RECEIVED by MSC 12/22/2023 3:50:25 PM

IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Letica, Anica, Riordan, Michael J., and Cameron, Thomas C.

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

Plaintiffs/Appellants,

v

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

Defendant/Appellee,

-and-

DONALD J. TRUMP,

Intervening Appellee.

SUPREME COURT DOCKET NO. 166470

COURT OF APPEALS DOCKET NO. 368628

COURT OF CLAIMS
CASE NO. 23-000137-MZ
HON. JAMES ROBERT REDFORD

Intervening Appellee Donald J. Trump's Answer to Plaintiffs-Appellants' Application for Leave to Appeal

---

Mark Brewer (P35661)
Rowan E. Conybeare (P86571)
GOODMAN ACKER, P.C.
Attorneys for Plaintiffs/Appellants
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant/Appellee Jocelyn Benson
P.O. Box 30736
Lansing, MI 48909
(517) 335-7659
meingasth@michigan.gov

Jonathan B. Koch (P80408)
Brendan P. Karl (P86612)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Intervening Appellee Donald J. Trump
100 Monroe Center NW
Grand Rapids, MI 49503
(616) 774-8000
jkoch@shrr.com
bkarl@shrr.com

Michael Columbo, *admitted pro hac vice*
Mark P. Meuser, *admitted pro hac vice*
DHILLON LAW GROUP, INC.
Attorneys for Intervening Appellee Donald J. Trump
177 Post St., Suite 700
San Francisco, CA 94108
(415) 433-1700

---

grille@michigan.gov

mcolumbo@dhillonlaw.com
mmeuser@dhillonlaw.com

Gary L. Lawkowski, *pro hac vice forthcoming*
DHILLON LAW GROUP, INC.
Attorneys for Intervening Appellee Donald J. Trump
2121 Eisenhower Avenue, Suite 608
Alexandria, VA 22314
(415) 433-1700
glawkowski@dhillonlaw.com

Nicholas J. Nelson, *pro hac vice forthcoming*
CROSS CASTLE PLLC
Attorneys for Intervening Appellee Donald J. Trump
333 Washington Ave. N., Suite 300-9078
Minneapolis, MN 55401
T 612.429.8100
F 612.234.4766
nicholas.nelson@crosscastle.com

RECEIVED by MSC 12/22/2023 3:50:25 PM

Table of Contents

Index of Authorities .... iii-viii

Counterstatement of Jurisdiction ix

Counterstatement of Questions Presented .... x-xii

Introduction 1

Statement of Facts & Procedural History 2

Standard of Review 3

Argument I 3

A. Michigan law does not authorize excluding Presidential candidates from a primary ballot based on eligibility concerns 4

1. Michigan officials aren't authorized to test presidential candidates' eligibility 4

B. Plaintiffs' Newly-Minted "State Actor" Argument is Unpreserved, Unmeritorious, and Unworthy of this Court's Review 7

C. The Colorado Supreme Court's recent decision holding that President Trump could be excluded from the Colorado presidential primary ballot does not help Plaintiffs' case. To the contrary, it proves that the Michigan Legislature didn't give the Secretary (or anyone else) authority to determine presidential candidate qualifications 10

Argument II 14

A. Political questions are non-justiciable 14

B. Courts have consistently held that disputes about presidential candidates' qualifications are political questions 15

C. This case bears multiple hallmarks of a political question 18

1. The Constitution commits Presidential qualification disputes elsewhere 18

2. Conflicting state-court decisions on Presidential candidate qualifications would create practical difficulties and significant potential for chaos 19

3. The United States Senate already decided the specific political question at issue 20

RECEIVED by MSC 12/22/2023 3:50:25 PM

Argument III 23

A. Section Three requires enforcement mechanisms from Congress, not the States 23

1. A long and distinguished history holds that Section Three is enforceable only as prescribed by Congress 23

2. *Griffin* is good authority 29

3. Post-Civil-War practice does not suggest that Section Three was self-executing 30

Argument IV 31

Argument V 33

A. The Constitutional phrase "Officers of the United States" does not include the President 33

1. Constitutional references to "officers of the United States" uniformly exclude the President 33

2. This meaning of the Constitutional term "officers of the United States" has been recognized throughout
U.S. legal history, including in the Civil War era 36

B. Presidents don't take oaths to "support" the Constitution, which is a prerequisite to Section Three disqualification..39

C. The Post-Civil-War Era presented no need to address this question. So the Framers of the Fourteenth Amendment left it to future generations 41

Argument VI 42

A. Section Three's threshold for an insurrection or rebellion wasn't met on January 6th 42

B. President Trump didn't "engage in" the January 6 riot for purposes of Section Three 44

1. Engaging in an Insurrection does not include pure speech 44

2. President Trump's alleged speech didn't violate Section Three..45

Argument VII..48

Conclusion 50

Certificate of Compliance Regarding Word Count..51

RECEIVED by MSC 12/22/2023 3:50:25 PM

Index of Authorities

Cases

Alabama v Buckley, 1875 WL 1358 (Ala. Dec. 1, 1875) 26

Anderson v Griswold, (Colo 2023) .... *passim*

Ashcroft v Free Speech Coalition, 535 US 234 (2002) 46

Baker v Carr, 369 US 186 (1962) 15

Barrow v Pritchard, 235 Mich App 478; 597 NW2d 853 (1999) 14

Bauserman v Unemployment Ins. Agency, 509 Mich 673; 983 NW2d 855 (2022) 7

Berg v Obama, 586 F.3d 234 (3d Cir. 2009) 15, 23

Booth Newspapers, Inc v Univ of Mich Bd of Regents, 444 Mich 211; 507 NW2d 422 (1993) 8

Brandenburg v Ohio, 395 US 444 (1969) 46

Browder v Int'l Fidelity Ins Co, 413 Mich 603; 321 NW2d 668 (1982) 5

Bullock v Carter, 405 US 134 (1972) 17

Bush v Gore, 531 US 98 (2000) 20

Cale v City of Covington, Va., 586 F.2d 311 (4th Cir. 1978) 28

Castro v Scanlan, ___ F Supp 3d ___ (DNH, Case No. 23-cv-416-JL Oct. 27, 2023), available at 2-23 WL 7110390, aff'd on different grounds, ___ F4th ___ (CA 1, 2023), available at 2023 WL 8078010 16

