STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiffs-Appellants,

Supreme Court No.
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 Defendant-Appellee.
_____/

ROBERT DAVIS,

Plaintiff,

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

v

WAYNE COUNTY ELECTION COMMISSION,

Defendant,

and

DONALD J. TRUMP,

Intervening-Defendant.
_____/

EMERGENCY APPLICATION FOR LEAVE TO APPEAL OF PLAINTIFFS-APPELLANTS LaBRANT ET AL.

ORAL ARGUMENT REQUESTED

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STATEMENT OF JUDGMENT APPEALED FROM

Plaintiffs-Appellants LaBrant et al. appeal from the opinion of the Court of Appeals in Case No. 368628, entered on December 14, 2023. It is attached hereto in the Appendix, pp 22–42.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err by giving the political parties the unreviewable discretion to place candidates on the presidential primary ballot?

Plaintiffs-Appellants' Answer: Yes.

Defendants-Appellee's Answer: No.

Intervening Defendant-Appellee's Answer: No.

2. Should this Court reverse the Court of Claims' alternative basis for dismissal that the political question doctrine prevents courts from deciding the eligibility of presidential candidates to appear on Michigan's presidential primary ballot under the Disqualification Clause?

Plaintiffs-Appellants' Answer: Yes.

Defendants-Appellee's Answer: No.

Intervening Defendant-Appellee's Answer: No.

3. Should the case be remanded to the Court of Claims to conduct an evidentiary hearing on Donald Trump's eligibility under the Disqualification Clause to be placed on the Michigan presidential primary ballot?

Plaintiffs-Appellants' Answer: Yes.

Defendant-Appellee's Answer: No.

Intervening Defendant-Appellee's Answer: No.

CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Material Facts

The material facts concerning Donald 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 in the Appendix, pp 43–115.

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 (App, p 113).

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, attached hereto in the Appendix, pp 1–21, denying Plaintiffs-Appellants' requested relief on three grounds: (1) the Secretary of State and political parties have the exclusive authority to determine presidential primary candidates—decisions voters cannot question in court; (2) the case was not ripe; and (3) the political question doctrine prevented the court from making a decision on the merits.

An appeal was filed in the Court of Appeals on November 15, 2023. On November 16, 2023, Plaintiffs-Appellants asked this Court to bypass the Court of Appeals, a request denied on December 6, 2023. The Court of Appeals consolidated this case with a related case, *Davis v Wayne Co Election Comm*, Court of Appeals Case No. 368615.

On December 14, 2023, the Court of Appeals issued its decision in the consolidated cases. In the instant case, the Court of Appeals held that this case was ripe as to Trump's eligibility to appear on the presidential primary ballot but affirmed the Court of Claims' holding that only the Secretary of State and political parties can determine presidential primary candidates—decisions courts and voters cannot question. The Court of Appeals found it unnecessary to reach the political question doctrine issue.

This appeal followed.

INTRODUCTION

> No person shall . . . hold any office, civil or military, under the United States . . . who, having previously taken an oath, . . . as an officer of the United States . . . , 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. . . .
>
> – US Const, Am XIV, § 3.

Under Article II of the U.S. Constitution, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." In Michigan, the manner that the legislature has directed includes a procedure for judicial challenge to the Secretary of State's ballot placement of an ineligible candidate.

Plaintiffs-Appellants filed this action to enjoin Secretary of State Benson from placing Donald Trump on the 2024 primary or general election ballots because he is disqualified from the U.S. presidency by Section 3 of the Fourteenth Amendment. As set forth in the Complaint, Trump engaged in insurrection or rebellion through his extensive efforts to illegally overturn the 2020 presidential election, beginning in late 2020 and culminating on January 6, 2021, in a violent assault on the U.S. Capitol that conquered the seat of our nation's government, nearly assassinated the Vice President and congressional leaders, and—as Trump hoped—disrupted certification of the electoral count. This prevented the peaceful transfer of power for the first time in U.S. history, a feat not even the Confederate rebellion achieved.

The Court of Claims declined to reach the merits, holding that (1) Michigan state law does not permit a challenge to a presidential candidate at the primary stage, and (2) notwithstanding Article II's plenary grant of power to appoint presidential electors, the federal political question doctrine forbids states from deciding whether presidential candidates meet constitutional

qualifications. The Court of Appeals affirmed solely on state law grounds. It did not reach the political question doctrine, but it held that the challenge could not proceed at the presidential primary stage on the grounds that presidential primaries in Michigan are "internal party elections" not subject to judicial review.

None of these rulings are correct. Michigan state law allows this challenge, and nothing in the U.S. Constitution prevents Michigan from using a statutorily enacted judicial review procedure to exclude ineligible candidates from the presidential ballot. Further, the claim that political parties in Michigan exercise complete control over who appears on the state's presidential primary ballot—without any judicial oversight at all—ignores the controlling precedents of the U.S. Supreme Court, this Court, and the Court of Appeals. Contrary to an argument by Trump and his *amici* that Michigan cannot implement the Fourteenth Amendment without special permission from Congress, Section 3 of the Fourteenth Amendment is just as enforceable in Michigan courts as Section 1 of the Fourteenth Amendment. Finally, Trump's argument that Section 3 does not apply because the presidency is not an office and the president not an officer under the Constitution flies in the face of the Constitution's plain language—which refers to the presidency as an "Office" 25 times—and centuries of common usage and precedent.

This case meets all applicable criteria for granting leave to appeal. *See* MCR 7.305(B)(1)–(3), and (5). Leave should be granted, the Court of Appeals reversed, and the case remanded to the Court of Claims for a prompt evidentiary hearing on whether Trump is disqualified under Section 3 from appearing on Michigan's presidential primary and general election ballots.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY GIVING THE POLITICAL PARTIES THE UNREVIEWABLE DISCRETION TO PLACE CANDIDATES ON THE STATE'S PRESIDENTIAL PRIMARY BALLOT.

The Court of Appeals held that the political parties have the exclusive authority to determine which candidates appear on the presidential primary ballot, calling the primary an "internal party election," which the State merely administers. *See LaBrant v Secretary of State*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 368628); slip op at 18 (App, p 39).

The Court of Appeals then went on to hold that because the election laws governing the presidential primary provide no statutory cause of action to review those party decisions, Plaintiffs-Appellants have no right to question them in court:

> Plaintiffs argue that . . . voters have a "clear legal right . . . to have only eligible candidates on a primary election ballot." . . . [T]he statutes concerning the presidential primary contain no such right.

Id at ___; slip op at 20 (App, p 41).

The effect of the exclusive role given to the political parties by the Court of Appeals to determine presidential primary candidates completely insulates the parties' decisions from any judicial scrutiny whatsoever, including, most importantly, whether those decisions comply with the federal Constitution. But by giving the political parties complete control over who appears on the presidential primary ballot without any judicial oversight at all, the Court of Appeals committed at least two fundamental errors, failed to conduct the necessary constitutional analysis, and ignored the controlling precedents of the U.S. Supreme Court, this Court, and the Court of Appeals.

A. The Political Parties' Control Over Access To The Presidential Primary Ballot Renders Them State Actors Subject To Constitutional Standards Enforced By The Courts.

First, the Court of Appeals neglected to recognize that the exclusive role it gave the political parties in the presidential primary process made them state actors subject to federal constitutional standards.

In Michigan elections, state and local election officials determine ballot access for all candidates. *See, e g,* MCL 168.552; MCL 168.558 (state and local election officials review nominating petitions, affidavit of identities, and other documents to decide whether candidates are eligible to appear on the ballot). Under those laws, filing officials also review the constitutional eligibility of candidates. *See* MCL 168.558(4). As state actors, those election officials' actions in determining eligibility are subject to constitutional standards, such as compliance with the Fourteenth Amendment. *See, e g, Burdick v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992) (ballot access subject to First and Fourteenth Amendment protections); *Anderson v Celebrezze*, 460 US 780; 103 S Ct 1564; 75 L Ed 2d 547 (1983) (same). In sharp contrast to all other candidates, the Court of Appeals held that those government officials play no role in determining candidate access to Michigan's presidential primary ballot. *LaBrant*, ___ Mich App ___; slip op at 16, 18–19 (App, pp 37, 39–40). Instead, the Court of Appeals held that the State has delegated *all* of its governmental authority over presidential primary ballot access *exclusively* to the political parties. *Id* at ___; slip op at 16, 19 (App, pp 37,40). At most, according to the Court of Appeals, the Secretary of State is merely the administrator of an "internal party election." *Id*.

