869); *see also In re Tate*, 63 NC 308 (1869) (applying *Worthy*); 12 US Att'y Gen Op, pp 161–62 ("engage" includes "persons who . . . have done any overt act for the purpose

[5] 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.

of promoting the rebellion"). Both 2022 decisions adopted the *Worthy-Powell* standard to construe "engage" under Section 3. *See New Mexico ex rel White v Griffin*, opinion of the First Judicial District Court of New Mexico, issued September 6, 2022 (Docket No. D-101-cv-2022-00473), p 34, *app dis* order of the New Mexico Supreme Court, issued November 16, 2022 (Docket No. S-1-SC-39571), *cert filed* May 18, 2023; *Rowan v Greene*, initial decision of the Georgia Office of State Admin Hearings, issued May 6, 2022 (Docket No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot) (*Rowan I*), pp 13–14 (Ex 3, pp 110–111). No court has ever used a different standard under Section 3.

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 (Ex 3, p 110); *White*, p 35; 12 US Att'y Gen Op, p 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 (Ex 3, p 111). 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 Att'y Gen Op, pp 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.").[6]

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*, 172 U Pa L Rev at 57–61. By analogy, although 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 2d 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

[6] 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").

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), as are 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 (Ex 3, pp 110–111); *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 NC 308 (same); Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const Commentary 87, 98–99 (2021) (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.[7] 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.

In the Court of Claims, Trump did not cite the *Worthy-Powell* standard—the *only* judicial definition of "engage" under Section 3. Instead, he relied on two inapposite House exclusion cases. *See* Trump's Br in Supp of Mot for Summ Disposition, p 27 (citing, without naming, cases of John M. Rice and Lewis McKenzie). The cases did not turn, as Trump suggested below, on whether their speech qualified as engagement in insurrection. Rather, the House did not exclude them

[7] 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.

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*.[8]

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), pp 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 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").[9] Crucially, the House's exclusion practice demonstrates the importance of an individual's conduct *during* the insurrection. That standard does not support Trump.

b. Trump Spearheaded The Insurrection Through Words And Actions.

Plaintiffs-Appellants' complaint extensively recites Trump's involvement in the insurrection, in a detailed timeline that lays out his culpability. In fact, nine federal judges have

[8] *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").

[9] Trump's argument that "aid or comfort" is restricted to *foreign* enemies, Trump's 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).

ascribed responsibility for the January 6 insurrection to Trump. Compl, ¶¶ 259–260 (Ex 2, pp 81–83).

In the Court of Claims, Trump picked and chose decontextualized examples of his conduct to evade responsibility for the whole, including citing a case decided two years before the insurrection. *See* Trump's 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 (Ex 2, pp 80–81), *quoting Thompson v Trump*, 590 F Supp 3d 46, 104, 118 (DDC, 2022).[10] 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*, 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 (Ex 3, p 111). "[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.

[10] 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 ___; 217 L Ed 2d 113 (2023) (Docket No. 22-1138); *Eastman v Thompson*, 594 F Supp 3d 1156 (CD Cal, 2022).

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 (Ex 2, p 90). 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 (Ex 2, pp 69–71), and deliberately refused to take steps to suppress or mitigate it, *id* ¶¶ 207–233 (Ex 2, pp 69–73). Trump knew of, consciously disregarded the risk of, or specifically intended *all* of it. *Id* ¶ 302 (Ex 2, pp 89–90).

The Colorado trial court—the only court in the country to specifically address this issue—found that Trump "engaged" in the insurrection. *Anderson*, ¶¶ 245–298 (Ex 6, pp 222–245) ("Consequently, the Court finds that Petitioners have established that Trump engaged in an insurrection on January 6, 2021 through incitement, and that the First Amendment does not protect Trump's speech."). Numerous other federal courts have explicitly recognized Trump's key role in facilitating or causing the insurrection.

D. Section 3 Is Self-Executing.

1. State Courts Do Not Need Congressional Permission To Enforce The Fourteenth Amendment.

a. 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 United States 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 United States 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").

b. 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 Co*, 404 Mich 524; 273 NW2d 829 (1979).[11]

2. Nothing In The Fourteenth Amendment Says Section 3 Requires Federal Legislation.

a. 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." *The Sweep and*

[11] 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.

