STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT LABRANT, ANDREW BRADWAY, NORAH MURPHY, WILLIAM NOWLING,

Plaintiffs,

v.

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

Defendant.

_____/

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

10/30/2023 MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

GOODMAN ACKER, P.C.
Mark Brewer (P35661)
Rowan Conybeare (P86571)
Attorneys for Plaintiffs
[redacted]

Heather S. Meingast (P55439)
Assistant Attorney General
Attorney for Defendant
Civil Rights & Elections Division
[redacted]

FREE SPEECH FOR PEOPLE
Ronald Fein (*pro hac vice* forthcoming)
Amira Mattar (*pro hac vice* forthcoming)
Courtney Hostetler (*pro hac vice* forthcoming)
John Bonifaz (*pro hac vice* forthcoming)
Ben Clements (*pro hac vice* forthcoming)
[redacted]

FINK BRESSACK
David H. Fink (P28235)
Nathan J. Fink (P75185)
Attorney for Proposed Amicus Curiae
Citizens for Responsibility and Ethics in Washington
[redacted]

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
Stuart McPhail
Laura Iheanachor
Kayvan Farchadi
Alex Goldstein
Adam Rappaport

[redacted]

_____/

10/30/2023 MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

Citizens for Responsibility and Ethics in Washington ("CREW"), by and through counsel, hereby moves for leave to submit a brief amicus curiae in support of the Plaintiffs in this action.

1. Plaintiffs ask this Court to hold that Section 3 of the Fourteenth Amendment to the United States Constitution disqualifies Donald J. Trump from holding the Office of President of the United States and that he therefore must be excluded from the ballot in the State of Michigan for the 2024 presidential nomination primary election and November 5, 2024 general election.

2. This request for leave to participate as *amicus curiae* describes CREW's interest in the matter, sets forth its legal position, and identifies why the Court may benefit from hearing its views. CREW's proposed amicus brief is attached hereto as **Exhibit A.**

3. CREW is a nonprofit, nonpartisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW works to ensure that Americans have a government that is ethical, accountable, and open. Since its founding in 2003, CREW has achieved successes holding those who abuse the system to account, compelling the government to be more open and transparent, and driving secret money and influence into the light. In 2022, CREW and co-counsel represented three New Mexico residents in *New Mexico ex rel. White v Griffin*, the first case to successfully

enforce Section 3 of the Fourteenth Amendment ("Section 3") against a government official in more than 150 years. No. D-101-CV-2022-00473, 2022 WL 4295619 (NM Dist Ct Sept. 6, 2022), *appeal dismissed*, No. S-1-SC-39571 (NM Nov. 15, 2022).

4. CREW and co-counsel currently represent six Republican and unaffiliated Colorado voters in litigation against Colorado Secretary of State Jena Griswold and former President Donald Trump to prevent the Secretary from taking any action to place Trump on Colorado's primary or general election ballot, due to his disqualification from office under Section 3. *See Anderson v Griswold*, No. 2023-CV-32577 (Dist Ct of Denver Colo, filed Sept. 6, 2022). Accordingly, CREW has an interest in this case.

5. In support of Plaintiffs, CREW will argue that Section 3 of the Fourteenth Amendment is "self-executing" insofar as it can be enforced through state law and does not require any implementing federal legislation.

6. Just as no federal statute is required to activate other sections of the Fourteenth Amendment (including the Due Process and Equal Protection Clauses), or other constitutional qualifications for office (including the qualifications for the Office of the President set forth in Article II and the 22nd Amendment), no federal statute is required give force to Section 3. It is a constitutional command with independent legal force, dictating that "[n]o person *shall*" hold public office if the disqualifying conditions are met.[1] Section 3's text, the historical practice in enforcing its provisions shortly after its adoption, and modern Supreme Court precedent all support the conclusion that Section 3 is "self-executing." And under the Constitution's Supremacy Clause, state courts have an affirmative duty to enforce Section 3 pursuant to applicable state law

[1] *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U Pa L Rev (forthcoming 2024), at 18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751.

procedures.

7. If granted leave, CREW will provide fulsome argument that Section 3 can be enforced through state law and that this Court does not require federal legislation to enforce, under the processes set out by Michigan law, Section 3's disqualification against a disqualified candidate.