However, under well-established constitutional law the Court of Appeals ignored, the delegation of government authority to private Michigan political parties does not and cannot mean that political parties are free to ignore the U.S. Constitution's strictures. In *Smith v Allwright*, 321

US 649; 64 S Ct 757; 88 L Ed 987 (1944), the Texas Legislature delegated to the Texas Democratic Party its governmental authority to select candidates for public office at primary elections. As a result, the Democratic Party had exclusive control over access to the primary ballot. Under those circumstances, the U.S. Supreme Court held that the Texas Democratic Party was a state actor subject to the federal Constitution—in that case, the Fifteenth Amendment. *See also Terry v Adams*, 345 US 461; 73 S Ct 809; 97 L Ed 1152 (1953) (political party-controlled primaries subject to Fifteenth Amendment). The Court has similarly concluded that the Fourteenth Amendment applies to the conduct of political parties using delegated government authority to conduct state primaries. *See, e g, Nixon v Condon*, 286 US 73; 52 S Ct 484; 76 L Ed 984 (1932). In all these cases, the U.S. Supreme Court forbade race discrimination against African-Americans in the conduct of those primary elections.

Collectively, the "White Primary Cases" established the principle that political parties are state actors subject to the federal Constitution when a state government delegates its authority over any portion of the primary election process to them.

Michigan courts have recognized that the White Primary Cases' principle applies to Michigan political parties, which are "agencies of the state" in the presidential primary process. *See, e g, Grebner v Michigan*, 480 Mich 939, 940–941; 744 NW2d 123 (2007) (*citing Nixon*, *Smith*, and *Terry*); *see also, e g, Fifth Dist Republican Comm v Employment Security Comm'n*, 19 Mich App 449, 454; 172 NW2d 825 (1969) (*citing Smith*, characterizing a political party as a state actor subject to constitutional restrictions when it is entrusted by the state with a role in a primary election).

The Court of Appeals failed to recognize that its interpretation of Michigan Election Law—giving the political parties exclusive control over access to the presidential primary ballot—

rendered them state actors subject to the federal Constitution. It completely ignored its decision's federal constitutional consequences. Under the correct constitutional analysis, Michigan political parties are state actors in the presidential primary process. As state actors, they cannot violate the federal Constitution by:

- Refusing to place or placing a presidential candidate on the primary ballot due to his or her race. *See, e g, Smith*, 321 US 649, *Nixon*, 286 US 73, and *Terry*, 345 US 461;
- Refusing to place or placing a presidential candidate on the primary ballot due to his or her gender. *See, e g,* US Const, Ams XIV and XIX;
- Refusing to place or placing a presidential candidate on the primary ballot due to his or her religion. *See* US Const, Am I;
- Placing a presidential candidate on the primary ballot who is term-limited, in violation of the Twenty-Second Amendment;
- Placing a presidential candidate on the primary ballot who is not a natural born citizen or at least 35 years old, as required by Article II, § 1, ¶ 5 of the U.S. Constitution; or
- Placing a presidential candidate on the primary ballot who is disqualified under Section 3 of the Fourteenth Amendment.

Michigan presidential primaries are not merely "internal party elections," as the Court of Appeals incorrectly labeled them, conducted for the private benefit of political parties. The parties' authority to determine candidate eligibility is a delegated government function, making the political parties state actors subject to constitutional standards and judicial oversight.

For these reasons, the Court of Appeals erred when it held that the political parties have the unreviewable discretion to name presidential primary candidates. That discretion is subject to

compliance with the federal Constitution—compliance reviewable by a court. *See, e g,* The White Primary Cases.

B. Michigan Voters Have The Right To Enforce Election Laws To Ensure That Only Eligible Candidates Appear On The Presidential Primary Ballot.

Second, the Court of Appeals erred in rejecting the well-established right of Michigan voters to enforce the election laws to have only eligible candidates on the ballot. The Court of Appeals asserted that the statutes governing the presidential primary process create no such right. *LaBrant*, ___ Mich App ___; slip op at 16 (App, p 37). This holding ignores the controlling precedents of this Court and prior Court of Appeals decisions.

This Court has held that Michigan plaintiffs are *not* restricted to a statutory cause of action, as the Court of Appeals assumed. They may pursue an action for declaratory relief under MCR 2.605 if they meet its standards. *See Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). Plaintiffs-Appellants here brought an action for declaratory relief, *see* Compl, ¶¶ 316–319 (App, pp 111–112), so the absence of a statutory cause of action in the election laws does not prevent them from seeking relief. The Court of Appeals was wrong.

This Court has also recognized that private citizens have broad standing to enforce the election laws through declaratory relief as long as there is a "present legal controversy." Speaking for this Court, Justice VIVIANO declared that:

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

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

Deleeuw involved presidential candidate access to the ballot, while *Helmkamp* considered the propriety of a candidate election. Justice VIVIANO correctly characterized both *Deleeuw* and *Helmkamp* as allowing citizens to enforce the election law through declaratory relief, as well as mandamus, as long as those citizens meet the declaratory relief requirement of a "present legal controversy." *League of Women Voters of Mich*, 506 Mich at 586.

In this case, Plaintiffs-Appellants voters seek to enforce the election law embodied in Section 3 of the Fourteenth Amendment, which establishes circumstances when a presidential candidate is disqualified. This case involves a "present legal controversy" over Trump's eligibility to appear on Michigan's presidential primary ballot. Therefore, Plaintiffs-Appellants have standing to seek declaratory and injunctive relief keeping him off the ballot.

This Michigan case law also negates the Court of Appeals' reliance on *Growe v Simon*, order of the Minnesota Supreme Court, issued November 8, 2023 (Docket No. A23-1354) (App, pp 116–119). In *Growe*, the Minnesota Supreme Court interpreted the Minnesota candidacy challenge statute, an entirely different body of law than Michigan's *Lansing Sch Bd-League of Women Voters of Mich* line of cases. In addition, the *Growe* decision, like the Court of Appeals decision here, failed to analyze the federal constitutional consequences of giving the political parties sole authority over ballot access. Thus, the Court of Appeals' reliance on *Growe* is completely misplaced.

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

challenge their eligibility under *Lansing Sch Bd-League of Women Voters*. The same would be true if the Michigan Republican Party placed George W. Bush on its list, or if a political party put forth an underage or otherwise disqualified presidential candidate. Michigan voters have the right to challenge those ineligible candidates and have them barred from the ballot, contrary to the Court of Appeals decision.

II. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR ADJUDICATING PRESIDENTIAL CANDIDATES' QUALIFICATIONS.

The political question doctrine is a "narrow exception." *Zivotofsky ex rel Zivotofsky v Clinton*, 566 US 189, 194–195; 132 S Ct 1421; 182 L Ed 2d 423 (2012). It is a doctrine 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 257 (1821). And the doctrine does not apply simply because a presidential election is involved. *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 2d 931 (2019) (citing only second factor); *Zivotofsky*, 566 US at 195 (citing only first two factors).

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

The 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 . . . ."). This power is plenary. *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"); *Bush v Gore*, 531 US 98, 104; 121 S Ct 525; 148 L Ed 2d 388 (2000) ("[T]he state legislature's power to select the manner for appointing electors is plenary . . . ."); *McPherson*, 146 US at 35 (similar).

This plenary power includes conditioning appointment of electors on their candidate's meeting constitutional criteria. *Lindsay v Bowen*, 750 F3d 1061, 1063 (CA 9, 2014) (state's interest in "protecting the integrity of the election process" allows it to enforce "the lines that the Constitution already draws" at the presidential primary stage) (citations and quotation marks omitted); *Hassan v Colorado*, 495 F Appx 947, 948 (CA 10, 2012) ("[A] state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the [presidential] ballot candidates who are constitutionally prohibited from assuming office."); 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.").

The Constitution does not commit that power to Congress at all, let alone expressly or exclusively. 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 provision explicitly authorizes—let alone directs—Congress to judge presidential candidates' qualifications. 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.[1]

Even if Congress holds some unwritten residual authority to judge presidential candidates' 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.").

[1] The same logic applies to Congress's power to set the time for choosing electors. *See* US Const, art II, § 1, cl 4.

B. Leading Precedent Confirms That States May Adjudicate Presidential Candidates' Constitutional Eligibility.

In 2012, then-Judge (now Justice) Gorsuch, writing for the Tenth Circuit, upheld the Colorado Secretary of State's exclusion of a constitutionally ineligible candidate. 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 Trump's theory that *only Congress* may decide whether a presidential candidate is constitutionally eligible.

In 2014, in a case arising before the presidential primary, the Ninth Circuit explicitly rejected the idea that the Constitution commits presidential candidates' qualification 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, 750 F3d at 1065 (emphasis added, except "*if*" in original).

Likewise, in 2016, the Pennsylvania Commonwealth Court expressly rejected the political question doctrine's applicability. It concluded, after closely reading 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).

These courts were not exceptions; many other states have adjudicated presidential candidates' constitutional qualifications. *See, e g, Ankeny v Governor of Ind*, 916 NE2d 678 (Ind App, 2009) (affirming Obama and McCain's eligibility on merits); *Purpura v Obama*, unpublished per curiam opinion of the Superior Court of New Jersey, issued May 31, 2012 (Docket No. A-4478-11T3) (same);[2] *see also Scrutinizing Federal Election Qualifications*, 90 Ind L J at 604.

C. Section 3 Involves Judicially Manageable Standards.

Interpreting constitutional text and applying that text to—sometimes disputed—facts is precisely what courts do. The meanings of "engage" or "insurrection" are judicially discoverable, just as the meanings of "due process of law" and "equal protection of the laws" are judicially discoverable. In fact, the Fourteenth Amendment's key framer explained during congressional debates *precisely how* to construe these terms. Asked 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 (1866), p 1089.