Force of Section Three, 172 U Pa L at 17–18. 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 parallels 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. Indeed, the drafters intended to constitutionalize these protections for the specific purpose that they would *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 unless and until *two-thirds* of each chamber grants amnesty.

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.

b. 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 United States 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. Section 3, like Section 1, also is enforceable in state court even without federal legislation.

3. 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.[12]

a. 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.[13]

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.[14] Congress understood that, absent amnesty, states could directly enforce Section 3 without federal legislation to bar those individuals from holding office.

In the Court of Claims, Trump relied on two badly out-of-context quotes from Representative Thaddeus Stevens. *See* Trump's 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 (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

[12] 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.
[13] *See* Act of May 31, 1870, ch 114, § 14, 16 Stat 140, 143 (repealed 1948).
[14] 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).

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.

b. 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 Amnesty and Section Three of the Fourteenth Amendment*, 36 Const Commentary at 112. 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 relied below on the remarks of Pennsylvania State Representative Thomas Chalfant. Trump's 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[15]—and is not a reliable source on its meaning.

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

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:

[15] *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).

> 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.

d. 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*, 63 NC at 200 (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*; *see also In re Tate*, 63 NC at 309 (citing *Worthy* as controlling authority). That same year, the Louisiana Supreme Court adjudicated a state official's Section 3 eligibility. *Louisiana 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.

4. 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 v Amalfi*, 35 F4th 245, 278 n 16 (2022) (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's Case*, 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.[16] 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*

[16] 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).

Section 3, 172 U 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 United States Constitution. 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." *Id*. 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.[17] *See Case of Davis*, 7 F Cas 63, 90, 102 (CCD Va, 1871); *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.[18]

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."[19] His *Griffin's Case* 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.[20]

Fourth, *Griffin's Case* was substantially disregarded. *See Louisiana ex rel Sandlin v Watkins*, 21 La 631, 633 (1861) (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

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[17] 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.

[18] 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* ("shield") to a criminal prosecution and as an *affirmative* argument ("sword") 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.

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

[20] *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.

disqualified); *Downes*, 21 La at 492 (after *Griffin's 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 14.

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's Case*, 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's Case*, 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."[21]

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

Since January 6, 2021, 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 White*, Docket No. D-101-CV-2022-00473. Similarly, Georgia adjudicated a Section 3 ballot challenge against

[21] Alternatively, Chief Justice Chase claims he consulted *ex parte* with the full United States 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's Case*, 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.

Representative Marjorie Taylor Greene. *See Rowan I* (Ex 3). 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) (Ex 4), 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.").[22] Most recently, the Colorado District Court rejected Trump's argument that Section 3 is not self-executing. *Anderson v Griswold*, order of the Colorado District Court, issued October 25, 2023 (Docket No. 2023-CV-32577), pp 19–20 (Ex 5, pp 144–145).

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 v Colorado*, 495 F Appx 947, 948 (CA 10, 2012); *Greene*, 599 F Supp 3d at 1319 (finding that the state's "legitimate interest includes enforcing existing constitutional requirements [including Section 3] to ensure that candidates meet the threshold requirements for office").

[22] 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*, order of the Arizona Supreme Court, issued May 9, 2022 (Docket No. CV-22-0099-AP/EL).

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

II. THE COURT OF CLAIMS DECISION WAS WRONG.

A. Michigan Voters Have A Right To Have Only Eligible Candidates On The Ballot.

The Court of Claims concluded that the Secretary of State and the political parties have the exclusive authority to determine which candidates appear on the presidential primary ballot, and that individual voters, such as Plaintiffs-Appellants, cannot challenge the qualification of those candidates in court. Opinion & Order, pp 6–9 (Ex 1, pp 7–10).

That erroneous conclusion ignores the well-established *right* of voters to not only challenge the ballot access of ineligible candidate in court but the voters' right to have only eligible candidates on primary and general election ballots.