8. Given the importance of determining the eligibility of former President Trump for the Michigan Republican presidential primary as soon as possible, and to meet statutory ballot printing timelines and to avoid disenfranchising overseas (including active military) voters who may vote for an ineligible candidate, as well as the broader need for other states to assess candidate Trump's constitutional eligibility, CREW can contribute to this Court's timely and comprehensive analysis of the legal issues in at least two ways.

9. First, CREW's success in *New Mexico ex rel White v Griffin*, which marked the first time since 1869 that a court ordered a public official removed from office under Section 3, and the first time any court has ruled the events of January 6, 2021 an insurrection under Section 3, demonstrates CREW's unique familiarity with this provision's applicability. In the court's decision finding that Griffin had indeed "engaged in" insurrection and was disqualified from holding office, the court relied on the constitutional interpretations of CREW's expert witness concerning the definition of "insurrection" consistent with how knowledgeable nineteenth-century individuals would have viewed January 6 and the surrounding events. *Griffin*, 2022 WL 4295619, at *17-23.

10. Second, CREW has extensively studied Section 3's text and history of enforcement, as well as relevant Supreme Court precedents interpreting the Fourteenth Amendment. CREW's research, for example, uncovered past cases where state courts have enforced constitutional qualifications in candidate challenges; in addition to *New Mexico ex rel White v Griffin*, there have

been various examples of state courts enforcing constitutional requirements on candidates, in accordance with their role in our federal system to faithfully enforce federal law, including the U.S. Constitution. CREW's knowledge of these cases will aid this Court's adjudication of Trump's eligibility.

11. Pursuant to LR 2.119, on October 27, 2023, the undersigned requested concurrence from counsel for Plaintiffs and counsel for Defendant in the relief sought herein. Plaintiffs concur in the relief sought. Defendant does not concur, but will not oppose the Motion.

12. For the foregoing reasons, Citizens for Responsibility and Ethics in Washington requests leave to participate as *amicus curiae* in support of Plaintiffs in these proceedings.

WHEREFORE, for the foregoing reasons, Citizens for Responsibility and Ethics in Washington requests leave to participate as *amicus curiae* in support of Plaintiffs in these proceedings, and requests that the Court accept the brief attached as **Exhibit A** for filing.

Respectfully submitted,

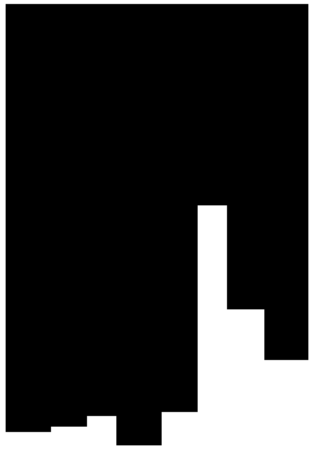
October 30, 2023

FINK BRESSACK

By: /s/ Nathan J. Fink
David H. Fink (P28235)
Nathan J. Fink (P75185)
Attorneys for Proposed Amicus Curiae Citizens for Responsibility and Ethics in Washington

[redacted]

Stuart McPhail
Laura Iheanachor
Kayvan Farchadi
Alex Goldstein
Adam Rappaport
CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON



STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT LABRANT, ANDREW BRADWAY, NORAH MURPHY, WILLIAM NOWLING,

Plaintiffs,

v.

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

Defendant.

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

10/30/2023 BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

_____/

GOODMAN ACKER, P.C.
Mark Brewer (P35661)
Rowan Conybeare (P86571)
Attorneys for Plaintiffs
[redacted]

Heather S. Meingast (P55439)
Assistant Attorney General
Attorney for Defendant
Civil Rights & Elections Division
[redacted]

FREE SPEECH FOR PEOPLE
Ronald Fein (*pro hac vice* forthcoming)
Amira Mattar (*pro hac vice* forthcoming)
Courtney Hostetler (*pro hac vice* forthcoming)
John Bonifaz (*pro hac vice* forthcoming)
Ben Clements (*pro hac vice* forthcoming)
[redacted]

FINK BRESSACK
David H. Fink (P28235)
Nathan J. Fink (P75185)
Attorney for Proposed Amicus Curiae
Citizens for Responsibility and Ethics in Washington
[redacted]

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
Stuart McPhail
Laura Iheanachor
Kayvan Farchadi
Alex Goldstein
Adam Rappaport

[redacted]

_____/

BRIEF IN SUPPORT

Proposed amicus curiae Citizens for Responsibility and Ethics in Washington relies on the rules and authorities set forth in its foregoing motion, including MCR 2.119 and those stated within its proposed Brief, attached as **Exhibit A**.