Coffman v State Bd of Exam in Optometry, 331 Mich 582; 50 NW2d 322 (1951) 4

Drake v Obama, 664 F.3d 774 (9th Cir. 2011) 49

Elliot v Cruz, 137 A3d 646 (Commonwealth Ct of Penn, 2016) 17

Eu v San Francisco City Democratic Cent. Comm., 489 US 214 (1989) 46

Ex parte Va., 100 US 339 (1879) 24

Free Enterprise Fund v PCAOB, 561 US 477 (2010) 34, 38

GCSSWU v Genesee County, 199 Mich App 717; 502 NW2d 701 (1993) 34

Greene v Secretary of State, 52 F4th 907 (CA 11, 2022) 32

RECEIVED by MSC 12/22/2023 3:50:25 PM

Grinols v Electoral College, 2013 WL 2294885 (E.D. Cal. May 23, 2013) 15

Hansen v Finchem, 2022 WL 1468157 (Ariz. May 9, 2022) 19, 24

Hassan v Colo., 495 F.App'x 947 (10th Cir. 2012) 17

Helmkamp v Livonia City Council, 160 Mich App 442; 408 NW2d 470 (1987) 49

Hess v Ind., 414 US 105 (1973) 47

Hollander v McCain, 566 F.Supp.2d 63 (D.N.H. 2008) 49

In re Griffin, 11 F. Cas. 7 (C.C.D. Va. 1869) .... *passim*

In re Request for Advisory Opinion on Constitutionality of 1986 PA 281, 430 Mich 93; 422 NW2d 186 (1988) 13

Jordan v Reed, 2012 WL 4739216 (Wash. Super. Ct. Aug. 29, 2012) 16

K&D LLC v Trump Old Post Office LLC, 951 F3d 503 (DC Cir 2020) 36

Katzenbach v Morgan, 384 US 641 (1966) 24

Kerchner v Obama, 669 F.Supp. 2d 477 (D.N.J. 2009) 16, 49

Keyes v Bowen, 189 Cal. App. 4th 647 (Cal. Ct. App. 2010) 20

Lansing Sch Educ Ass'n v Lansing Bd of Educ, 487 Mich 349; 792 NW2d 686 (2010) 49

Layzell v JH Somers Coal Co, 156 Mich 268; 120 NW 996 (1909) 13

Liberty Legal Found v Nat'l Democratic of USA, Inc, 868 F Supp 2d 734 (WD Tenn 2012) 32, 34

Lincoln v General Motos Corp, 461 Mich 483; 607 NW2d 73 (2000) 4

Lindsay v Bowen, 750 F.3d 1061 (9th Cir. 2014) 17

Makowski v Governor, 495 Mich 465; 852 NW2d 61 (2014) 14

McCutcheon v Federal Election Commission, 572 US 185 (2014) 46

Mich Farm Bureau v DEQ, 292 Mich App 106; 807 NW2d 866 (2011) 4

Munro v Socialist Workers Party, 479 US 189 (1986) 17

New Mexico v Griffin, 2022 WL 4295619 (D.Ct. N.M. Sept. 6, 2022) 28-29

Nixon v United States, 506 US 224 (1993) 22

Nwanguma v Trump, 903 F.3d 604 (6th Cir. 2018) 46

RECEIVED by MSC 12/22/2023 3:50:25 PM

Ownbey v Morgan, 256 US 94 (1921) 19

People v Francisco, 474 Mich 82; 711 NW2d 44 (2003) 5, 46, 50

People v Vaughn, 491 Mich 642; 821 NW2d 288 (2012) 4

Privett v Bickford, 26 Kan. 52 (1881) 9, 32

Protect MI Constitution v Secretary of State, 297 Mich App 553; 824 NW2d 299 (2012) 49

Reynolds v Robert Hasbany MD PLLC, 323 Mich App 426; 917 NW2d 715 (2018) 4

Robinson v Bowen, 567 F. Supp. 2d 1144 (N.D. Cal. 2008) 16

Rosberg v Johnson, No. 8:22CV384, 2023 WL 3600895 (D. Neb. May 23, 2023) 23

Rucho v Common Cause, 139 S.Ct. 2484 (2019) 14

Schaefer v Townsend, 215 F3d 1031 (CA 9 2000) 32

Secor v Oklahoma, No. 16-CV-85-JED-PJC, 2016 WL 6156316 (N.D. OK Oct. 21, 2016) 23

Seila Law LLC v Consumer Financial Protection Bureau, 140 S.Ct. 991 (2020) 34

Shinkle v Shinkle, 255 Mich App 221; 663 NW2d 481 (2003) 4

Sibley v Obama, 866 F.Supp.2d 17 (D.D.C. 2012) 49

Smith v Moore, 90 Ind. 294 (1883) 9, 32

Snyder v Phelps, 562 US 443 (2011) 46

Stand Up for Democracy v Secretary of State, 297 Mich App 45; 824 NW2d 220 (2012) 4

State ex rel. Sandlin v Watkins, 211 La. Ann. 631 (1869) 26

Strunk v N.Y. State Bd. of Elections, 35 Misc. 3d 1208(A) (N.Y. Sup. Ct. 2012) 15

Sublett v Bedwell, 47 Miss. 266 (1872) 9, 32

Taitz v Democrat Party of Miss., 2015 WL 11017373 (S.D. Miss. Mar. 31, 2015) 16

Therrian v Gen Laboratories, Inc, 372 Mich 487; 127 NW2d 319 (1964) 8

UAW v CMU Trustees, 295 Mich App 486; 815 NW2d 132 (2012) 48

United States v Greathouse, 26 F. Cas. 18 (C.C.N.D. Cal. 1863) 42

United States v Mouat, 124 US 303 (1888) 37-38

RECEIVED by MSC 12/22/2023 3:50:25 PM

United States v Powell, 27 F.Cas. 605 (D.N.C. 1871) 27

United States Fidelity Ins. & Guaranty Co. v Mich Catastrophic Claims Ass'n (On Rehearing), 484 Mich 1; 795 NW2d 101 (2009) 40

United States ex rel. Stokes v Kendall, 26 F. Cas. 702, 753 (C.C.D.D.C. 1837) 39

US Term Limits, Inc v Thornton, 514 US 779 (1995) 32

Webster v Fall, 266 US 507 (1924) 17

Rules and Statutes

MCL 168.558(1) 6

MCL 168.558(1)-(2) 3, 6

MCL 168.558(4) 6

MCL 168.614a 7, 12

MCL 168.614a(1) 5

MCL 168.614a(2) 5

MCL 168.615a 7

MCL 168.615a(1) 5

MCL 168.615a(2) 5

MCR 7.212(B)(5) 51

MCR 7.305 51

Constitutional Provisions

US Const, Amend XIV, § 3 ....30, 31

US Const, Amend XIV, § 5 23

US Const, art I, § 2 32

US Const, art III, § 3 41

RECEIVED by MSC 12/22/2023 3:50:25 PM

Federal Statutes

12 Stat 589, 627 (1862) 42

15 Stat 73 26

15 Stat 74 (1868) 26

16 Stat 114 (1870) 26

17 Stat 142 (1872) 27

49 Stat 132 (1898) 27

3 USC 15 16

3 USC 15(d)(B)(ii) 18

18 USC 2383 42

28 USC 1442 36

Other Authorities

2 *Records of the Federal Convention of 1787*, 545, 552, 600 (Farrand ed., 1911) 35