In *Barrow v City of Detroit Election Comm'n*, 301 Mich App 404; 836 NW2d 498 (2013), *lv den* 494 Mich 866; 831 NW2d 461 (2013), the Court of Appeals recognized and enforced (in that case, by mandamus) the clear legal right of voters to have only eligible candidates on a primary election ballot. *Id* at 412. The Supreme Court and other Court of Appeals decisions have reaffirmed and applied that principle. In *Berdy v Buffa*, 504 Mich 876; 928 NW2d 204 (2019), the Supreme Court cited *Barrow* with approval for the proposition that ineligible candidates cannot appear on the ballot. *Id* at 879. To that same effect are other Court of Appeals decisions. *See, e g, Sheffield v Detroit City Clerk*, 337 Mich App 492, 507; 976 NW2d 95 (2021), *rev'd on other grounds* 508 Mich 851; 962 NW2d 157 (2021) (citing *Barrow* and *Berdy* for the proposition that ineligible candidates *must* be removed from the ballot); *Burton-Harris v Wayne Co Clerk*, 337 Mich App

215, 233–234; 976 NW2d 30 (2021) (*per curiam*), *vacated in part on other grounds* 508 Mich 985; 966 NW2d 349 (2021) (disqualified candidate must be removed from the ballot).

The Court of Claims erred in not even citing, let alone addressing, this well-established right of voters to go to court to ensure that candidates are eligible to be listed on the ballot.

This Michigan case law also negates the Court of Claims' reliance on *Growe v Simon*, order of the Minnesota Supreme Court, issued November 8, 2023 (Docket No. A23-1354) (Ex 7). In *Growe*, the Minnesota Supreme Court interpreted the Minnesota candidacy challenge statute, an entirely different body of law than Michigan's *Barrow-Berdy* line of cases. Thus, the Court of Claims' reliance on *Growe* is completely misplaced.

Furthermore, the Court of Claims' statements that primaries are merely "designed as an aid of the respective political parties" and "designed to assist the parties in determining their respective presidential candidates," Opinion & Order, pp 8–9 (Ex 1, pp 9–10), misunderstands the constitutional significance of primary (including presidential primary) elections. The United States Supreme Court has long rejected, in the white primary cases, the idea that the Fourteenth Amendment does not apply to primary votes. *See Nixon v Herndon*, 273 US 536, 540–541; 47 S Ct 446; 71 L Ed 759 (1927) (Fourteenth Amendment applies to primary elections); *see also Smith v Allwright*, 321 US 649, 661–662; 64 S Ct 757; 88 L Ed 987 (1944) (same for Fifteenth Amendment).

The soundness of allowing voters to challenge candidate qualifications is easily illustrated. If the Democratic Party put forward the name of Barack Obama as a candidate, would the Secretary of State be obligated to put his name on the presidential primary ballot despite his obvious disqualification under the two-term limit for President of the Twenty-Second Amendment? Of course not, and if she did, then Michigan voters under *Barrow-Berdy* could challenge his

eligibility. The same would be true if the Republican Party put George W. Bush on the list, or if a political party put forth an underage or otherwise disqualified presidential candidate. Voters have the right to challenge those ineligible candidates and have them barred from the ballot.

The Court of Claims erred in prohibiting Plaintiff-Appellant voters from challenging Trump's eligibility for the presidential primary ballot. They have the clear legal right to do so.

B. The Case Is Ripe For Decision Before The February 27, 2024 Presidential Primary.

In an attempt to bolster its conclusions that Plaintiffs-Appellants have no cause of action, the Court of Claims also engaged in a superficial ripeness analysis that concluded that Plaintiffs-Appellants' claim is not "ripe at this time." Order & Opinion, pp 9–10 (Ex 1, pp 10–11).

This analysis is based on a mischaracterization of Plaintiffs-Appellants' complaint. In the complaint, they challenge Trump's eligibility to appear on the *primary election* ballot, now less than three months away, with ballots being printed by mid-January, less than two months away.

The ripeness "analysis" of the Court of Claims focused on speculation about *post-primary* events: Will Trump win the Michigan primary? Will he win the Republican nomination? Will he win the general election? *Id*. All of that speculation is irrelevant to the question of whether this challenge to his eligibility to be on the *primary election* ballot is ripe now. The challenge is clearly ripe. There are no "contingent future events" between now and the primary. Secretary Benson has put Trump on her eligibility list and repeatedly declared that she will not remove him without a court order. Unless the Michigan courts act, Trump will be on the primary ballot.

This case is ripe.