Respectfully submitted,

October 30, 2023

FINK BRESSACK

By: /s/ Nathan J. Fink
David H. Fink (P28235)
Nathan J. Fink (P75185)
Attorneys for Proposed Amicus Curiae Citizens for Responsibility and Ethics in Washington

[redacted]

Stuart McPhail
Laura Iheanachor
Kayvan Farchadi
Alex Goldstein
Adam Rappaport
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

[redacted]

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2023, I electronically filed the foregoing paper with the Clerk of the court using the electronic filing system, which sends notice to all counsel of record.

FINK BRESSACK

By: _*/s/ Nathan J. Fink*___
Nathan J. Fink

EXHIBIT A

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT LABRANT, ANDREW BRADWAY, NORAH MURPHY, WILLIAM NOWLING,

Plaintiffs,

v.

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

Defendant.

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

PROPOSED AMICUS CURIAE BRIEF OF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

_____/

GOODMAN ACKER, P.C.
Mark Brewer (P35661)
Rowan Conybeare (P86571)
Attorneys for Plaintiffs
[redacted]

Heather S. Meingast (P55439)
Assistant Attorney General
Attorney for Defendant
Civil Rights & Elections Division
[redacted]

FREE SPEECH FOR PEOPLE
Ronald Fein (*pro hac vice* forthcoming)
Amira Mattar (*pro hac vice* forthcoming)
Courtney Hostetler (*pro hac vice* forthcoming)
John Bonifaz (*pro hac vice* forthcoming)
Ben Clements (*pro hac vice* forthcoming)
[redacted]

FINK BRESSACK
David H. Fink (P28235)
Nathan J. Fink (P75185)
Attorney for Proposed Amicus Curiae Citizens for Responsibility and Ethics in Washington
[redacted]

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
Stuart McPhail
Laura Iheanachor
Kayvan Farchadi
Alex Goldstein
Adam Rappaport

[redacted]

_____/

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Citizens for Responsibility and Ethics in Washington ("CREW") is a nonprofit, nonpartisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW works to ensure that Americans have a government that is ethical, accountable, and open. Since its founding in 2003, CREW has achieved successes holding those who abuse the system to account, compelling the government to be more open and transparent, and driving secret money and influence into the light. In 2022, CREW and co-counsel represented three New Mexico residents in *New Mexico ex rel. White v. Griffin*, the first case to successfully enforce Section 3 of the Fourteenth Amendment ("Section 3") against a government official in more than 150 years. No. D-101-CV-2022-00473, 2022 WL 4295619 (N.M Dist. Ct. Sep. 6, 2022), *appeal dismissed*, No. S-1-SC-39571 (N.M. Nov. 15, 2022).

CREW and co-counsel currently represent six Republican and unaffiliated Colorado voters in litigation against Colorado Secretary of State Jena Griswold and former President Donald Trump to prevent the Secretary from taking any action to place Trump on Colorado's primary or general election ballot, due to his disqualification from office under Section 3. *See Anderson v. Griswold*, No. 2023-CV-32577 (Dist. Ct. of Denver Colo., filed Sept. 6, 2023). Accordingly, CREW has an interest in this case.

INTRODUCTION

Enacted in the wake of the Civil War and unrepentant secessionists' efforts to return to power, the United States adopted a "measure of self-defense" designed to preserve and protect

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

American democracy against those who broke their oaths to the Constitution. Cong. Globe, 39th Cong., 1st Sess. 2918 (May 31, 1866) (statement of Sen. Willey). Section 3 of the Fourteenth Amendment added a new qualification to hold office to those already enumerated in the Constitution: one may not hold state or federal office if they have broken a prior oath to the Constitution by engaging in insurrection against it. Put another way, through its enactment of Section 3, the United States asserted "that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress." *Worthy v. Barrett*, 63 N.C. 199, 204 (1869), *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869). Reflecting the immediacy and gravity of its need, Section 3 "operates independently of any … criminal proceedings and, indeed, independently of impeachment proceedings and of congressional legislation"; it applies "directly and immediately upon those who betray their oaths to the Constitution." J. Michael Luttig & Laurence H. Tribe, *The Constitution Prohibits Trump From Ever Being President Again*, The Atlantic (Aug. 19, 2023).[2]