The same logic applies to Section 3's language. "Insurrection" was interpreted and defined repeatedly by courts, law dictionaries, and other authoritative legal sources before, during, and after Reconstruction. *See, e g, Webster's Dictionary* (1830) ("[C]ombined resistance to . . . lawful authority . . . , with intent to the denial thereof . . . ."); 1 Bouvier, *Bouvier's Law Dictionary* (15th ed, 1883), p 817 (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*

[2] *Accord, e g, Farrar v Obama*, decision of the Georgia Office of State Admin Hearings, issued February 3, 2012 (Docket No. OSAH-SECSTATE-CE-1215136-60-MALIHI) (same, affirming Obama's eligibility on the merits); *Joyce v Cruz*, decision of the Illinois State Board of Elections, issued January 28, 2016 (Docket No. 16 SOEB GP 526) (reaching merits of Cruz's eligibility); *In re Ind Election Comm'n Hearing*, decision of the Indiana Election Commission, issued February 19, 2016 (Docket No. 2016-2) (affirming Rubio's and Cruz's eligibility).

process lawfully issued") (emphasis added); 2 Bouvier, *Bouvier's Law Dictionary* (15th ed, 1883), p 510 (same); *see also The Prize Cases (The Amy Warwick)*, 2 US (67 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."); *Case of Fries*, 9 F Cas 924, 930 (CCD Pa, 1800) ("[A]ny insurrection or rising of any body of the people, within the United States, to attain or effect by force or violence any object of a great public nature, or of public and general (or national) concern . . . ."); *Allegheny Co v Gibson*, 90 Pa 397, 417 (1879) ("A rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state; a rebellion; a revolt . . . ."); President Lincoln, *Instructions for the Government of Armies of the United States in the Field*, General Orders No. 100 (April 24, 1863), art 149 ("Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.").[3]

The point here is not that this Court must rule whether the January 6 attack constituted an insurrection—it was—but simply that the question is judicially discoverable using traditional methods of constitutional interpretation. Last month, in a case where Trump was a party, a Colorado court applied such methods and interpreted "insurrection" in Section 3. *Anderson v Griswold*, order of the Colorado District Court, issued November 17, 2023 (Docket No. 2023-CV-32577) (App, pp 120–221), *app pending* Colorado Supreme Court No. 2023-SA-300.

[3] These sources define "insurrection" in general. Section 3's phrase "insurrection or rebellion against *the same*" is best read as an "insurrection or rebellion 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 or rebellion against "the United States." The January 6 insurrection satisfies both readings, so that distinction does not matter here.

Likewise, the judicial interpretation of "engage" under Section 3 has been settled for 150 years. Under the long-established *Worthy-Powell* standard, to "engage" in insurrection or rebellion under Section 3 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* 12 US Op Att'y Gen, pp 161–62 (opining that, in similarly-worded statute, "engage" includes "persons who . . . have done *any overt act* for the purpose of promoting the rebellion").

All three modern courts that have construed "engage" under Section 3—including one just last month—have applied the same *Worthy-Powell* standard. *See Griswold*, ¶¶ 245–257 (App, pp 191–196); *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), *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), pp 13–14 (*Rowan I*), *aff'd Rowan v Raffensperger*, order of the Superior Court of Georgia, issued July 25, 2022 (Docket No. 2022-CV-364778). No court has ever used a different standard under Section 3. Just last month, a Colorado court applied this standard and concluded that Trump engaged in insurrection. *See Griswold*, ¶¶ 245–298 (App, pp 191–214).

This case is unlike *Rucho*. That case questioned whether broad principles of "fairness" presumably implicitly embodied in the Equal Protection Clause were judicially manageable. *See Rucho*, 139 S Ct at 2500. But this case does not require interpretating implicit values (like fairness) that may be embodied in abstract constitutional text ("equal protection of the laws"), nor arbitrarily dividing a continuous spectrum. Rather, it involves interpreting explicit constitutional terms ("engage," "insurrection," and "rebellion") that were defined when the amendment was enacted and were construed by courts applying the amendment soon after its ratification.

D. Prudential Factors Do Not Divest The Court's Jurisdiction.

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

1. 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 empower Michigan's courts to hear challenges to candidate eligibility. The presidential selection process proceeds in steps; at different stages, different branches of government lead. In the first (current) stage, states have plenary authority to appoint electors "in such Manner as the Legislature thereof may direct." US Const, art II, § 1, cl 2. Michigan's Legislature has chosen to appoint electors via a process that includes ballot access challenges like this. After the electors have cast their votes, Congress will then take the lead in *counting* votes. *See* US Const, Am XII. Michigan's use of a judicial process to help ensure that it appoints electors only for constitutionally eligible candidates does not disrespect Congress.

Nor does the fanciful possibility that two-thirds of both houses *might theoretically* grant Trump amnesty prevent Michigan from exercising its plenary power to appoint electors in the manner directed by its legislature. First, that possibility is purely speculative—Trump has not even

requested congressional amnesty. Speculative or imaginary possibilities do not divest states' Article II power, and Michigan courts do not act on 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* Mich Const 1963, art XI, § 8. The governor could, in theory, pardon a convicted felon. *See* Mich 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. Second, this Court's exercise of its legislatively-conferred authority to limit the ballot to constitutionally qualified candidates would not preclude Congress from later removing Trump's Section 3 disability. Congress could remove the disability tomorrow, or after this or another court rules Trump ineligible to appear on the ballot, thereby enabling him to appear on the ballot despite his engagement in insurrection.

2. There is no "unusual need for unquestioning adherence to a political decision already made," *Baker*, 369 US at 217, nor could there be at this stage. *After* electors have been appointed, that need might arise. But appointment of electors is almost a year away. No political decision has been made, nor will be made any time soon.

The U.S. Senate's failure to attain a two-thirds supermajority to convict Trump in impeachment proceedings does not present an "unusual need for unquestioning adherence." To the extent the Senate impeachment vote has any relevance, it *supports* the conclusion that Trump engaged in insurrection and is therefore disqualified under Section 3. First, a clear bipartisan

majority of 57 Senators concluded, as did the House, that Trump incited insurrection, and should be convicted. Second, 22 Senators expressly based their vote to acquit on their belief that the Senate lacked jurisdiction to try a *former* official (an issue unrelated to the merits under Section 3), and either criticized him or stated no view on the merits. *See* 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 was responsible for inciting the insurrection. The minority view that he was not subject to precisely impeachment because he was *no longer in office* cannot control this question. Indeed, the notion that the failure of the Senate to vote by two-thirds to convict Trump could immunize him from disqualification under Section 3 would effectively reverse the constitutional requirement that disqualification under Section 3 can *only* be removed by a two-thirds affirmative vote of both houses of Congress.

3. There is no "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id*. Article II grants *each state* the power to appoint electors in the manner directed by *its* legislature.[4]

And if the political question doctrine prevented resolution wherever sister courts might disagree, no case could ever be decided. The possibility that another court may decide this matter differently does not relieve this Court of its obligation to decide the case before it. State courts *regularly* rule on questions that could also be decided by courts in other states; no one claims, e.g.,

[4] The sky does not fall when presidential candidates appear on some states' ballots but not others. In 2020, Kanye West appeared on twelve states' ballots—not Michigan's. Lee, *Kanye West Reportedly Concedes Defeat, Ending 2020 Race*, Atlanta Journal-Constitution (November 4, 2020). In 2012, four major Republican presidential candidates were excluded from Virginia's primary ballot. Mears, *Four GOP Candidates Fail To Make Virginia Primary Ballot, Judge Rules*, CNN (January 13, 2012).

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 Constitution to their best ability. And if any state decides Trump is disqualified, the U.S. Supreme Court can rapidly resolve the issue. *See, e g, Bush*, 531 US 98 (argued December 11, 2000, and decided the next day).

E. The Court Of Claims Relied On Unpersuasive Decisions Where The Issues Were Not Properly Joined.

The Court of Claims ignored *Lindsay*, *Hassan*, and other leading precedent. It instead relied on unpersuasive authority—mainly unpublished decisions dismissing challenges by pro se plaintiffs who failed to cite this authority. *See, e g, Castro v NH Secretary of State*, ___ F Supp 3d ___ (D NH, 2023) (Docket No. 23-cv-416-JL) ("Castro does not present case law that contradicts the authority discussed above—nor has the court found any."), *aff'd on other grounds Castro v Scanlan*, 86 F4th 947, 953 (CA 1, 2023) (confining analysis to standing and noting "the limited nature of the arguments that [Castro] makes about the more generally consequential political question issue").[5] Indeed, *none* of the cases upon which the Court of Claims relied involved a properly filed challenge under a well-established state candidacy challenge procedure like Michigan's. Nearly all were filed in *federal* court, where plaintiffs lacked *both* Article III standing *and* a statutory cause of action. Even those filed in state courts did not cite or use procedures developed by state legislatures for candidacy challenges.[6] It is therefore unsurprising that these

[5] The *Castro* district court's failure to find, cite, and apply relevant—and still valid—authority such as *Lindsay* and *Hassan* is partly explained by the fact that the case was litigated by a pro se plaintiff who failed to cite that authority. That does not apply here.