6 C. Cannon, Cannon's Precedents of the House of Representatives §§ 56-59, (1935) 27

16 Am Jur 2d, Constitutional Law § 76 40

A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union (Philadelphia, G.W. Childs, 12th ed., rev. and enl. 1868) 42

Applicability of 3 C.F.R. Pt. 100 to the President and Vice President 37

Blackman & Tillman, *Sweeping and Forcing the President into Section 3,* 28 Tex. Rev. L. & Ol. *(*forthcoming 2024), at 126-27 & nn.344-350 ....25, 33, 37

Black's Law Dictionary (11th ed. 2019) 43

Closing of Government Offices in Memory of Former President Eisenhower 37

Cong Globe, 37th Cong, 2d Session (1862) 41

Cong Globe, 41st Cong, 2d Session (1870) 41, 44

Congressional Record Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap, at 145 (1876) 37

RECEIVED by MSC 12/22/2023 3:50:25 PM

David A. McKnight, *The Electoral System of the United States* at 346 (1878) 37

George Washington Paschal, *The Constitution of the United States Defined and Carefully Annotated* xxxviii (W.H. & O.H. Morrison, Law Booksellers 1868) 40

H.R. 1405, 117th Cong, 1st Session 28

Hinds' Precedents of the House of Representatives of the United States, 477-478 (1907) 44

Joseph Story *Commentaries on the Constitution of the United States* (Lonang Inst. 2005) § 791 36

Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, 15(1) N.Y.U. J.L. & LIBERTY 1 (2021) 33

Officers of the United States Within the Meaning of the Appointments Clause 38

Reading Law 40

Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870,* 49 TENN B.J. 20, at 24-26 (2013) 27

167 Cong Rec S129 21

167 Cong Rec S733 ....21, 22

167 Cong Rec H165 21

167 Cong. Rec. S609 (daily ed. Feb. 9, 2021) 22

RECEIVED by MSC 12/22/2023 3:50:25 PM

<u>**Counterstatement of Jurisdiction**</u>

Intervenor/Appellee Donald J. Trump does not dispute that this Court has jurisdiction to consider Plaintiff-Appellants' application for leave to appeal. That being said, this Court should deny Plaintiffs' application. Further, there is no need for oral argument on Plaintiffs' application. However, if this Court decides to hold oral argument, President Trump reserves his right to present oral argument through counsel.

RECEIVED by MSC 12/22/2023 3:50:25 PM

Counterstatement of Questions Presented

I.

The Michigan Legislature has specified that Presidential primary ballots must include the names of (i) "individuals generally advocated" as candidates "by the national news media" and (ii) people who "the state chairperson of each political party … consider[s] to be potential presidential candidates," and (iii) individuals who submit petitions signed by the requisite number of voters. In this case, Plaintiffs asked the courts to force the Secretary of State to engage in an additional, extra-statutory investigation of whether Presidential primary candidates are qualified to hold office and to disregard these statutory instructions for candidates the Secretary finds to be unqualified. Did the lower courts correctly decline to do so?

Intervening Appellee's Answer:	"Yes."
Defendant-Appellee's Answer:	"Yes."
Plaintiffs-Appellants' Answer:	"No."
The Trial Court's Answer:	"Yes."
The Court of Appeals' Answer:	"Yes."

II.

The great weight of judicial authority nationwide recognizes that Presidential qualification disputes are non-justiciable political questions, entrusted by the Constitution to the legislative and political processes. Was the Court of Claims correct to join that nationwide consensus?

Intervening Appellee's Answer:	"Yes."
Defendant-Appellee's Answer:	"Yes."
Plaintiffs-Appellants' Answer:	"No."
The Trial Court's Answer:	"Yes."

The Court of Appeals did not answer this question.

SHRR\6011910.v1

RECEIVED by MSC 12/22/2023 3:50:25 PM

III.

Is Section Three of the Fourteenth Amendment self-executing?

Intervening Appellee's Answer: "No."

Defendant-Appellee did not answer this question.

Plaintiffs-Appellants' Answer: "Yes."

The Trial Court did not answer this question.

The Court of Appeals did not answer this question.

IV.

Are Plaintiffs-Appellants' claims unripe?

Intervening Appellee's Answer: "Yes."

Defendant-Appellee's Answer: "Yes."

Plaintiffs-Appellants' Answer: "No."

The Trial Court's Answer: "Yes."

The Court of Appeals held that Plaintiffs' claims are unripe with respect to the general election ballot, but ripe with respect to the primary election ballot.

V.

Is the President an "officer of the United States" under Section Three of the Fourteenth Amendment?

Intervening Appellee's Answer: "Yes."

Defendant-Appellee did not answer this question.

Plaintiffs-Appellants' Answer: "No."

The trial court did not answer this question.

The Court of Appeals did not answer this question.

RECEIVED by MSC 12/22/2023 3:50:25 PM

VI.

Did President Trump engage in insurrection?

Intervening Appellee's Answer: "No."

Defendant-Appellee did not answer this question.

Plaintiffs-Appellants' Answer: "Yes."

The Trial Court did not answer this question.

The Court of Appeals did not answer this question.

VII.

Do Plaintiffs lack standing to raise claims for declaratory relief?

Intervening Appellee's Answer: "Yes."

Defendant-Appellee did not answer this question.

Plaintiffs-Appellants' Answer: "No."

The Trial Court did not answer this question.

The Court of Appeals did not answer this question.

RECEIVED by MSC 12/22/2023 3:50:25 PM

RECEIVED by MSC 12/22/2023 3:50:25 PM

Introduction

Plaintiffs-Appellants want the Michigan courts and Secretary of State Jocelyn Benson to wade into Presidential politics by declaring Donald J. Trump ineligible for the Presidency and removing him from the Michigan primary ballot. Secretary Benson, the Court of Claims, and the Court of Appeals all correctly recognized that Michigan law doesn't authorize her to do this. On top of that, the Court of Claims correctly added that Presidential qualifications are nonjusticiable political questions. These conclusions match those of courts in many other states that have already decided similar challenges to the qualifications of President Trump and previous presidential candidates. Indeed, the only court to rule to the contrary—the Colorado Supreme Court's split decision in *Anderson v Griswold*—based its decision on a statutory framework that it expressly distinguished from Michigan's.