Nonetheless, some have incorrectly posited that Section 3's qualifications are, in essence, optional. They contend that, contrary to all other provisions setting qualifications for office in the Constitution, the Fourteenth Amendment's bar on insurrectionists is a legal nullity, unless Congress chooses to impose it through legislation. That argument flips Section 3 on its head—it shifts the burden of seeking recourse away from insurrectionists, who must seek amnesty from Congress by a two-thirds vote, onto those loyal to the Constitution, who are left unprotected without Congressional authorization. It imagines a hurdle for the Fourteenth Amendment's qualification that is absent from any other qualification for office in the Constitution and from any other part of the Fourteenth Amendment. This argument rests on the conflation of a

[2] Available at https://www.theatlantic.com/ideas/archive/2023/08/donald-trump-constitutionally-prohibitedpresidency/675048.

provision's force of law with a provision's creation of a cause of action. In other words, it conflates Section 3's power to be executed against those it governs with the ability for a plaintiff to bring suit where they otherwise have no legal vehicle to put the question to a court.

Plaintiffs here do not seek to enforce Section 3 standing alone or through any implied federal private right of action; rather, they bring an action under *Michigan law* to enforce a qualification for office against a constitutionally ineligible candidate. *See* Compl. ¶ 316-22. The candidate is ineligible because Section 3 is "self-executing" in the sense that matters here: it imposes an immediate and enforceable rule of law that limits who may hold office—that "[n]o person shall" serve who has broken their oath.

ARGUMENT

I. Section 3 of the Fourteenth Amendment is enforceable in state courts through state law, without any federal legislation.

A. Under the Supremacy Clause, state courts must enforce Section 3 where state law allows and, historically, state courts have done exactly that.

The Supreme Court has stated "[t]he label 'self-executing' has on occasion been used to convey different meanings." *Medellín v. Texas*, 552 U.S. 491, 505 n.2 (2008). Relevant here is whether Section 3 is "self-executing" in terms of "operat[ing] of itself without the aid of any legislative provisions." *Id.* at 505. In other words, whether the operation of Section 3 alone disqualifies Donald Trump from holding state or federal office.

Amicus Trump here attempts to recast the argument by focusing on the irrelevant claim that Section 3 is not "self-executing" in a different sense: that it does not "provide for a private cause of action." *Id.* at 506 n.3; *see, Proposed Amicus Curiae Brief of Donald J. Trump at 13* (citing *Josh Blackman & Seth Barrett Tillman, Sweeping and Forcing the President into Section 3: A Response to William Baude and Michael Stokes Paulsen*, 28 Tex. Rev. L. & Pol. (forthcoming 2023-24), at 12 (equating "self-executing" to a cause of action under § 1983,

Bivens, and *Ex Parte Young*).[3] But Plaintiffs need not establish that Section 3 provides for a cause of action; *state* law supplies that cause, and there is no further need for *federal* legislation to give Section 3 operation.

The Supreme Court has squarely held that *state law* can provide a cause of action to enforce the Constitution, *regardless* of whether a *federal* cause of action exists. *See, e.g.*, *Health and Hospital Corp. v. Talevski*, 599 U.S. 166, 177 (2023) ("[T]he § 1983 remedy ... is, in all events, *supplementary to any remedy any State might have*." (emphasis added)). States "have great latitude to establish the structure and jurisdiction of their own courts," and federal law "may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Howlett v. Rose*, 496 U.S. 356, 372–73 (1990). Where state law provides a cause of action, there is no need to appeal to implied causes of action brought directly under the Constitution. *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020) (discussing implied causes of action under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)); *cf. Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (discussing implied causes of action for federal statutes). Here, Michigan law provides Plaintiffs a cause of action to prevent the Secretary from granting ballot access to a constitutionally ineligible presidential primary candidate. *See* Compl. ¶ 316-22.