[6] *See, e g, Strunk v NY State Bd of Elections*, 35 Misc 3d 1208(A); 950 NYS2d 722 (NY Sup Ct, 2015) (plaintiff did not use the objection procedure provided by the New York legislature, but rather filed a "lengthy, vitriolic, baseless diatribe against defendants, but most especially against the Vatican, the Roman Catholic Church, and particularly the Society of Jesus"), *app dis* 126 App Div 3d 777; 5 NYS3d 483 (2015).

courts—nearly all of which dismissed the challenges for standing, mootness, or other jurisdictional defects and addressed the political question doctrine (if at all) in dictum—failed to recognize the state's plenary power to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors," when the plaintiffs did not employ a procedure in the "Manner as the Legislature thereof" had directed.

In contrast, the *Griswold* court declined to adopt the Court of Claims' analysis, noting that it relied on constitutional provisions that did not provide "a *clear* textual commitment to Congress." *Griswold*, ¶ 13 n 2 (emphasis in original) (App, p 125).

Cases cited by Trump or relied on by the Court of Claims fall into four main categories that demonstrate why they are not useful authority here.

1. Post-Election cases seeking to annul the results of elections already held, claiming remedies that do not exist. *See Berg v Obama*, 586 F3d 234 (CA 3, 2009) (seeking post-inauguration relief after failing earlier to enjoin Electoral College and Congress); *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) (post-election lawsuit seeking to enjoin Electoral College and others), *aff'd on other grounds* 622 F Appx 624 (CA 9, 2015); *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) (seeking to "decertify or annul" presidential primary results); *Kerchner v Obama*, 669 F Supp 2d 477, 479 (D NJ, 2009) (seeking "to remove the President from office"), *aff'd on other grounds* 612 F3d 204 (CA 3, 2010). Unlike those cases, this action relies on a pre-election candidacy challenge

procedure that the legislature enacted to help perform its Article II duty to appoint electors "in such Manner as the Legislature thereof may direct."[7]

2. Cases that do not even discuss or purport to apply the political question doctrine. Many of these cases that did not even discuss the political question doctrine, but instead barred ballot access challenges on inapplicable or otherwise baseless grounds. *See Robinson v Bowen*, 567 F Supp 2d 1144, 1147 (ND Cal, 2008) (not citing political question doctrine; stating that judicial review "should occur only *after* the electoral and Congressional processes" (emphasis added) and citing *Texas v United States*, 523 US 296, 300–302; 118 S Ct 1257; 140 L Ed 2d 406 (1998), which concerns *ripeness*); *Keyes v Bowen*, 189 Cal App 4th 647, 659–661; 117 Cal Rptr 3d 207 (2010) (not addressing political question doctrine; dismissing entirely on state law grounds).

3. Cases that were decided or affirmed on unrelated grounds. Of the cases that even discussed the political question doctrine, most did so as an aside in an order dismissing for lack of Article III standing in federal court. Crucially, appellate courts have carefully affirmed on other grounds *without* addressing trial courts' political question musings. *See Castro*, 86 F4th at 953 ("[w]e confine our analysis, however, to the issue of standing"; declining to adopt district court's political question analysis and noting "like the Supreme Court, '[o]ur court has been similarly sparing in its reliance on the political question doctrine'") (citation omitted); *Grinols*, 622 F Appx at 625 n 1 ("While the district court based its decision on several alternative holdings, we reach only the issue of mootness."); *Kerchner*, 612 F3d at 209 n 3 (noting that district court decided "as an alternate holding" that political question doctrine applied, but "we need not discuss that issue");

[7] While *Congress* holds the power to remove a sitting president, US Const, art I, § 2, cl 5 (House has "sole Power of Impeachment"), *states* hold the power to appoint electors. US Const, art II, § 1, cl 2.

Berg, 586 F3d at 242 (stating sole holding as "Because there is no case or controversy, we will affirm the District Court's order dismissing Berg's action.").

4. Cases that have been superseded in their own circuits. Even if the pre-2014 California federal district court decisions in *Robinson* or *Grinols* could be interpreted as addressing the political question doctrine, they were superseded by *Lindsay*, which explicitly rejected the idea that resolution of presidential candidates' qualifications is exclusively committed to Congress. *See Lindsay*, 750 F3d at 1065. Notably, in *Grinols*, the trial court decision preceded *Lindsay*, but then after *Lindsay*, the Ninth Circuit affirmed *Grinols* on mootness alone. *See Grinols*, 622 F Appx at 625 n 1.

Nor is Section 3 adjudication uniquely committed to Congress. As explained in detail *infra* Part III, the only role that Section 3 commits to Congress is *removing* disqualification. *See* US Const, Am XIV, § 3 ("But Congress may by a vote of two-thirds of each House, remove such disability."). And Section 5 of the Fourteenth Amendment, which says that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article," does not assign exclusive authority to Congress to decide Fourteenth Amendment questions. Section 5 applies to Sections 1 and 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 3 claims are non-justiciable political questions.

III. SECTION 3 DOES NOT REQUIRE ADDITIONAL FEDERAL LEGISLATION.

Neither the Court of Claims nor the Court of Appeals indulged Trump's theory that Michigan courts require special congressional authorization to enforce the Fourteenth

Amendment. This Court should likewise reject that claim, because Michigan may enforce Section 3 without special federal legislation.[8]

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

1. State Courts Must Adjudicate Federal Constitutional Questions.

Nothing in the Constitution supports the idea that state judges may apply the Constitution only if Congress says they can. Rather, state courts *must* apply the Constitution. *See* US Const, art VI, § 2 (the U.S. Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby"); *Martin v Hunter's Lessee*, 14 US (1 Wheat) 304, 339–342; 4 L Ed 97 (1816) (state courts are competent to adjudicate federal constitutional questions); *see also Robb v Connolly*, 111 US 624, 637; 4 S Ct 544; 28 L Ed 542 (1884) (obligation to enforce U.S. Constitution lies "[u]pon the state courts, equally with the courts of the Union").

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

When plaintiffs in state court civil actions raise federal constitutional claims, courts do not first demand a federal statute authorizing consideration of the claims. *See Testa v Katt*, 330 US 386, 389; 67 S Ct 810; 91 L Ed 967 (1947) (when federal law applies to a cause of action, state courts must apply it). Instead, state courts review the constitutional claims on their merits.

State courts began adjudicating Fourteenth Amendment claims—including claims using the amendment as a "sword," i.e., seeking affirmative relief—almost immediately after the amendment's passage, without special authorization from Congress. *See, e g*, *Van Valkenburg v*

[8] The present question is not whether Section 3 can be enforced without *any* underlying cause of action. Rather, the present question is whether, even where, as here, state law supplies a cause of action, some unwritten principle requires *congressional* action before the state may apply its laws to enforce Section 3.

Brown, 43 Cal 43 (1872) (deciding affirmative claim for relief under Section 1). Today, Michigan and other 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).

B. Nothing In The Fourteenth Amendment's Text Suggests Section 3 Requires Federal Legislation.

1. Section 3 States A Direct Prohibition, Not An Authorization.

Section 3 states 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. The prohibition "lays down a rule by saying what shall be. It does not *grant a power* to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself." Baude & Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U Pa L Rev (forthcoming 2024), pp 17–18 (emphasis in original). It parallels other qualifications in the Constitution that, indisputably, require no special implementing legislation. *See* US Const, art I, § 2, cl 2 ("*[n]o Person shall be* a Representative" who does not meet age, citizenship, and residency requirements); *id* § 3, cl 3 ("*[n]o Person shall be* a Senator" who does not meet age, citizenship, and residency requirements); US Const, art II, § 2, cl 5 ("*[n]o Person . . . shall be* eligible to the Office of President" who does not meet age, citizenship, and residency requirements); US Const, Am XII ("*[N]o person* constitutionally ineligible to the office of President *shall be* eligible to that of Vice-President . . . .").

Likewise, Section 3's prohibitory language resembles the language of Section 1, which is indisputably self-executing. No federal legislation is needed to enforce the Due Process Clause or Equal Protection Clause in state court. *See* US Const, Am XIV, § 1 ("*No State shall make or enforce any law* which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny* to any person within its jurisdiction the equal protection of the laws.") (emphases added).

In fact, a major purpose of the Fourteenth Amendment was to constitutionalize these protections precisely so that they did *not* depend on the whims of Congress. *See*, *e g,* Cong Globe, 39th Cong, 1st Sess (1866), p 1095 (Rep. Hotchkiss) (arguing for constitutional protection of civil rights because "[w]e may pass laws here to-day, and the next Congress may wipe them out"). That is why Section 1 is self-executing. *See City of Boerne v Flores*, 521 US 507, 522–524; 117 S Ct 2157; 138 L Ed 2d 624 (1997), *superseded on other grounds by statute* ("Section 1 of the new draft Amendment imposed self-executing limits on the States . . . [T]he Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."); *Civil Rights Cases*, 109 US at 20 ("[Thirteenth] amendment, *as well as the Fourteenth*, is undoubtedly self-executing without any ancillary legislation . . . ."). If "No *State* shall" is self-executing, then so is "No *person* shall."