C. The Political Question Doctrine Does Not Apply.

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 doctrine "is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker v Carr*, 369 US 186, 217; 82 S Ct 691; 7 L Ed 2d 663 (1962). Rather, a court "has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 US at 194, *quoting Cohens v Virginia*, 19 US (6 Wheat) 264, 404; 5 L Ed 527 (1821). And the political question doctrine does not apply simply because a presidential election is involved. *See McPherson v Blacker*, 146 US 1, 23; 13 S Ct 3; 36 L Ed 869 (1892) ("It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature . . . . But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising . . . .").

Baker identified six relevant factors, but recent Supreme Court precedent focuses on two: (1) whether the issue is textually committed to another branch of government, or (2) lacks judicially manageable standards for resolution. *See Rucho v Common Cause*, 588 US ___; 139 S Ct 2484, 2494; 204 L Ed 931 (2019) (citing only second factor); *Zivotofsky*, 566 US at 195 (citing only first two factors).

1. Appointment Of Presidential Electors Is Committed To States, Not Congress.

The Constitution's Electors Clause textually commits to the *states* plenary power to appoint presidential electors in the manner they choose. *See* US Const, art II, § 1, cl 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."); *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 Ct 2316, 2324; 207 L Ed 2d 761 (2020) (Electors Clause gives states "far-reaching authority over presidential electors"). A state's plenary power to choose electors includes conditioning appointment of electors on their candidate's meeting constitutional criteria. 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.").

But the Constitution does not expressly commit any such power to Congress. To the contrary, while Article I explicitly authorizes and directs Congress to *judge qualifications* of incoming *Senators and Representatives*, US Const, art I, § 5, cl 1 ("Each House shall be the Judge of the . . . Qualifications of its own Members . . . ."), neither Article II nor any other constitutional provision explicitly authorizes—let alone directs—Congress to judge the qualifications of presidents or presidential candidates. The Twelfth Amendment authorizes Congress to *count electoral votes*; it does not explicitly authorize Congress to *judge presidential qualifications. See* US Const, Am XII. Similarly, the Twentieth Amendment provides a contingency procedure "if the President elect shall have failed to qualify," but does not textually commit the question of candidate eligibility to Congress. US Const, Am XX.

Even if Congress holds some unwritten implicit residual authority to judge presidential candidate qualifications, that implicit authority is certainly not *exclusive*. *See Scrutinizing Federal Electoral Qualifications*, 90 Ind L J at 605 ("Unlike the robust history of the power of the legislature to adjudicate the qualifications of its own members and the textual language ensuring that each house of Congress is the 'sole' judge of the qualifications of its members, the power of

Congress to examine the qualifications of executive candidates is, at the very best, debatable, and certainly not exclusive.").

Leading appellate precedents confirm this. In 2012, then-Judge (now Justice) Gorsuch, writing for the Tenth Circuit, "expressly reaffirm[ed] [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. Justice Gorsuch's conclusion cannot be reconciled with the theory that *only Congress* may decide whether a presidential candidate is constitutionally eligible. In 2014, the Ninth Circuit joined the Tenth Circuit in explicitly rejecting the idea that the Constitution commits presidential candidate determinations exclusively to Congress:

> *[N]othing in the Twentieth Amendment states or implies that Congress has the exclusive authority to pass on the eligibility of candidates for president.* The amendment merely grants Congress the authority to determine how to proceed *if* neither the president elect nor the vice president elect is qualified to hold office, a problem for which there was previously no express solution. . . . Candidates may, of course, become ineligible to serve after they are elected (but before they start their service) due to illness or other misfortune. Or, a previously unknown ineligibility may be discerned after the election. The Twentieth Amendment addresses such contingencies. *Nothing in its text or history suggests that it precludes state authorities from excluding a candidate with a known ineligibility from the presidential ballot.*

Lindsay v Bowen, 750 F3d 1061, 1065 (CA 9, 2014) (emphasis in original and added). In 2016, the Pennsylvania Commonwealth Court expressly rejected applicability of the political question doctrine, noting that the "touchstone in determining whether the political question doctrine applies is whether the resolution of the question has been textually committed to one or the other political branches of the federal government" and concluding, after close analysis of Article II and the Twelfth Amendment, that "determination of the eligibility of a person to serve as President has

not been textually committed to Congress." *Elliott v Cruz*, 137 A3d 646, 650–651 (Pa Commw, 2016), *aff'd* 635 Pa 212; 134 A3d 51 (2016).