State courts have an affirmative duty to adjudicate constitutional questions where state law allows, even absent federal legislation. The Constitution's Supremacy Clause provides that "[t]his Constitution … shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*." U.S. Const. art. VI, cl. 2. (emphasis added). The Clause explicitly "charges

[3] Available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4579135_code345891.pdf?abstractid=4568771&mirid=1&type=2.

state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure." *Howlett*, 496 U.S. at 367. Put simply, "the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Id.* at 367. And "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Haywood v. Drown*, 556 U.S. 729, 736 (2009) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

In keeping with these bedrock principles of federalism, state courts have historically enforced Section 3 pursuant to state statutes and procedural rules, without separate federal enforcement legislation in effect. *See, e.g.*, *New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, at 27, 2022 WL 4295619 (N.M. Dist. Ct. Sep. 6, 2022) (adjudicating Section 3 challenge under state quo warranto law); *Worthy*, 63 N.C. at 202 (mandamus); *In re Tate*, 63 N.C. 308 (1869) (same); *State ex rel. Sandlin*, 21 La. Ann. 631 (1869) (quo warranto); *see also Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Off Admin. Hr'gs May 6, 2022) (adjudicating Section 3 challenge in state administrative proceeding).[4] Recently, when considering whether a state court may enforce Section 3 under state law, a Colorado district court cited the above cases in explicitly rejecting Trump's arguments that states cannot enforce Section 3 without congressional authorization. *See Anderson v. Griswold*, No. 2023-CV-32577 at 19-20 (Dist. Ct. of Denver Colo., Oct. 26, 2023) ("[T]he Court holds that states can, and have, applied Section 3 pursuant to state statutes without federal enforcement legislation.").

Plaintiffs here invoke a state cause of action to seek relief. They do not attempt, and do not need, to bring a cause of action implied directly from the Fourteenth Amendment. Concerns of whether the Amendment imposes its own cause of action are thus irrelevant. Instead, those

[4] Available at https://perma.cc/M93H-LA7X.

asserting that Section 3 is not self-executing must show this constitutional provision lacks independent legal force, which they cannot.

B. The Fourteenth Amendment's text and Supreme Court precedent confirm Section 3 is "self-executing" and can be enforced without federal legislation.

When interpreting the Constitution's text, courts are "guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

Section 3 imposes a clear command with independent legal force: "[n]o person *shall*" hold public office if the disqualifying conditions are met. U.S. Const. amend. XIV, § 3 (emphasis added). Its mandatory language mirrors other self-executing constitutional qualifications. *See, e.g., id.* art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not…"); *id.* art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not…"); *id.* art. II, § 1, cl. 5 ("No Person … shall be eligible to the Office of President … who shall not…"); *id.* amend. XXII ("No person shall be elected to the office of the President more than twice…"). Section 3 also echoes other substantive provisions of the Fourteenth Amendment, *see, e.g., id.* amend. XIV, § 1 ("No State shall …"), *id.* § 4 ("[N]either the United States nor any State shall…"), and provisions of the Constitution's other Reconstruction Amendments, *see id.* amend. XIII, § 1 ("Neither slavery nor involuntary servitude … shall exist …"); *id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged …").

Each of the Reconstruction Amendments include materially identical sections authorizing Congress to enact legislation to enforce the Amendments' substantive provisions. *See id.* amend. XIII, § 2; *id*. amend. XIV, § 5; *id.* amend. XV § 2. The Supreme Court has consistently held the substantive provisions of these Amendments—including the Fourteenth Amendment—to be

"self-executing." *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are *self-executing*." (emphasis added)); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) (the Fifteenth Amendment is "*self-executing*," even though it "also gives Congress the 'power to enforce this article by appropriate legislation'" (emphasis added)) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966)); *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (holding that the Thirteenth Amendment "as well as the Fourteenth, is undoubtedly *self-executing* without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances" (emphasis added)).

Moreover, as a federal appeals court has expressly confirmed, Section 3's authorization of Congress to "remove such disabilit[ies]" by a two-thirds vote "connotes taking away something which has already come into being." *Cawthorn v. Amalfi*, 35 F.4th 245, 260 (4th Cir. 2022) (quoting U.S. Const. amend XIV, § 3). Section 3 itself therefore creates the disability.