Likewise, Congress did not leave Section 3 to the whims of "the next Congress" which could pass or repeal legislation by bare majority; to the contrary, Section 3 applies until *two-thirds* of each chamber grants amnesty.

In contrast, constitutional provisions that require effectuating federal legislation explicitly state that Congress *may* enact legislation. Such authorizing language typically uses formulations such as Congress "may" "by Law" do something, *e g,* US Const, art I, § 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. Unlike those provisions, Section 3 enacts its own disqualification—"[n]o person shall be . . . or hold," the office—and, like other provisions of the Fourteenth Amendment, sets no prerequisites for congressional action before a state may independently implement it. To

the contrary, the only exclusive role Section 3 confers upon Congress is the right to *waive* disqualification—which Congress has not done for Trump.

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

Under Section 5 "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." US Const, Am XIV, § 5. This provision authorizes federal legislation but does not require it. Indeed, as the Supreme Court recognized soon after the enactment of the Fourteenth Amendment, in a dispute over 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 at 20.

Section 5 applies to the entire Fourteenth Amendment, including Section 1's Due Process and Equal Protection Clauses. 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 adjudicate such questions without specific congressional authorization. Just as Section 1 is enforceable outside of 42 USC 1983, so too Section 3 is enforceable in state court even without federal legislation.

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

Nothing in Section 3's original public meaning—in congressional debates, state ratification debates, or public discussion surrounding ratification—supports the argument that congressional action is required for enforcement. To the contrary, the crucial period between 1868, when the amendment was ratified, and 1870, when the first federal enforcement legislation was passed,

confirms that virtually everyone involved understood that Section 3 applied without special federal legislation.[9]

Both Congress and ex-Confederates understood Section 3 to apply between ratification of the Fourteenth Amendment in July 1868 and passage of the first federal statute enforcing Section 3 in May 1870.[10] If Section 3 were not self-executing, then during this 22-month period, Section 3 should have had no effect. But neither Congress nor ex-Confederates treated it that way.

Rather, during that 22-month period, Congress enacted multiple private bills granting Confederate insurrectionists amnesty from Section 3.[11] If Section 3 could not be enforced without federal enforcement legislation, it would have made no sense for Congress to pass amnesty bills long *before* enacting any enforcement legislation. Yet two-thirds of both houses of Congress *repeatedly* passed amnesties during that period.

These amnesty bills—passed by Congress months or years before any congressional statute authorizing federal Section 3 enforcement—show that Congress understood that Section 3's disqualification could be enforced directly by *states*. Reconstruction-era state courts used state law in civil cases to enforce Section 3 *without* special federal legislation. *See, e g, Worthy*, 63 NC at 200 (holding that sheriff-elect could not take office because he served under the Confederacy); *Louisiana v Lewis*, 22 La 33 (1870) (holding that official was disqualified under section 3); *Louisiana ex rel Downes v Towne*, 21 La 490, 492 (1869) (finding official *not* disqualified under section 3 but adjudicating disqualification on merits). Congress granted amnesty to specific individuals *precisely* because states could enforce Section 3 without federal legislation.

[9] For more on why Section 3 is self-executing, *see The Sweep and Force of Section 3*, pp 17–49.
[10] *See* Act of May 31, 1870, ch 114, § 14, 16 Stat 140, 143 (repealed 1948).
[11] *See, e g,* 16 Stat 632 (1870); 16 Stat 614–630 (1870); 16 Stat 613 (1869); 16 Stat 607–613 (1869); 15 Stat 436 (1868).

The ex-Confederate public also understood this. 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. The many thousands who sought amnesty before May 1870 understood that they could be excluded from office by state law and state courts; two-thirds of both houses of Congress agreed.

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

The only ostensible basis for the view that state courts cannot enforce Section 3 without specific congressional action is an 1869 decision—since described by leading originalist scholars as "indefensible" and "bonkers," *The Sweep and Force of Section 3*, p 43—in the then-unreconstructed state of Virginia. *See Griffin's Case*, 11 F Cas 7 (CCD Va, 1869). Caesar Griffin, a Black man, was convicted in Virginia court. *Id* at 22. He brought a federal habeas petition challenging his conviction, arguing the Virginia judge presiding over his trial was disqualified under Section 3. *Id* at 22–23. Chief Justice Chase, acting as a Circuit Justice, presided over a two-judge federal court hearing Griffin's challenge. *See id* at 22. Chase rejected the petition on the purported basis that Section 3 was not self-executing and required federal legislation for enforcement. *Id* at 26.

This decision—which is not binding outside federal courts in Virginia—is erroneous, contradictory, and unpersuasive. At minimum, it does not apply where, as in Michigan, a functional state government exists.

Chief Justice Chase acknowledged that the "literal construction"—the plain meaning—of Section 3 disqualified the Virginia judge. *Id* at 24. However, that could mean that many other prisoners *besides* Griffin would go free. Chase expounded upon the "great inconvenience" of

applying the plain meaning. *Id* at 24–25. To avoid this outcome, he adopted two alternative holdings: (1) a constitutional interpretation of Section 3, and (2) a statutory interpretation (the "de facto officer" doctrine) that habeas was not available simply because a prisoner was sentenced by a judge later found disqualified.

First, Chase opined that Section 3 requires federal legislation. *See id* at 25. He 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." *Id* at 26. But he did not consider *state* court proceedings, and never explained why *state* courts could not provide such "proceedings, evidence, decisions, and enforcements of decisions, more or less formal"—like this action under Michigan law. Instead, Chase simply proclaimed that "these can only be provided for by congress." *Id*. Even if true in *federal* court, it does not explain why a *state* court would need federal legislation to enforce the Fourteenth Amendment. After all, loyal southern officials *did* adjudicate ex-Confederates' disqualification. *See, e g, Worthy*, 63 NC at 199; *Downes*, 21 La at 490.

Chase instead relied on Section 5, which authorizes congressional legislation. *See Griffin's Case*, 11 F Cas at 26. But authorizing Congress to enact legislation does not deprive states of their authority and obligation to enforce Section 3 of the Fourteenth Amendment any more than it deprives them of their authority and obligation to enforce Section 1 (Equal Protection, Due Process) of the Fourteenth Amendment. *See supra* Part III.B.2. Chase stated that the exclusive role for Congress in removing disqualifications "gives to [C]ongress absolute control over the whole operation of the amendment." *Griffin's Case*, 11 F Cas at 26. But that does not follow. Rather, Section 3's grant of exclusive authority to Congress to *remove* the disqualification, coupled with the absence of such language regarding the *disqualification itself*, reinforces the conclusion that

Section 3's disqualification requirement, like other requirements of the Fourteenth Amendment and the Constitution generally, may (and must) be enforced by state courts with or without congressional action.

Griffin's Case is "confused and confusing." *Cawthorn v Amalfi*, 35 F4th 245, 278 n 16 (CA 4, 2022) (Richardson, J., concurring in the judgment). During Reconstruction, it was ignored by state courts, *e g, Louisiana ex rel Sandlin v Watkins*, 21 La 631, 633 (1869) (four months after *Griffin's Case*, in response to disqualified individual claiming that Section 3 was not self-executing, responding that "we are far from assenting to" that proposition, and ruling him disqualified); *Lewis*, 22 La at 33 (after *Griffin's Case*, adjudicating a 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 the decision.[12]

1. *Griffin's Case* Should, At Most, Be Limited To Its Unusual Context: A State Without A Fully Functional Government.

In 1869, Virginia was an unreconstructed state under military occupation. Its provisional government operated under the control of a Union Army General as part of military reconstruction and lacked the powers of ordinary state governments. *See, e g,* First Military Reconstruction Act, ch 153, 14 Stat 428–430 (1867). Put differently, Virginia was treated more like a federal territory, with limited autonomy accorded by Congress. Thus, Chase's conclusion that the "proceedings . . . can only be provided for by [C]ongress," *Griffin's Case*, 11 F Cas at 26, is defensible in that context.

[12] In further repudiation, the Union-appointed provisional governor of Virginia pardoned Griffin three weeks after the decision. *See* Rockingham Register (May 20, 1869), p 2, col 3.

2. The Precedential Effect Of *Griffin's Case* Is Limited To The "De Facto Officer" Doctrine.

While *Griffin's Case* was pending, Chase consulted with the full Court's justices, 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." *Id* at 27. In other words, the full U.S. Supreme Court agreed that habeas does not lie when the sentencing judge, though disqualified by Section 3, acts under color of office. That unanimous Supreme Court ruling obviates the remainder of *Griffin's Case* and is the relevant precedent.