Now, with just days left before ballot preparation must begin, Plaintiffs ask this Court to upend the rulings below and order an emergency trial in the Court of Claims. That's not appropriate. This Court should deny review, for several reasons.

First, the Court of Appeals' ruling applies the plain language of Michigan's election statutes and gets it exactly right. The statutes tell the Secretary (and election commissions) precisely what criteria to apply in determining which Presidential candidates shall appear on Michigan ballots—and they don't allow any inquiry into a candidate's eligibility to be President. Therefore, Secretary Benson and the courts below correctly concluded that Michigan law doesn't allow the Secretary to do what Plaintiffs want her to do. Plaintiffs don't even appear to contest this. Instead, their Application appears to argue, vaguely, that Michigan's election statutes violate the federal Constitution. The Court of Appeals didn't address this argument, and it's obviously unmeritorious. There is no reason for this Court to be the first one to consider it.

Second, the Court of Claims correctly held that disputes over a presidential candidate's qualifications are non-justiciable political questions. A long line of decisions from across the country recognizes that deciding who can be President is committed by the Constitution to the electoral process and Congress, not the courts or state agencies. The Court of Claims correctly joined that consensus.

If that weren't enough, there are multiple alternative reasons why the judgment below was correct. Long-settled law establishes that Section Three of the Fourteenth Amendment can be enforced only as prescribed by Congress, not under state law as Plaintiffs seeks to do. Plaintiffs' claims are unripe and this lawsuit premature. Section Three doesn't apply to the Office of President (or to former Presidents) at all. President Trump didn't violate Section Three. And in any event, Plaintiffs lack standing to bring their claim for declaratory relief.

For multiple reasons, therefore, this Court should affirm.

Statement of Facts & Procedural History

Plaintiffs filed this lawsuit in the Court of Claims, alleging that President Trump is ineligible to be President under Section Three of the Fourteenth Amendment, and seeking to prevent him from appearing on Michigan's 2024 presidential primary and general election ballots.[1] Similar ballot-access lawsuits have been filed in nearly every State in the Union. To date, only one has succeeded—and the deeply divided Colorado Supreme Court relied on unique aspects of Colorado law and specifically distinguished Michigan law.[2]

Here, the Secretary explained that the Michigan Election Law doesn't authorize her "to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected," and that she "does not have an affirmative, legal

---

[1] See Plaintiffs' Complaint (Appellants' App'x at 43).
[2] *Anderson v Griswold* (Colo 2023) (Appellee's App'x at 063a).

RECEIVED by MSC 12/22/2023 3:50:25 PM

duty or the authority to decide whether the Fourteenth Amendment renders Mr. Trump eligible or ineligible to be placed on the ballot."[3] The Court of Claims agreed, holding that Michigan election statutes don't authorize the Secretary, or county election commissions, to investigate or determine the qualification of presidential primary candidates.[4] The Court of Claims added that, in any event, disputes over presidential qualifications are non-justiciable political questions.[5]

Plaintiffs appealed, and the Court of Appeals granted President Trump leave to intervene.[6] After this Court denied Plaintiffs' bypass application,[7] the Court of Appeals affirmed. It noted that Michigan election statutes require the Secretary to place on the presidential primary ballot the names of people who are either (i) presented as presidential candidates by the national news media, or (ii) identified as candidates by a state party chairperson.[8] These are the exclusive statutory criteria for appearing on the primary ballot: as the Court of Appeals noted, "nothing in the statutory framework … confers any authority on the Secretary of State to make eligibility determinations" for the Presidency, "or to refuse to place a candidate on [the] ballot based on an eligibility determination."[9] The panel noted that the Legislature has expressly required candidates for many other offices to affirming that they are eligible for the office sought, but has expressly exempted presidential candidates from this requirement.[10] And, since the Legislature didn't authorize the Secretary to make determinations about the qualifications of presidential candidates, the Court of Appeals affirmed the Court of Claims' dismissal of Plaintiffs' suit.[11]

---

[3] Secretary's Memorandum of Law (LaBrant), pg. 4-5, 7 (Appellee's App'x at 010a-011a, 013a).
[4] *LaBrant* COC Opinion at 6-9 (Appellants' App'x at 6-9).
[5] *Id.* at (App. 10-20.)
[6] Court of Appeals Intervention Order (Appellee's App'x at 051a).
[7] MSC Bypass ALA Denial Order (Appellee's App'x at 053a).
[8] Court of Appeals' Opinion at 15 (Appellants' App'x at 36).
[9] *Id.* at 19 (Appellants' App'x at 40).
[10] *Id.*, quoting MCL 168.558(1), (2).
[11] *Id.* at 21 (Appellants' App'x at 42).

RECEIVED by MSC 12/22/2023 3:50:25 PM

RECEIVED by MSC 12/22/2023 3:50:25 PM

Standard of Review

This Court reviews legal questions de novo.[12] That includes questions of statutory and constitutional interpretation, subject-matter jurisdiction, and justiciability.[13]

Argument I

The Secretary lacks authority to determine eligibility of Presidential candidates or exclude them from the ballot because of a qualifications dispute.

A. Michigan law doesn't authorize excluding Presidential candidates from a primary ballot based on eligibility concerns.

The foremost reason for denying leave to appeal is that the Court of Appeals' opinion was straightforward and correct. Michigan law specifically instructs the Secretary how to determine which names should appear on a Presidential primary ballot, and those instructions neither require nor permit any inquiry into a candidate's eligibility.

1. Michigan officials aren't authorized to test presidential candidates' eligibility.

It's well established that the Secretary and county election commissions have only the powers given to them by the Legislature.[14] That is, Michigan "[a]dministrative boards, commissions, and officers have no common-law powers"; rather, "[t]heir powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication."[15] So if the Legislature hasn't authorized the Secretary or the Commission to determine whether a presidential candidate is qualified to hold office, they cannot do so.

[12] *Shinkle v Shinkle*, 255 Mich App 221, 224; 663 NW2d 481 (2003).
[13] *Lincoln v General Motos Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000); *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012); *Reynolds v Robert Hasbany MD PLLC*, 323 Mich App 426, 431; 917 NW2d 715 (2018); *Stand Up for Democracy v Secretary of State*, 297 Mich App 45, 63; 824 NW2d 220 (2012), rev'd on other grounds, 492 Mich 488; 822 NW2d 159 (2012).
[14] *Mich Farm Bureau v DEQ,* 292 Mich App 106, 128-130; 807 NW2d 866 (2011) (cites omitted).
[15] *Coffman v State Bd of Exam in Optometry*, 331 Mich 582, 590; 50 NW2d 322 (1951).