The Court of Claims did not cite *Lindsay*, *Hassan*, *Elliott*, or any of the other authorities confirming that states may, under Article II of the Electors Clause, condition appointment of electors on presidential candidates meeting federal constitutional qualifications. *See* Pls' Br in Opp to Trump's Mot for Summ Disposition, pp 1–3 (citing authorities). Instead, the Court of Claims relied almost entirely on a case filed by a pro se plaintiff in which the court noted that it could not find applicable authority. *See* Opinion & Order, pp 11–13 (Ex 1, pp 12–14); *Castro v NH Secretary of State*, ___ F Supp 3d ___ (D NH, 2023) (Docket No. 23-cv-416-JL), *aff'd on other grounds Castro v Scanlan*, ___ F4th ___ (CA 1, 2023) (Docket No. 23-1902) (affirming on the basis of federal standing rules and explicitly declining to affirm the district court's political question doctrine ruling).[23] Lacking such relevant authority, the *Castro* Court instead relied on superseded and irrelevant cases and applied a flawed and discredited legal analysis to reach a legally erroneous conclusion, all of which the Court of Claims below quoted verbatim and adopted in toto with no independent analysis:

- *Robinson v Bowen*, 567 F Supp 2d 1144 (ND Cal 2008), was superseded by *Lindsay*, 750 F3d 1061.
- *Grinols v Electoral College*, order of the United States District Court for the Eastern District of California, issued May 23, 2013 (Docket No. 12-CV-02997-MCE-DAD), a post-election case seeking to annul the results of the electoral vote, was superseded by *Lindsay*, 750 F3d 1061, then affirmed solely on mootness. *See Grinols v Electoral College*, 622 F Appx 624 (CA 9, 2015).
- *Kerchner v Obama*, 669 F Supp 2d 477 (D NJ, 2009), a post-election case demanding President Obama prove his qualifications for the office he already

[23] The First Circuit affirmed *Castro* solely on the basis of standing. It said, "[w]e confine our analysis, however, to the issue of standing," noting the "limited nature of the arguments that [Castro] ma[de] about the more generally consequential political question issue" and that "like the Supreme Court, '[o]ur court has been similarly sparing in its reliance on the political question doctrine.'" *Castro*, ___ F4th at ___; slip op at 13 (citation omitted).

held, was affirmed solely for lack of Article III standing. *See Kerchner v Obama*, 612 F3d 204, 209 n 3 (CA 3, 2010).

- *Taitz v Democrat Party of Miss*, opinion and order of the United States District Court for the Southern District of Mississippi, issued March 31, 2015 (Docket No. 12-CV-280-HTW-LRA), was a post-election case seeking to *remove* President Obama from office.

The *Castro* Court concluded its analysis: "Critically, Castro does not present case law that contradicts the authority discussed above—nor has the court found any." Opinion & Order, p 13, *quoting Castro*, ___ F Supp 3d at ___; slip op at 7–9 (Ex 1, p 14). But *Lindsay*, *Hassan*, and *Elliott* are precisely that authority; in particular, *Lindsay* supersedes *Robinson* and *Grinols*; *Hassan* was written by a current Supreme Court Justice; and *Elliott*, unlike the cases *Castro* cited, was a state court ballot access challenge like this. *See also Ankeny v Governor of Ind*, 916 NE2d 678 (Ind App, 2009) (adjudicating presidential candidate's qualifications); *Purpura v Obama*, unpublished per curiam opinion of the Superior Court of New Jersey, issued May 31, 2012 (Docket No. A-4478-11T3) (similar); Muller, *"Natural Born" Disputes in the 2016 Presidential Election*, 85 Fordham L Rev 1097, 1103–1106 (2016) (collecting multiple similar cases).[24]

The Court of Claims also stated that Section 3 adjudication is uniquely committed to Congress. *See* Opinion & Order, pp 14–15 (Ex 1, pp 15–16). But the only role that Section 3 commits to Congress is *removing* disqualification, which it may only do by a two-thirds vote of each House. *See* US Const, Am XIV, § 3 ("But Congress may by a vote of two-thirds of each House, remove such disability."). And the Court of Claims' reference to Section 5 of the Fourteenth Amendment, which says that "Congress shall have the power to enforce, by appropriate