Indeed, that's exactly how Section 3 was understood to operate during Reconstruction: as early as 1867—before Congress had yet passed any federal statute to enforce Section 3—thousands of ex-Confederates flooded Congress with amnesty requests to "remove" their disabilities. *See* The National Archives, "Preliminary Inventory of the Records of the Select Committee on Reconstruction, 1867-71," compiled by George P. Perros (1960).[5]

Similarly, under the *expressio unius* canon, Section 3's inclusion of an explicit congressional role in *removing* disqualifications, but omission of such role in *imposing* them, supports a "sensible inference" that no congressional action is required to activate it. *See N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 302 (2017); *see also U.S. Term Limits, Inc. v.*

[5] Available at https://www.citizensforethics.org/wp-content/uploads/2023/06/Confederate-Amnesty-Petitions-PI_0233_Select-Committee-on-Reconstruction-1867-71.pdf.

Thornton, 514 U.S. 779, 793 n.9 (1995) (applying canon in construing Article I's Qualifications Clauses).

Further, the Constitution uses different language when it merely empowers Congress to create its own rules, rather than when it imposes direct legal obligations like Section 3. For example, the Constitution provides that "[t]he Congress shall have Power To lay and collect Taxes," "To borrow Money," or "To regulate Commerce." U.S. Const. Art I, § 8, cl. 1-3. It says "Congress may" set the time for choosing electors, or create inferior officers, or establish inferior courts. *Id.* Art. II, § 1, cl. 4; *id.* § 2, cl. 2; Art III, § 1. These provisions empower Congress and, absent enacting legislation, impose no obligation or burden. *See, e.g.*, *Palmore v. United States*, 411 U.S. 389, 400–01 (1973) ("The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art. III courts[.]"). They do not "operate of [themselves] without the aid of any legislative provisions." *Medellín*, 552 U.S. at 505. Section 3, on the other hand, uses direct, "self-executing" commands.

Like other substantive provisions of the Fourteenth Amendment and other constitutional qualifications, Section 3 "directly adopts a constitutional rule of disqualification from office" that requires no federal legislation to take effect. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev. 1, 18 (forthcoming 2024).[6]

C. Supreme Court precedent makes clear that congressional action cannot be required to activate Section 3.

Boerne further shows that Section 3's detractors get the separation of powers backwards—congressional action cannot be required to activate Section 3, because Congress's

[6] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751.

remedial authority under Section 5 of the Fourteenth Amendment itself depends on courts' interpretation of the Amendment's substantive scope.

The Supreme Court in *Boerne* addressed the authority of Congress to enact the Religious Freedom Restoration Act, which was enacted in response to the restriction of the First Amendment (as incorporated by the Fourteenth Amendment) in a prior Supreme Court decision. The Court started with the observation that "[a]s broad as the congressional enforcement power is, it is not unlimited." *Boerne*, 521 U.S. at 519 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970)). Congress's power under Section 5 "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment …. Legislation which alters the meaning of the Free Exercise Clause [as incorporated under the Fourteenth Amendment] cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is." *Id.* The meaning of any provision that Congress is authorized to enforce, then, must be interpreted by the courts: "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary." *Id.* at 524. Allowing Congress to define the meaning of constitutional provisions would mean that the Constitution is no longer "superior paramount law, unchangeable by ordinary means." *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The Court held that legislation under Section 5 must show "proportionality or congruence between the means adopted and the legitimate end to be achieved," with the latter interpreted by courts.[7] *Id.* at 533.

Boerne's rationale applies equally to Section 3. Congress's Section 5 power to legislate for Section 3, like its power to legislate for Section 1, is necessarily limited by the *judiciary's*

[7] After *Boerne*, the Court has consistently reaffirmed this doctrine. *See, e.g.*, *Allen v. Cooper*, 140 S. Ct. 994, 1004 (2020) ("Congress cannot use its 'power to enforce' the Fourteenth Amendment to alter what that Amendment bars … [congressional action] is valid under Section 5 only if it sufficiently connects to conduct *courts* have held Section 1 to proscribe." (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000) (emphasis added)).

interpretation of the Constitution. The contours of Congress's enforcement authority must be shaped by the courts, through the interpretation of "engage" and "insurrection," among other terms. Otherwise, "it is difficult to conceive of a principle that would limit congressional power" with respect to Section 3. *Boerne* 521 U.S. at 529; *cf. Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) (contrasting the Copyright Clause which "empowers Congress to *define* the scope of the substantive right" and Section 5 which "authorizes Congress to *enforce* commands" of the Fourteenth Amendment) (emphasis added).