The Legislature has prescribed specific, limited procedures for the Secretary to determine which names appear on a presidential primary ballot. First, by the second Friday in November of the year before a presidential election, the Secretary "shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates."[16] Then, by the following Tuesday, the "state chairperson of each political party" that's holding a primary "shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party."[17] Finally, "the secretary of state shall cause the name of a presidential candidate" on either of these lists "to be printed on the appropriate presidential primary ballot."[18]

For a candidate who appears on one or both of these lists, the law provides only one situation in which his or her name may be excluded from the ballot: if a candidate "files an affidavit with the secretary of state specifically stating that '(candidate's name) is not a presidential candidate,'" then "the secretary of state shall not have that presidential candidate's name printed on a presidential primary ballot."[19] A candidate who does *not* appear on one of these lists must be added to the ballot if, by the second Friday in December, he or she submits a nominating petition with the requisite number of voter signatures (determined by a statutory formula).[20]

That is all that the statute provides. Michigan law requires that the Secretary "shall" place names on the ballot according to these criteria. The use of "shall" means that placing those names on the primary ballot is "mandatory."[21] It doesn't authorize any other investigation or the use of

[16] MCL 168.614a(1).
[17] MCL 168.614a(2).
[18] MCL 168.615a(1).
[19] *Id.*
[20] *Id.* Sec. 615a(2).
[21] *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2003); *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).

RECEIVED by MSC 12/22/2023 3:50:25 PM

any other criterion. No plausible reading of the statute gives the Secretary any discretion to exclude any of the listed candidates because of a qualification dispute (or for any other reason except the filing of an affidavit of non-candidacy). So the Court of Appeals correctly held that the Secretary has no authority to do so.

This conclusion is reinforced by the fact that, when Michigan election law does authorize the Secretary to strike candidates' names based on ineligibility, it specifically exempts presidential candidates. As the Court of Appeals observed, "when the Legislature wishes to require that election officers refuse to place ineligible candidates on the ballot, it has."[22] Michigan's election laws require most candidates for office to file an "affidavit of identity" containing, among other things, "a statement that the candidate meets the constitutional and statutory qualifications for the office sought."[23] The Legislature also has instructed that the Secretary "shall not certify to the board of election commissioners the name of a candidate" who doesn't file an affidavit, or "who executes an affidavit of identity that contains a false statement."[24] Thus, when this statute applies, it requires the Secretary to determine whether a candidate is eligible for the office he or she is seeking.

But the Legislature has ***specifically exempted*** presidential candidates from these provisions. As the statute instructs, "[t]he affidavit of identity filing requirement does not apply to a candidate nominated for the office of President of the United States or Vice President of the United States."[25] As a result, nothing in the language of the Michigan Election Law authorizes or requires the Secretary to determine whether a presidential candidate meets the qualifications for office.

---

[22] Court of Appeals' Opinion at 19 (Appellants' App'x at 40).
[23] MCL 168.558(1)-(2), (4).
[24] MCL 168.558(4).
[25] MCL 168.558(1).

SHRR\6011910.v1

RECEIVED by MSC 12/22/2023 3:50:25 PM

All of this is consistent with general principles of Michigan administrative law. State agencies like the Secretary generally "don't have the power to determine constitutional questions."[26] But the qualifications for the presidency are created by the U.S. Constitution, and so assessing whether a candidate satisfies those qualifications often will require addressing and deciding constitutional questions. That certainly is true in the dispute at hand, which would require the Secretary to decide—among other things—difficult questions about whether Section Three of the Fourteenth Amendment can be enforced with federal implementing legislation, whether it applies to the President or the Presidency, and whether its reference to "engag[ing] in insurrection" includes actions like those Plaintiffs allege here. Considering all this, it's unsurprising that, as the Secretary herself has stated, "the Secretary simply has no administrative process for making the legal—let alone factual—determinations that would need to be made concerning the application of §3."[27]

B. Plaintiffs' Newly-Minted "State Actor" Argument is Unpreserved, Unmeritorious, and Unworthy of this Court's Review.

Remarkably, Plaintiffs' application doesn't bother even trying to argue that the Court of Appeals misinterpreted these crystal-clear Michigan statutes. Indeed, Plaintiffs never even cite—let alone address—the primary statutes at issue (MCL 168.614a and MCL 168.615a). Instead, Plaintiffs' primary argument in this Court appears to be that Michigan's election statutes, as written and as applied by the Court of Appeals, would somehow violate the U.S. Constitution.[28]

Although somewhat convoluted, Plaintiffs' argument appears to involve two steps. The first step, evidently, is that the federal Constitution prohibits the placement on any State primary

[26] *Bauserman v Unemployment Ins. Agency*, 509 Mich 673, 710; 983 NW2d 855 (2022).
[27] Secretary's Memorandum of Law (LaBrant) (Appellee's App'x at 002a).
[28] ALA at 6-7.

SHRR\6011910.v1

RECEIVED by MSC 12/22/2023 3:50:25 PM

ballot of a presidential candidate who is ineligible for the Presidency.[29] The second step of the argument is less clear. Citing cases brought under federal civil-rights statutes, Plaintiffs insist that the listing of an ineligible presidential candidate must be "reviewable by a court."[30] But Plaintiffs have not brought suit under federal civil-rights statutes. Instead, Plaintiffs appear to argue that Michigan's declaratory-judgment statute entitles them to a judicial determination of whether the placement of a particular candidate's name on the primary ballot would violate this supposed federal constitutional rule.[31]

There are three principal problems with this argument.

First, it's unpreserved.[32] Plaintiffs didn't raise this issue in the Court of Claims or the Court of Appeals. Instead, they raise it for the first time on appeal to this Court. As a result, the lower courts didn't decide this issue or even address it. The Court of Appeals considered only whether the Secretary had complied with her duties under Michigan statutes. It was not asked to consider whether the U.S. Constitution imposes some free-standing requirement that ineligible candidates' names must not appear on primary ballots.

Second, Plaintiffs' argument appears to be completely unsupported by any authority whatsoever. Plaintiffs cite nothing suggesting that the federal Constitution requires States to ensure that every candidate listed on a primary ballot is eligible for office. In fact, the settled practice is exactly the opposite with respect to the very constitutional provision Plaintiffs are seeking to enforce. Section Three of the Fourteenth Amendment provides that, even when a person is barred

---

[29] See ALA at 6.
[30] *Id.* at 6-7.
[31] *Id.* at 7-9.
[32] *Therrian v Gen Laboratories, Inc*, 372 Mich 487, 490; 127 NW2d 319 (1964) ("Since defendant failed to raise such issues below, they are not available to it on appeal."); *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) ("Issues raised for the first time on appeal are not ordinarily subject to review.").