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

Since January 6, 2021, three different state courts have applied Section 3 to the January 2021 insurrection. *See White*, No. D-101-CV-2022-00473; *Rowan I*, Docket No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (deciding Section 3 challenge on merits). None required special federal legislation.[13]

Most recently, the Colorado District Court rejected Trump's argument that Section 3 is not self-executing. *Griswold*, ¶ 13 (App, pp 124–125).

IV. THE PRESIDENCY OF THE UNITED STATES IS A BARRED "OFFICE . . . UNDER THE UNITED STATES" UNDER SECTION 3.

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

1. The Constitution Repeatedly Describes The Presidency As An "Office."

The 1787 Constitution and antebellum (1803) Twelfth Amendment repeatedly (over two

[13] In one Arizona decision, the state supreme court noted that the county trial judge had dismissed a Section 3 challenge on multiple grounds, including an ostensible requirement for congressional legislation, but 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).

dozen times) label the presidency an "office." *See, e g,* US Const, art II, § 1, cl 1 ("[The President] shall hold his *Office* during the Term of four years."); *id* § 1, cl 8 ("Before he enter on the Execution of his *Office*, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the *Office* of President of the United States . . . .'"). The antebellum Constitution repeatedly uses that term in *eligibility* provisions. *Id* § 1, cl 5 ("No person . . . shall be eligible to the *Office* of the President; neither shall any Person be eligible to that *Office* . . . ."); *id* § 1, cl 6 ("In Case of the Removal of the President from *Office*, or of his . . . Inability to discharge the Powers and Duties of the said *Office*."); *see also* US Const, Am XII ("[N]o person constitutionally ineligible to the *office* of President . . . .").[14]

Likewise, the ratifying public understood the presidency as an "office." *See, e g,* Federalist No. 39 (Madison) (referring to presidency as an "office" three times); Federalist No. 66 (Hamilton) (referring to presidency as the "first office"); Federalist No. 68 (Hamilton) (referring to presidency as an "office" five times); Federalist No. 69 (Hamilton) (twice); Federalist No. 72 (Hamilton) (five times); Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 Duke J Const L & Pub Pol'y 143, 147–148 (2009) (collecting other citations).

2. A Contrary Reading Is Absurd.

Several provisions of the 1787 Constitution would be absurd if the presidency were not an office "under the United States." If it were not, then "the President could simultaneously hold a seat in Congress, sit in the Electoral College, and be subject to a religious test." *District of Columbia v Trump*, 315 F Supp 3d 875, 884 (D Md, 2018), *rev'd on other grounds* 928 F3d 360 (CA 4, 2019), *rev'd en banc* 958 F3d 274 (CA 4, 2020), *vacated as moot* ___ US ___; 141 S Ct

[14] This Brief adds emphases to constitutional text *passim*, highlighting terms such as "office" and "officer."

1262; 209 L Ed 2d 5 (2021); *Why the Incompatibility Clause Applies to the Office of the President*, pp 148–151.

Specifically:

- Presidents could be impeached and convicted, but not removed. *See* US Const, art I, § 3, cl 7 ("Judgment in cases of impeachment shall not extend further than to removal from *office* . . . .").
- Even if removed, they could not be disqualified from returning to power. *See id* ("[A]nd disqualification to hold and enjoy any *office* of honor, trust or profit *under the United States* . . . .").
- The president could simultaneously serve in Congress. *See* US Const, art I, § 6, cl 2 ("[N]o Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office."); Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan L Rev 141, 146 (1995) ("The Presidency is surely an 'Office under the United States'; one could hardly interpret the Incompatibility Clause to allow a Representative or Senator to retain a seat in the Congress after being elected and inaugurated as President.").
- The president could serve as a presidential elector—for himself—even though every other major federal officeholder is barred. See US Const, art II, § 1, cl 2 ("[N]o Senator or Representative, or Person holding an *Office* of Trust or Profit *under the United States*, shall be appointed an Elector.").
- The presidency could be subject to a religious test. *See* US Const, art VI, cl 3 ("[N]o religious Test shall ever be required as a Qualification to any *Office* or public Trust *under the United States*.").

Thus, the presidency is an "office . . . under the United States." *Trump*, 315 F Supp 3d at 881–886; *see also Trump v Mazars USA, LLP*, 39 F4th 774, 792 (CA Fed, 2022) (the Foreign Emoluments Clause, which applies to anyone "holding any Office of Profit or Trust under" the United States, "bars federal officials (including the President) from accepting gifts or other payments from foreign governments"); *see also* HR No. 302, 23d Cong, 1st Sess (1834), p 2 (noting that President Jefferson had reached same conclusion).

B. Congressional Debate Specifically Clarified That The Presidency Is A Barred "Office . . . Under The United States" Under Section 3.

The history and purpose of Section 3 confirm that insurrectionists are barred from the presidency. In fact, this question was explicitly asked and answered during congressional debate, in which Senator Johnson expressed concern that "this amendment does not go far enough." He expressed concern that the specific enumeration of certain offices and not others meant that section 3 would *not* apply to the presidency:

> 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. In other words, the phrase "office . . . under the United States" already addressed Senator Johnson's concern, because it prevented insurrectionists from holding the "two highest offices" in the land. Senator Johnson then 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*.

This legislative history conclusively establishes Congress's understanding and intent, and the presumptive understanding of the ratifying public, that insurrectionists are barred from the presidency.

C. The Generation That Ratified And Implemented The Fourteenth Amendment Understood The Presidency As An "Office . . . Under The United States" For Purposes Of Section 3.

During the ratification period, the public specifically discussed the scenario of Jefferson Davis or Robert E. Lee rising to the presidency. *See, 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 a rebel is as worthy of honor as a Union soldier; that ROBERT E. LEE is as eligible to the Presidency as Lieut. General GRANT"); *Rebels and Federal Officers*, Gallipolis Journal (February 21, 1867), p 2, col 1 (criticizing President Johnson's alternate Fourteenth Amendment proposal, which lacked an equivalent to Section 3, and noting that "Reconstruction upon this basis would render Jefferson Davis eligible to the Presidency of the United States").

After ratification, newspapers around the country raised the concern that amnesty proposals debated at the time might render Jefferson Davis eligible for the presidency. *See* Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit J Am Legal Stud (forthcoming 2024), pp 7–10 (collecting sources). The idea that amnesty could make Davis eligible for the presidency was expressed by both amnesty *opponents*, who viewed this specter with horror, *see* Terre Haute Weekly Express (April 19, 1871), p 4, col 1 (warning that if amnesty were granted, "JEFF DAVIS would be elligible [sic] to the Presidency"); *Columbus Letter: An Unexpected Opposition*, Cincinnati Commercial (January 9, 1871), p 3, col 3 (questioning whether nation should "make Jeff. Davis and John C. Breckinridge eligible to the Presidency of the United States"), and amnesty

supporters, who welcomed Davis's return to presidential eligibility, *see The Administration, Congress and the Southern States—The New Reconstruction Bill*, NY Herald (March 29, 1871), p 6 (proposing "such an amnesty as will make even Jeff Davis eligible again to the Presidency").[15]

In 1872, after a broad amnesty bill finally passed, the Chicago Tribune noted that the act made many ex-Confederates "as eligible to the Presidency . . . as General Logan or General Butler." *The Philadelphia Platform*, Chicago Tribune (June 8, 1872), p 4. Similarly, in 1876, the central debate over a (failed) universal amnesty bill concerned whether it would, or would not, render Davis eligible for the presidency. *See Insurrection, Disqualification, and the Presidency*, p 9 (citing multiple newspaper reports and editorials describing the debate as whether amnesty bill should extend so far as to make Davis eligible for the presidency).

If Davis were already eligible for the presidency because the presidency was *not* an "office . . . under the United States" under Section 3, then these debates would have been pointless.

D. The Spirit And Purpose Of Section 3 Reveals An Intent To Include The Presidency As An "Office . . . Under The United States."

Section 3's purpose is to protect the republic from those who, having sworn to support its Constitution, turned against it. *See* Cong Globe, 39th Cong, 1st Sess (1866), p 2918 (Sen. Willey) (Section 3 is "not . . . penal in its character, it is precautionary. It looks not to the past, but it has reference, as I understand it, wholly to the future. It is a measure of self-defense."); *Powell*, 27 F Cas at 605 ("[T]hose who had been once trusted to support the power of the United States, and proved false to the trust reposed, ought not, as a class, to be entrusted with power again until congress saw fit to relieve them from disability.").

Given this broad purpose, it is absurd to suggest that insurrectionists are considered so

[15] Reproduced in *Northern View*, Fairfield Herald (April 12, 1871), p 1.

dangerous to the republic that they must be excluded from minor offices, such as county commissioner, *White*, pp 16–17; county sheriff, *Powell*, 27 F Cas at 605; *Worthy*, 63 NC at 201–103; district solicitor, *In re Tate*, 63 NC 308, 308 (1869); or even as an *elector* for the president, *see* US Const, Am XIV, § 3—yet are for some reason still eligible for the nation's most powerful office. Nothing in the amendment's text or history suggests that the Framers and the ratifying public acted with such bizarre effect. *See* Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm & Mary Bill of Rights J 153, 163 (2021) ("[I]nstead of questioning whether the drafters intended to include the President, it is proper to question whether the public would have thought the President was immune from this provision.").