[24] The *Castro* Court's failure to find, cite, and apply the relevant and (still valid) authority is explained, in part, by the fact that the case was litigated by a pro se plaintiff who failed to provide the court with that authority. Here, Plaintiffs-Appellants cited and discussed all of the relevant authority in their briefing below; the Court's failure to even cite (or apparently consider) it is inexplicable.

legislation, the provisions of this article," proves far too much. Section 5 applies to Section 1 and Section 3 equally. Congress's power to enact additional legislation under Section 5 does not mean that all Section 1 Equal Protection Clause or Due Process Clause claims are non-justiciable political questions—no one thinks that. Likewise, Congress's power to enact additional legislation under Section 5 does not mean that all Section 1 claims are non-justiciable political questions. In any case, as is explained at length above, the Court's conclusion that only Congress can enforce Section 3 is contrary to the text, structure, and history of section 3, as well as longstanding (and recent) practice and precedent.

2. Section 3 Involves Judicially Manageable Standards.

The Court below suggested that Section 3 lacks judicially discoverable or manageable standards because courts cannot ascertain "[w]hat is an insurrection or a rebellion" or "[w]hat is it to engage in it or to give aid and comfort to the enemies of the Constitution." Opinion & Order, p 19 (Ex 1, p 20). But interpreting constitutional text, and applying that text to (sometimes disputed) facts, are precisely what courts do.

The meanings of the phrases "engage," "aid or comfort," and "insurrection or rebellion" are judicially discoverable, just as the meanings of "due process of law" and "equal protection of the laws" are judicially discoverable. In fact, the key framer of the Fourteenth Amendment explained during congressional debates *precisely how* to construe these terms. Asked during debate to define "due process of law," Representative John Bingham replied: "[T]he courts have settled that long ago, and the gentleman can go and read their decisions." Cong Globe, 39th Cong, 1st Sess 1089 (1866).

The same logic applies to the phrases in Section 3 that the trial court claimed were incapable of judicial interpretation. For example, the terms "insurrection" and "rebellion" were

interpreted and defined repeatedly by courts and law dictionaries before and after the Civil War; the court may "go and read their decisions." *See supra* Part I.C.1.a. In fact, some of the hypothetical questions the trial court raised as supposedly unanswerable—*e.g.*, "[d]oes it require a war of 1,458 days with 620,000 killed and battles throughout the land?," Opinion & Order, p 19 (Ex 1, p 20)—were explicitly asked and answered with reference to past (far smaller) insurrections, such as the Whiskey, Shays', and Fries Insurrections. *See* Cong Globe, 39th Cong, 1st Sess (1866) p 2534 (Rep. Eckley) (explicitly citing the "small in comparison" Whiskey Insurrection as precedent); *The Reconstruction Acts*, 12 US Att'y Gen Op, p 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"). One state court has already applied these judicial precedents to construe "insurrection" under Section 3. *See White*, pp 17–19 (finding that January 2021 insurrection met the standard).

Likewise, the judicial interpretation of "engage" under Section 3 has been settled for 150 years. All four courts to construe "engage" under Section 3—two in the 1860s, two last year—have relied on the same *Worthy-Powell* standard. *See supra* Part I.C.2.a.

The fact that these terms from the constitutional text have been judicially interpreted and applied during Reconstruction and today refutes the trial court's conclusion that they are incapable of judicial interpretation or application.

3. Prudential Factors Do Not Divest The Court Of Jurisdiction.

None of *Baker*'s final three factors apply here.

First, there is no "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker*, 369 US at 217. The branch of government due respect here is the Michigan Legislature, which has plenary power to

appoint presidential electors, and has chosen to vest the Michigan courts with jurisdiction to hear challenges to candidate eligibility. The process of determining the president proceeds in steps, and at different stages, a different branch of government leads. In the first stage—where we are now—the states have plenary authority under Article II to appoint electors. *See* US Const, art II. After the electors have cast their votes, Congress will then take the lead in *counting* the votes. *See* US Const, Am XII. Michigan's use of a judicial process to help ensure that it appoints electors only for presidential candidates who are constitutionally eligible does not disrespect Congress.