RECEIVED by MSC 12/22/2023 3:50:25 PM

from office under that provision, "Congress may by a vote of two-thirds of each House, remove such disability." Immediately after the Fourteenth Amendment was enacted, Congress regularly considered whether to remove this disability for Members-elect *after* they had been chosen by the voters of their States—without anyone ever concluding that their elections had been unconstitutional.[33]

Thus, Plaintiffs' principal argument in this Court—that the Constitution *requires* states to ensure that federal candidates are eligible and exclude any candidates that aren't—is: (1) entirely unsupported by legal authority; (2) wasn't raised below; and (3) wasn't addressed by the Court of Appeals or the Court of Claims. That doesn't warrant this Court's review.

Third, Plaintiffs have based their argument on legally incorrect and inapposite hyperbole. Plaintiffs' application suggests that the Court of Appeals has somehow outsourced presidential primary elections entirely to political parties, and thus purported to exempt them from any constitutional requirements.[34] Neither half of that argument bears any resemblance to what the Court of Appeals actually held. Instead, it appears to be based exclusively on a cherry-picked phrase rather than the substance of the Court of Appeals' opinion.

First, Plaintiffs are wrong to contend that the Court of Appeals "held that the State has delegated *all* of its government authority over presidential primary ballot access *exclusively* to the political parties."[35] As just explained, identification by the party chairperson is only one of the

[33] *See Smith v Moore*, 90 Ind. 294, 303 (1883) ("Under [Section Three] . . . it has been the constant practice of the Congress of the United States since the Rebellion, to admit persons to seats in that body who were ineligible at the date of the election, but whose disabilities had been subsequently removed."); *Privett v Bickford*, 26 Kan. 52, 58 (1881) (voters can vote for an ineligible candidate who can only take office once his disability is legally removed); *Sublett v Bedwell*, 47 Miss. 266, 274 (1872) ("The practical interpretation put upon [Section Three] has been, that it is a personal disability to 'hold office,' and if that be removed before the term begins, the election is made good, and the person may take the office.").
[34] *See* ALA at 4-6.
[35] *See* ALA at 4.

SHRR\6011910.v1

RECEIVED by MSC 12/22/2023 3:50:25 PM

statutory methods for presidential candidates to be placed on the primary ballot. The others are identification by the Secretary based on national media reporting, and submission of a nominating petition with voter signatures. Candidates identified by these other methods are required by statute to appear on the ballot even if their parties don't want them to. Case in point: although the Michigan Democratic Party recognizes only one candidate for the 2024 presidential primary,[36] the Secretary has listed three Democratic candidates, all of whom will appear on the ballot.[37]

Second, no matter who runs which aspects of Michigan presidential primaries, nothing about the Court of Appeals' opinion even suggests that they are exempt from the requirements of the Constitution. So Plaintiffs' invocation of "white primaries" and the like is far off the mark.[38] Of course primary elections must comport with actual constitutional requirements. Plaintiffs' problem is that the constitutional "requirement" they are trying to invent—keeping every candidate who is allegedly disqualified from holding office off of every state primary ballot—has never before been thought to exist, and was not considered by the courts below.

C. The Colorado Supreme Court's recent decision holding that President Trump could be excluded from the Colorado presidential primary ballot doesn't help Plaintiffs' case. To the contrary, it proves that the Michigan Legislature didn't give the Secretary (or anyone else) authority to determine presidential candidate qualifications.

On December 19, 2023, the Colorado Supreme Court issued a split decision in *Anderson v Griswold*, in which the majority held that President Trump is disqualified from holding the office under Section Three and can be excluded from the Colorado presidential primary ballot.[39] Plaintiffs will almost certainly feature this opinion prominently in their reply and tout it as the

---

[36] See https://www.detroitnews.com/story/news/politics/2023/11/19/insider-why-the-michigan-houses-deadlock-could-last-for-months/71613291007/; see also https://twitter.com/CraigDMauger/status/1725612039131766903.

[37] Secretary's 2024 Presidential Primary Candidate Listing (Appellee's App'x at 055a).

[38] See ALA at 4-6.

[39] *Anderson v Griswold*, slip op at 1 (Colo 2023) (Appellee's App'x at 063a).

RECEIVED by MSC 12/22/2023 3:50:25 PM

roadmap that this Court should use to disqualify President Trump from the Michigan primary ballot. This Court should decline that invitation.

The problem with applying *Anderson* here is that the majority's decision provides no support for Plaintiffs' desired outcome here. Indeed, it proves that the exact opposite is true—that the *Michigan* Legislature hasn't authorized the Secretary (or anyone else) to investigate or challenge the qualifications of presidential candidates before they appear on presidential primary ballots.

The linchpin of the majority's decision was that Colorado's Election Code expressly requires presidential candidates to establish that they are qualified to hold office and provides a process for challenging a candidate's qualifications.[40] The majority highlighted several key aspects of Colorado's Election Code, including that:

- The Election Code expressly "limits participation in the presidential primary to 'qualified' candidates."[41]

- The Election Code requires each prospective presidential candidate to "attest[] that he or she is a 'qualified candidate'" in a " 'statement of intent' (or 'affidavit of intent') filed with the [Colorado Secretary of State]."[42]

- The Election Code expressly provides that the "only" presidential candidates whose names can appear on the primary ballot are those "who…submitted to the secretary…a notarized candidate's statement of intent."[43]

- The "statement-of-intent form" requires presidential primary candidates to affirm that they are qualified under Article II and, further, "meet all qualifications for the office prescribed by law."[44] And nobody disputed that the Election Code authorized the Colorado Secretary of State to require presidential candidates to attest that they are qualified to hold office.[45]

---

[40] *Id.* at 17-18 (Appellee's App'x at 074a-075a).
[41] *Id.* at 22, citing CRS § 1-4-1203 and CRS §§ 1-4-1101(1) (Appellee's App'x at 079a).
[42] *Id*, citing CRS § 1-4-1204(1)(c) and CRS § 1-4-1205.
[43] *Id.* at 23, quoting CRS 1-4-1204(1) (Appellee's App'x at 080a).
[44] *Id.*
[45] *Id.* at 31 (Appellee's App'x at 088a).