Indeed, such a bizarre interpretation would contradict a broader constitutional design. Elsewhere, throughout the Constitution, presidential qualifications are the *most* stringent, whether for age (25 for House; 30 for Senate; 35 for president), United States residency ("when elected" for House and Senate; fourteen years for president), or citizenship (seven years for House; nine years for Senate; from birth for president). *Compare* US Const, art I, § 2, cl 1 *with id* § 2, cl 3 *and id* § 1, cl 5. Reading the presidency out of section 3 would lead to the incongruous result of rendering the qualifications for president far *less* stringent than those of minor local, state, or federal officials.[16]

Finally, the fact that Section 3 specifically enumerates various barred positions (including presidential electors) that are *not* offices under the United States does not indicate that the presidency is not covered—rather, it confirms that he is. As noted above, the Constitution refers to the presidency as an "office" over two dozen times. So, too, Article III refers to "Judges, both

[16] For more on why the presidency is a barred office under Section 3, *see Insurrection, Disqualification, and the Presidency*, pp 6–13, 22–27; *The Sweep and Force of Section Three*, pp 104–112.

of the supreme and inferior Courts" as holding "Office." US Const, art III, § 1. Thus, the presidency—and federal judgeships—are included by default in the phrase "office . . . under the United States."

In contrast, the Constitution does *not* refer to members of Congress as holding "office," and its only reference to congressional "officers" are those chosen to hold office *within* the legislative body, such as Speaker. *See, e g,* US Const, art I, § 2, cl 5 ("The House of Representatives shall chuse [sic] their Speaker and other Officers"). And the Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office," which would be self-contradictory if the position of Representative or Senator were itself an "Office under the United States." *Id* § 6, cl 2. Thus, members of Congress—unlike the president—do not hold "office under the United States." *See* Reed Amar & David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan L Rev 113, 136 (1995) (explaining why Senators and Representatives are not "officers of the United States"). The same is true for electors—they *cannot* hold federal office. *See* US Const, art II, § 1, cl 2 ("[N]o . . . Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector . . . .").

Thus, it was *specifically necessary* to enumerate members of Congress and presidential electors in Section 3's barred-positions list precisely because they do *not* hold "Office under the United States." But since the presidency—and federal judgeships—*are* constitutional "offices," there was no need to enumerate them separately—they are covered by the phrase "office . . . under the United States."

V. THE PRESIDENT OF THE UNITED STATES IS A COVERED "OFFICER OF THE UNITED STATES" UNDER SECTION 3.

A. The Plain Meaning Of "Officer Of The United States" Includes The President.

The simplest meaning of "officer" is one who holds an office. *See* Bailey, *An Universal*

Etymological English Dictionary (20th ed, 1763) ("[O]ne who is in an Office."); *see also United States v Maurice*, 26 F Cas 1211, 1214 (CCD Va, 1823) ("An office is defined to be a public charge or employment, and he 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.") (quotation marks omitted). This plain meaning must be the starting point.

> The Constitution repeatedly designates the Presidency as an "Office," which surely suggests that its occupant is, by definition, an "officer." An interpretation of the Constitution in which the holder of an "office" is not an "officer" seems, at best, strained.

Motions Sys Corp v Bush, 437 F3d 1356, 1371–1372 (CA Fed, 2006) (*en banc*) (Gajarsa, J., concurring in part and concurring in the judgment) (citations omitted). Even today, this plain meaning is widely used by the Supreme Court and the executive branch alike. *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 United States"); *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*, 437 F3d at 1368 (cataloguing multiple presidential executive orders in which the president refers to himself as an "officer"); Office of Legal Counsel, U.S. Dep't of Justice, *A Sitting President's Amenability to Indictment and Criminal Prosecution* (October 16, 2000), pp 222, 226, 230, available at https://www.justice.gov/d9/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf (distinguishing "*other* civil officers" from the president) (emphasis added); Executive Order No. 11435 (January 21, 1968) (referring to actions "of the President or of any other officer of the United States").

The phrase is not a technical "term of art." *See* Mascott, *Who Are "Officers of the United States"?*, 70 Stan L Rev 443, 471 (2018) (explaining why the phrase is not an "indivisible term of art"). Rather, "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 US 570, 576; 128 S Ct 2783; 171 L Ed 2d 637 (2008) (quotation omitted); *Whitman v Nat'l Bank of Oxford*, 176 US 559, 563; 20 S Ct 477; 44 L Ed 587 (1900) ("The simplest and most obvious interpretation of a Constitution . . . is the most likely to be that meant by the people in its adoption."). Furthermore, technical legal terms of art are defined in law dictionaries. *See Carpenter v United States*, 585 US ___; 138 S Ct 2206, 2238; 201 L Ed 2d 507 (2018) (Thomas, J., dissenting) (a constitutional term "was probably not a term of art, as it does not appear in legal dictionaries from the era"). No contemporaneous law dictionary provided a technical definition for "officer of the United States."

The constitutional text, drafting history, and Founding-era debates all demonstrate that "Officers of the United States' is a descriptive phrase indicating that the officers are federal, and not state or private, actors." *Who Are "Officers of the United States"?*, pp 471–483; *cf* Cong Globe, 39th Cong, 1st Sess (1866), p 3939 (noting that "'officers of' and 'officers under' the United States are . . . 'indiscriminately used in the Constitution.'") (citation omitted).

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

In multiple lawsuits, Trump has argued that he was an "officer of the United States" under the federal officer removal statute. Under 28 USC 1442(a)(1), "any officer . . . of the United States" may remove a state court case to federal court if the action concerns "any act under color of such office." *Id*. While Trump's removal efforts have met with mixed success, the courts have agreed with him that the president is an officer of the United States. *See K&D LLC v Trump Old Post Office LLC*, 951 F3d 503, 505 (CA Fed, 2020) (affirming district court's denial of motion to remand); *New York v Trump*, ___ F Supp 3d ___ (SD NY, 2023) (agreeing with Trump that

president is an "officer of the United States" but remanding because acts at issue were not under color of office).

In New York, Trump argued that he *is* a former "officer of the United States." *See* Trump Memo in Opp to Mot to Remand, pp 2–9, available at https://bit.ly/TrumpRemandOpp. He correctly argued that the claim that the president is not an officer of the United States has "never been accepted by any court." *Id* at 2–3. He distinguished Appointments Clause cases such as *Free Enterprise Fund v Pub Co Accounting Oversight Bd*, 561 US 477; 130 S Ct 3138; 177 L Ed 2d 706 (2010), explaining the "Supreme Court was not deciding that meaning of 'officer of the United States' as used in every clause in the Constitution," but rather was only describing the meaning of "other officers of the United States" in that clause, and *United States v Mouat*, 124 US 303, 307; 8 S Ct 505; 31 L Ed 463 (1888), which held a naval paymaster's clerk was not an officer of the United States. Trump Opp, p 4.

The court agreed with Trump that the president *is* an "officer of the United States." *New York v Trump*, ___ F Supp 3d ___ (remanding on other grounds). This Court should reject Trump's opportunistic turnabout.

C. The Original Meaning Of "Officer Of The United States" Included The President.

By the 1860s—the relevant period for ascertaining the original public meaning of the Fourteenth Amendment—"officer of the United States" was widely understood to include the president. This 1860s-era usage defines the original public meaning of the Fourteenth Amendment. *See McDonald v City of Chicago*, 561 US 742, 813; 130 S Ct 3020; 177 L Ed 2d 894 (2010) ("the objective of this inquiry is to discern what 'ordinary citizens' *at the time of ratification* would have understood" the words to mean) (cleaned up); *Minnesota v Dickerson*, 508 US 366, 379; 113 S Ct 2130; 124 L Ed 2d 334 (1993) (Scalia, J., concurring) ("I take it to be a fundamental principle of

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

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, is, in plain language, an "officer of the United States." Presidents, members of Congress, Supreme Court justices, and the general public referred to the president this way. Thus, the original public understanding of Section 3 in the 1860s applied to an insurrectionist ex-president.

Long 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 (Joseph Gales ed, 1789), pp 487–488 (Rep. Boudinot); *cf* Federalist No. 69 (Hamilton) ("The President of the United States would be an officer elected by the people . . . ."). Chief Justice Branch wrote in 1837 while riding circuit 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 (CCD DC, 1837), *aff'd* 37 US 524; 9 L Ed 1181 (1838).

By the 1860s, this usage was firmly entrenched. *See Insurrection, Disqualification, and the Presidency*, pp 18–20. On the eve of the Civil War, President Buchanan called himself "the chief executive officer under the Constitution of the United States." *Id* at 18 (citation omitted). That usage was repeated with respect to President Lincoln. *See* 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 official proclamations that reorganized the governments of

former confederate states in 1865, President Andrew Johnson referred to himself as the "chief civil executive officer of the United States."[17]

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

Indeed, an insurrectionist ex-president was hardly inconceivable in 1866. Former President John Tyler (1841–1845) joined the Confederacy, although he died in 1862. If he had survived the war and sought public office, the idea that his disqualification would turn on whether he had happened to also serve as a *less powerful* covered official—as it happens, Tyler had also served in the House—bears no relation to any defensible understanding of Section 3.