Nor would a court exercising its authority to enforce Section 3's disability and limit the ballot to constitutionally qualified candidates "strip Congress of its ability to by a vote of two thirds of each House, remove such a disability," as the Court below insisted. *See* Opinion & Order, p 20 (Ex 1, p 21). Congress could have exercised its authority to remove the disability any time since January 6, 2021; it has not. To date, Congress has taken no such action and Trump has not even requested it. Cmpl, ¶ 277 (Ex 2, p 86). And no action by this Court or any other will "strip" Congress of that authority: Congress, if it so chose, could remove the disability tomorrow, or immediately after any court rules Trump ineligible to appear on the ballot, thereby enabling Trump to appear on the ballot notwithstanding his engagement in insurrection. Further, the remote and speculative possibility that Congress *might* at some future date grant Trump amnesty by a two-thirds vote of each chamber does not divest Michigan of its power to condition the appointment of electors. That theoretical possibility is purely speculative, and Michigan courts do not take action based on such speculation. *See, e g, Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9 n 15; 753 NW2d 595 (2008) (no injunctive relief where injury is speculative or conjectural); *Wayne Co Employees Retirement Sys v Charter Co of Wayne*, 301 Mich App 1, 70 n 38; 836 NW2d 279 (2013) ("[T]his position is so speculative and tenuous that we refuse to apply it[.]"), *vacated*

in part on other grounds, 497 Mich 36; 859 NW2d 678 (2014). *Compare, e g,* Michigan's constitutional prohibition on officeholding for former officials who have been convicted of certain felonies. *See* Const 1963, art XI, § 8. The governor could, in theory, pardon a convicted felon. *See* Const 1963, art V, § 14. But the mere theoretical possibility that a governor *might* do this does not mean that convicted felons may appear on ballots and run for office notwithstanding the prohibition. Likewise, the fanciful speculation that two-thirds of both houses might grant Trump amnesty does not prevent Michigan from exercising its plenary power to appoint electors in the manner directed by its legislature, which includes this challenge procedure.

Second, there is no "unusual need for unquestioning adherence to a political decision already made," *Baker*, 369 US at 217, nor did the Court below explain how there could be at this stage. *After* electors have been appointed, such a need might arise. But this case arises nearly a year before the date set for the appointment of electors. No political decision has been made; nor is one expected any time soon.

Third, there is no "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id*. As a preliminary matter, if Michigan or any other state rules that Trump is disqualified under Section 3, he may appeal that decision to the United States Supreme Court, which can render a final decision. And crucially, "various departments" does not mean "various state courts." State courts *regularly* rule on questions that could also be decided by courts in other states; no one would claim, for example, that Michigan courts cannot decide a First or Second Amendment question merely because California or Texas courts might rule differently. Rather, state courts interpret and apply the United States Constitution to their best ability, subject to appeal to the United States Supreme Court. The trial court's suggestion that the United States Supreme Court is incapable of resolving a fast-track election dispute, *see* Opinion & Order, p 20

(Ex 1, p 21), is belied by the Court's history of rapid decisions on contested constitutional election issues. *See, e g, Bush v Gore*, 531 US 98; 121 S Ct 525; 148 L Ed 2d 388 (2000) (argued December 11, 2000, and decided the next day).

* * *

This case involves the application of the Fourteenth Amendment to a specific set of facts. It involves weighty issues of nationwide interest, but so do many other cases considered by Michigan courts. Its resolution may have political consequences, but so do many other cases considered by Michigan courts. And as the United States Supreme Court explained, the political question doctrine "is one of 'political questions,' not one of 'political cases.'" *Baker*, 369 US at 217. Article II of the United States Constitution grants Michigan the power to appoint its electors in the manner directed by the legislature; the legislature has empowered its courts to hear this challenge; nothing in the Constitution says otherwise. The case does not fall under the political question doctrine and the courts must decide it.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated, Plaintiffs-Appellants ask that the Court:

1. Reverse the Court of Claims; and

2. Remand to the Court of Claims to conduct an evidentiary hearing on Trump's eligibility under the Disqualification Clause to be placed on the Michigan presidential primary ballot.

Respectfully submitted,

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Proof of Service

The undersigned certifies that on November 30, 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
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