SHRR\6011910.v1

RECEIVED by MSC 12/22/2023 3:50:25 PM

- The Election Code specifically authorizes voters to "challenge…the listing of any candidate on the presidential primary election ballot" and expressly delineates a "special statutory procedure" for adjudicating those challenges in the courts.[46]

By incorporating these features, the majority concluded that the Colorado legislature adopted a statutory framework allowing constitutionally disqualified candidates to be excluded from the presidential primary ballot.[47] And, from that starting point, the *Anderson* majority ultimately concluded that President Trump could be excluded from Colorado's presidential primary ballot (and still imposed a temporary stay on its decision pending an appeal to the United States Supreme Court).

But, in reaching that starting point, the majority specifically distinguished Colorado's Election Code from Michigan's election statutes:

> We note that Colorado's Election Code differs from other states' election laws. Michigan's election law, for example, does not include the term "qualified candidate," does not establish a role for Michigan courts in assessing the qualifications of a presidential primary candidate, and strictly limits the Michigan Secretary of State's responsibilities in the context of presidential primary elections. The Michigan code also excludes presidential and vice presidential candidates from the requirement to submit the "affidavit of identity" that other candidates must submit to indicate that they "meet[] the constitutional and statutory qualifications for the office sought." Given these statutory constraints, it is unsurprising that the Michigan Court of Appeals recently concluded that the Michigan Secretary of State had no discretion to refrain from placing President Trump on the presidential primary ballot once his party identified him as a candidate.[48]

That's absolutely correct. The distinctions between Michigan and Colorado law highlighted by the *Anderson* majority are why their opinion has no persuasive value here. The Michigan Legislature hasn't limited the presidential primary ballot to "qualified" candidates.

---

[46] *Id.* at 24-27, quoting CRS 1-4-1204(4) (Appellee's App'x at 081a-084a).
[47] *Id.* at 32 (Appellee's App'x at 089a).
[48] *Id.* at 48, 48 n 10 (citations omitted) (Appellee's App'x at 105a).

SHRR\6011910.v1

RECEIVED by MSC 12/22/2023 3:50:25 PM

Instead, it expressly excluded presidential candidates from the affidavit-of-identity requirement. The Legislature also provided no framework for disputing the qualifications of a presidential candidate identified under MCL 168.614a. It also didn't authorize the Secretary to make determinations about a presidential candidate's qualifications or exclude disqualified candidates from the ballot. Thus, as the *Anderson* majority recognized, while Colorado's legislature opened the door for investigations and challenges to a presidential primary candidate's qualifications, Michigan's Legislature hasn't done so. And that choice must be respected. Even if this Court thinks it would be good policy for the Secretary to assess presidential candidate qualifications, "it is not [the judiciary's] role to second-guess the Legislature regarding the wisdom [of a statute] from a public policy perspective."[49] Indeed, courts "have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written."[50]

* * *

In short, the Secretary and the lower courts all correctly recognize that the Michigan Election Law doesn't permit—let alone require—the Secretary (or anyone) to investigate the qualifications of presidential candidates or exclude candidates from the presidential primary ballot when their qualifications are disputed. The relevant statutes make that point crystal clear and so there's no need for this Court to address it. Indeed, Plaintiffs barely try to argue otherwise, instead manufacturing a completely different and meritless federal-law argument that wasn't addressed below. There simply is no need for this Court's review. So it should deny Plaintiffs' application.

---

[49] *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93, 110; 422 NW2d 186 (1988).
[50] *Layzell v JH Somers Coal Co*, 156 Mich 268, 280; 120 NW 996 (1909).

RECEIVED by MSC 12/22/2023 3:50:25 PM

RECEIVED by MSC 12/22/2023 3:50:25 PM

Argument II

Presidential qualification disputes are non-justiciable political questions.

Independently of its holding based on Michigan election law, the Court of Claims held that, consistent with the "vast weight of authority" that has considered the issue, the parties' dispute over President Trump's qualifications for holding office is "a nonjusticiable political question."[51] The Court of Appeals declined to address this issue. Regardless, the Court of Claims got it right. Generally, the Constitution contemplates that disputes over Presidential qualifications will be decided in the political and electoral process, not in the courts—and certainly not in a 51-state ballot-access-litigation marathon in ***state*** courts.

In any event, this particular eligibility dispute is emphatically outside the courts' jurisdiction, because Congress in impeachment proceedings already decided *not* to disqualify President Trump from future office.

A. Political questions are non-justiciable.

Under the federal Constitution, some questions are "entrusted to one of the political branches or involve[] no judicially enforceable rights."[52] The Constitution places these "political question[s] … beyond the courts' jurisdiction."[53]

The hallmarks of a non-justiciable political question include: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," (2) "a lack of judicially discoverable and manageable standards for resolving it," (3) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate

---

[51] *LaBrant COC Opinion* at 13 (Appellants' App'x at 34) (citation omitted).
[52] *Rucho v Common Cause*, 139 S.Ct. 2484 (2019).
[53] *Id.* Michigan's state political-question doctrine is similar. *See Makowski v Governor*, 495 Mich 465, 471-473; 852 NW2d 61 (2014). Regardless, the federal standard controls when, like here, the question implicates the federal Constitution. See *Barrow v Pritchard*, 235 Mich App 478, 483 n 2; 597 NW2d 853 (1999).

branches of government," (4) "an unusual need for unquestioning adherence to a political decision already made," and (5) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[54] Both state and federal courts are bound by this standard.[55]

B. Courts have consistently held that disputes about presidential candidates' qualifications are political questions.

Seeking to remove a Presidential candidate from the ballot as ineligible isn't a new phenomenon. Courts across the country regularly declined to decide such challenges. For example, in suits alleging that John McCain or Barack Obama were barred from the Presidency by the Constitution's "natural born citizen" requirement, the courts regularly held that "the Constitution assigns to Congress, and not to … courts, the responsibility of determining whether a person is qualified to serve as President," so "whether [a candidate] may legitimately run for office … is a political question that the Court may not answer."[56] As one court explained:

> If a state court were to involve itself in the eligibility of a candidate to hold the office of President … it may involve itself in national political matters for which it is institutionally ill-suited and interfere with the constitutional authority of the Electoral College and Congress. Accordingly, the political question doctrine instructs this Court and other courts to refrain from superseding the judgments of the nation's voters and those federal government entities the Constitution designates as the proper forums to determine the eligibility of presidential candidates.[57]

[54] *Baker v Carr*, 369 US 186, 217 (1962).

[56] See, e.g., *Grinols v Electoral College*, 2013 WL 2294885, at *6 (E.D. Cal. May 23, 2013) (Appellee's App'x at 274a) ; *Strunk v N.Y. State Bd. of Elections*, 35 Misc. 3d 1208(A) (N.Y. Sup. Ct. 2012) ("If a state court were to involve itself in the eligibility of a candidate to hold the office of President … it may involve itself in national political matters for which it is institutionally ill-suited and interfere with the constitutional authority of the Electoral College and Congress."). Occasionally courts have held they lack jurisdiction because the plaintiffs lack standing—but that doesn't preclude the presence of a political question. See *Berg v Obama*, 586 F.3d 234, 238 (3d Cir. 2009) (rejecting challenge to President Obama's qualifications on standing grounds, but noting that it "seemed to present a non-justiciable political question").