In addition to ignoring the Fourteenth Amendment's text and enforcement history, Amicus Trump confuses the provision's *substantive scope* with its *remedy*. *See* Blackman & Tillman, *supra* at 3. Of course, a litigant needs a cause of action to get into court and obtain affirmative relief. For example, the Supreme Court in *Bivens*, 403 U.S. at 389, asked whether there is "a cause of action for damages" consequent upon the conduct of a federal agent *even if* such conduct is found to be violative of a constitutional provision as interpreted by courts. Most recently, *Egbert v. Boule*, 142 S. Ct. 1793, 1802-03 (2022), noted that "creating a cause of action is a legislative endeavor" and "Congress is 'far more competent than the Judiciary' to weigh such policy considerations."

But that in no way undermines the judiciary's "power to interpret the Constitution in a case or controversy" once the question of constitutional interpretation is properly before a court. *Boerne*, 521 U.S. at 524. Here, Plaintiffs challenge Trump's candidate qualifications under a state law cause of action, and the task of interpreting Section 3 of the Fourteenth Amendment is properly before this Court. This Court must therefore "say what the law is." *Id.* at 536 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

D. *In re Griffin* is neither binding nor persuasive.

Section 3's detractors rely on one non-binding case to the contrary: *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869). There, Chief Justice Salmon Chase, while sitting as a circuit judge in post-war Virginia, held that an Act of Congress was required to permit a federal court to grant *habeas corpus* relief to a defendant convicted in a trial presided over by a state judge presumably disqualified under Section 3. 11 F. Cas. at 26. That case, however, arose from a unique historical context with no applicability to the modern day. In 1869, Virginia was an "unreconstructed" territory under federal military control, and it lacked any operative state law that could have enabled enforcement of Section 3. *Id.* at 14. *Griffin* had no occasion to address whether a functional state like Michigan in 2023 could pass its own legislation providing procedures for enforcing constitutional qualifications like Section 3. *See Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 170 (2004) ("Questions … neither brought to the attention of the court nor ruled upon … are not to be considered as having been so decided as to constitute precedents.").

Moreover, Chief Justice Chase reversed his position on Section 3 shortly thereafter in the treason prosecution of the former president of the Confederate States of America, Jefferson Davis. In that case, Chief Justice Chase agreed (again as a circuit judge) with Davis that Section 3 "executes itself" and "needs no legislation on the part of [C]ongress to give it effect." *In re Davis*, 7. F. Cas. 63, 90, 102 (C.C.D. Va. 1871).[8]

[8] Similarly, notwithstanding resuscitating the "self-execution" objection, Blackman and Tillman recognize Section 3 has force of law without enabling legislation. *See* Blackman & Tillman, *supra* at 29 ("[T]he Fourteenth Amendment can be raised as a defense, even in the absence of enforcement legislation"). The idea that Section 3 was enacted to serve as a "shield" to *protect* insurrectionists and not a "sword" to disqualify them absent further legislation runs headlong into history.

Neither *Griffin* nor *Davis* are binding precedent here, since Chief Justice Chase was merely "acting as a circuit judge," and Chase's "contradictory holdings, just a few years apart, draw both cases into question and make it hard to trust [his] interpretation." *Cawthorn v. Amalfi*, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring in the judgment); *see also* Baude & Paulsen, *supra* at 35-49. Recently, the Colorado district court in *Anderson* considered and rejected *Griffin* as applicable authority, finding the case "irrelevant" to the question of whether a state court may enforce Section 3 under state law. See *Anderson*, No. 2023-CV-32577 at 19 (Dist. Ct. of Denver Colo., Oct. 26, 2023).

CONCLUSION

This Court has the power and duty to adjudicate Plaintiffs' claim under state law challenging Donald J. Trump's constitutional eligibility to serve as President and appear on Michigan's ballots. No federal legislation is needed for this Court to apply Section 3, because the Fourteenth Amendment, including Section 3, is "self-executing."

Respectfully submitted,

October 30, 2023

FINK BRESSACK

By: /s/ Nathan J. Fink
David H. Fink (P28235)
Nathan J. Fink (P75185)
Attorneys for Proposed Amicus Curiae Citizens for Responsibility and Ethics in Washington

[redacted]

Stuart McPhail
Laura Iheanachor
Kayvan Farchadi

Alex Goldstein
Adam Rappaport
CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON
[redacted]