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

Those charged with interpreting and applying the term "officer" in Section 3—often in the

[17] 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* (James D. Richardson ed, 1897), pp 3510–3514, 3516–3523, 3524–3529.

context of the phrase "officer of any State"—repeatedly interpreted it in a commonsense manner that does not distinguish elected from appointed office. Rather, they understood an "officer" (state or federal) as one who, by dint of office, must take an oath to support the Constitution. *See Worthy*, 63 NC at 204 ("The oath to support the Constitution is the test. The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress.").

Thus, an "officer" under Section 3 is one who is "required to take an oath to support the Constitution," not a "placeman" who is "simply required to take an oath to perform the particular duty required of him." *Id* at 202–203 (enumerating state officers who satisfy this test, including apex elected officials such as governor, as well as minor officials such as "Inspectors of flour, Tobacco, &c." and "Stray Valuers"); *see also Powell*, 27 F Cas at 605–606 (holding elected constable was an "officer in the state" because he held "executive office"); 12 US Op Att'y Gen Op, pp 141, 158 (defining covered officials as those "[h]olding the designated office, State or federal, accompanied by an official oath to support the Constitution of the United States"); *accord In re Exec Comm of 14th October, 1868*, 12 Fla 651, 651–652 (1868) (interpreting Section 3 as incorporated into Florida Constitution, and defining an "officer" simply as "a person commissioned or authorized to perform any public duty").

Just one month after sending the Fourteenth Amendment to the states for ratification, Congress explained its own interpretive methodology, rejecting constitutional distinctions between "officer of" and "office under" the United States. *See Insurrection, Disqualification, and the Presidency*, pp 24–26. As the report explained, "[i]t is irresistibly evident that no argument can be based on the different sense of the words 'of' and 'under.'" Cong Globe, 39th Cong, 1st Sess (1868), p 3939 (concluding that terms "of" and "under" the United States "are made by the

Constitution equivalent and interchangeable."). The committee dismissed efforts to distinguish these terms as "mere verbal criticism" and emphasized that "[n]o method of attaining the Constitution is more unsafe than this one of 'sticking' in sharp verbal criticism." *Id*.

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

Any reading of Section 3 that allows an insurrectionist president to return to power simply because he did not perform any prior public service mocks the protective purpose and parallel structure of Section 3. Structurally, for federal positions, Section 3 pairs covered officials with barred positions:

Covered officials	Barred positions
"members of Congress"	"Senator or Representative in Congress"
"officer of the United States"	"any office, civil or military, under the United States"

See The Sweep and Force of Section 3, pp 106–107. The simplest understanding is that—with the exception of presidential electors, who only appear in the "barred positions" list—these lists match. *See Insurrection, Disqualification, and the Presidency*, pp 22–27 (describing the "essential harmony" of the "office" and "officer" terms).

It strains credulity to suggest that the Framers of the Fourteenth Amendment relied on nonsensical textualism that would somehow seek to distinguish "member[] of Congress" from "Senator or Representative in Congress" because they used different words. The same logic applies to the table's second row: "officer of the United States" in the covered-officials clause corresponds to "any office, civil or military, under the United States" in the barred-positions clause.

Some commentators have developed elaborate schema to try to distinguish officers of "the Government of the United States," US Const, art I, § 8, which indisputably includes the president, from officers of "the United States," which they claim does not. *See* Barrett Tillman & Blackman,

Offices and Officers of the Constitution, Part I: An Introduction, 61 S Tex L Rev 309 (2021) (introducing a planned ten-part series of law review articles that is apparently necessary to understand and explain their taxonomy). This bizarre argument flies in the face of the plain meaning of the words used, their dictionary definitions, and hundreds of years of common usage by Congress, the president, and the Supreme Court, and the public generally. No evidence suggests that the Framers of the Fourteenth Amendment, or the ratifying public, understood the meaning of terms in the amendment to be constrained by byzantine technical taxonomies. *See The Sweep and Force of Section 3*, p 105 ("[A] reading that renders the document a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one . . . ."); *cf* Cong Globe, 39th Cong, 1st Sess (1866), p 1089 (Rep. Bingham) (asked to define "due process of law," replying "the courts have settled that long ago, and the gentleman can go and read their decisions").

Rather, the Framers understood the terms with their common meanings and for the intended purpose of protecting the republic. If "[t]he oath to support the Constitution is the test," *Worthy*, 63 NC at 204, then the president's oath—the only one explicitly specified in the Constitution itself—must qualify at least as much as those of "Inspectors of flour, Tobacco, &c." or "Stray Valuers." *See id* at 203.

The theory that a deputy assistant undersecretary, newly commissioned second lieutenant, or Inspector of Flour who engages in insurrection is forever excluded from public office unless and until Congress grants him amnesty, but a *president* is not,[18] is completely untethered from the amendment's purpose to protect the republic from oath-breaking insurrectionists.[19]

[18] Unless, of course, he previously served as Inspector of Flour.

[19] For more on why the president is a covered official under Section 3, *see Insurrection, Disqualification, and the Presidency*, pp 13–27; *The Sweep and Force of Section 3*, pp 104–112.

Finally, the fact that Section 3 specifically enumerates various covered officials who are not officers of the United States does not indicate that the president is not covered; rather, it confirms that he is. As discussed *supra*, members of Congress *cannot* hold "office under the United States." US Const, art I, § 6, cl 2. They are therefore not "officers of the United States."

Thus, it was *specifically* necessary to enumerate members of Congress in Section 3's covered-officials clause precisely because they are *not* officers of the United States. But since the president (and federal judges) *are* officers of the United States, there was no need to enumerate them separately.

F. The Presidential Oath Is An Oath To Support The Constitution.

The presidential oath to "preserve, protect and defend" the Constitution is an oath to "support" the Constitution under Section 3. *See* US Const, art II, § 1, cl 8. It is not materially distinct from the oath described in Article VI, cl 3. Article VI requires all state and federal legislators and "all executive and judicial Officers both of the United States and of the several States" to "be bound by Oath or affirmation to support this Constitution," but it does not provide the specific language to be used in swearing the oath. Instead, Article II prescribes the specific language to be used by the president in his oath to support the Constitution, while the Constitution leaves it to Congress and the states to provide oath language for all other officers. In enacting such language at the federal level, Congress has specifically recognized that the president indeed holds an office under the United States. *See* Act of July 2, 1862, ch 128, 12 Stat 502 ("[E]very person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military or naval departments of the public service, *excepting the President of the United States*, shall . . . take and subscribe the following oath or affirmation . . . ."). In other words, the presidential oath is simply a specific instantiation of the Article VI oath requirement.

Furthermore, the distinct wording ("preserve, protect and defend") of the presidential oath is not material. As a leading commentator explained:

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

Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* (8th ed, 1885).[20]

Indeed, the definition of "defend" includes "support," and vice versa. *See Webster's Dictionary* (1828) (defining "defend" to include "to support," and defining "support" to include "to defend"); Johnson, *A Dictionary of the English Language* (4th ed, 1773) (defining "[d]efend" as "[t]o stand in defence [sic] of; to protect; to support"). And Section 3 refers to "an" oath to support the Constitution, not a particular specifically worded oath.

In the 1860s, Congress twice revised Article VI oaths, using these verbs interchangeably. *See* Act of July 2, 1862, ch 128, 12 Stat 502 ("support and defend"); Act of August 6, 1861, ch 64, 12 Stat 326–327 ("support, protect, and defend"). Likewise, many states—mandated by Article VI to require officials to *support* the Constitution—then or now have specified an oath to "preserve, protect, and defend" the Constitution. *See, e g,* Ga Const 1868, art IV, § 1, cl 5 ("preserve, protect, and defend"); SC Const 1895, art III, § 26 ("preserve, protect, and defend"). This long history of interchangeable usage demonstrates the verb phrases' equivalence.

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

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

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

Memphis Public Ledger (December 2, 1870), p 3, col 4. So too here.

CONCLUSION AND RELIEF SOUGHT

Michigan state law allows this challenge and the Michigan Secretary of State's placement of candidates on the state's presidential primary ballot is subject to judicial review and must be consistent with the U.S. Constitution.

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

1. Grant their Emergency Application for Leave to Appeal;

2. Set the case for expedited briefing and oral argument;

3. Render a decision by December 25, 2023;

4. Reverse the Court of Appeals on the issue of Plaintiffs-Appellants' right to have only eligible candidates on the presidential primary ballot;

5. Reverse the Court of Claims on the issue of the political question doctrine barring a judicial role in deciding this case; and

6. Remand to the Court of Claims to promptly 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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Date: December 18, 2023

Certificate of Compliance

I certify that this brief complies with the word volume limitation set forth in MCR 7.212(B)(1) and with the format requirements of MCR 7.212(B)(5). I am relying on the word count of the word-processing system used to produce this document. The word count is 15,802.

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Proof of Service

The undersigned certifies that on December 18, 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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