[57] *Strunk*, *supra*.

RECEIVED by MSC 12/22/2023 3:50:25 PM

Many state and federal courts across the country have reached the same conclusion.[58] Indeed, in a similar challenge to President Trump's appearance on the New Hampshire presidential primary ballot, the District Court found that the complaint presented a nonjusticiable political question and observed that "the vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications."[59] Similarly, although the Third Circuit dismissed a challenge to then-candidate Obama's qualifications on alternative jurisdictional grounds, it noted that the challenge likely was also a political question.[60]

RECEIVED by MSC 12/22/2023 3:50:25 PM

---

[58] *See, e.g.,* See *Grinols*, supra at *6 (dismissing a challenge to President Obama's qualifications because "the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States" and, thus, "the question presented by Plaintiffs in this case—whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer."); *Taitz v Democrat Party of Miss.*, 2015 WL 11017373, at *16 (S.D. Miss. Mar. 31, 2015) (Appellee's App'x at 294a) (holding that disqualification claims were nonjusticiable because the presidential electoral and qualification process "are entrusted to the care of the United States Congress, not this court"); *Robinson v Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008) (holding that "mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify" and that "[i]ssues regarding qualifications for president are quintessentially suited to the foregoing process." Thus, "the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance" and "judicial review—if any—should occur only after the electoral and Congressional processes have run their course."); *Jordan v Reed*, 2012 WL 4739216, at *2 (Wash. Super. Ct. Aug. 29, 2012) (Appellee's App'x at 319a) ("The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S. Constitution."); *Kerchner v Obama*, 669 F.Supp. 2d 477, 483 n.5 (D.N.J. 2009) ("The Constitution commits the selection of the President to [specific and elaborate procedures] …. None of these provisions evidence an intention for judicial reviewability of these political choices.").

[59] *See Castro v Scanlan*, ___ F Supp 3d ___ (DNH, Case No. 23-cv-416-JL Oct. 27, 2023), available at 2-23 WL 7110390, *9 (Appellee's App'x at 331a) (footnote omitted), aff'd on different grounds, ___ F4th ___ (CA 1, 2023), available at 2023 WL 8078010 (Appellee's App'x at 336a).

[60] *See Berg*, 586 F.3d at 238.

Plaintiffs mistakenly dismiss this weight of authority as "superseded."[61] The "[l]eading precedent[s]" from the Ninth and Tenth Circuits that Plaintiffs rely upon[62] don't even purport to address the question at hand: whether the courts can resolve a genuine dispute over a presidential candidate's qualifications. Instead, in those cases, the candidates *admitted* they were ineligible for the Presidency but sued to be on the ballot anyway.[63] In allowing these candidates to be excluded from the ballot, these cases cited Supreme Court precedents that allow reasonable restrictions on ballot access in certain, limited, circumstances.[64] They didn't hold that genuine disputes over a presidential candidate's qualifications are justiciable. That leaves Plaintiffs citing only one solitary decision in which a court held that a genuine dispute over a qualification was *not* a political question—a single Pennsylvania state court case holding that Senator Ted Cruz was a natural-born citizen.[65]

To sum up: Plaintiffs want this Court to decide a raging political dispute over whether a candidate is qualified to be President. But, in arguing that this qualification dispute is *not* a political question, Plaintiffs almost exclusively rely on cases where *there was no genuine qualification dispute* because everyone agreed the candidate was ***not*** qualified. Where there ***is*** a dispute—when,

RECEIVED by MSC 12/22/2023 3:50:25 PM

---

[61] ALA at 21-22.
[62] *Id.* at 12-13.
[63] *See Lindsay v Bowen*, 750 F.3d 1061, 1064 (9th Cir. 2014) ("Nor is this a case where a candidate's qualifications were disputed. Everyone agrees that Lindsay couldn't hold the office for which she was trying to run."); *Hassan v Colo.*, 495 F.App'x 947, 948 (10th Cir. 2012) (candidate concededly was not a natural-born citizen).
[64] *See Hassan*, 495 Fed App'x at 948-949, citing, e.g., *Munro v Socialist Workers Party*, 479 US 189, 194-95 (1986); *Lindsay*, 750 F3d at 1063-1064, citing, e.g., *Bullock v Carter,* 405 US 134, 145 (1972).
[65] See ALA at 12, citing *Elliot v Cruz*, 137 A3d 646 (Commonwealth Ct of Penn, 2016), aff'd 635 Pa 212. The small number of cases cited by Plaintiffs where the courts decided a presidential candidate's qualifications without considering the jurisdictional question, apparently because the issue wasn't raised are inapposite. See *id.* at 13. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v Fall*, 266 US 507, 511 (1924).

as here, the candidate's qualification is the very issue being presented for decision—a large number of courts nationwide have found the case to be nonjusticiable. Plaintiffs have found only one decision going the other way. The Court of Claims was right: the vast weight of authority *does* find this to be a non-justiciable political question. And it didn't err by following that strong consensus. That is another reason why this Court should deny leave (or, alternatively, affirm).

C. This case bears multiple hallmarks of a political question.

1. The Constitution commits Presidential qualification disputes elsewhere.

A dispute is not justiciable if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[66] Here, the Constitution contains numerous and elaborate procedures for determining who can and should be President—and none of them involve the courts.

Article II, Section 1 of the Constitution permits state legislatures to direct how electors for President should be appointed. The Twelfth Amendment to the Constitution prescribes that the electors' votes must be "sealed," and may be opened and counted only in a joint session of Congress. This process may include certain objections to electors or their votes, which Congress then can consider and decide.[67] If this process results in a President-elect who isn't qualified, the Constitution specifies further political procedures—under the Twentieth Amendment, "if the President elect shall have failed to qualify" at the beginning of his or her term, "then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President." Finally, Section Three of the Fourteenth Amendment itself provides an important safety valve: if the voters choose someone who is

[66] *Baker*, 369 US at 217.
[67] *See* 3 U.S.C. 15(d)(B)(ii).

RECEIVED by MSC 12/22/2023 3:50:25 PM

arguably disqualified for engaging in insurrection, Section Three gives Congress the option to, "by a vote of two-thirds of each House, remove such disability." And Section Five of that Amendment expressly gives "Congress … the power to enforce, by appropriate legislation, the provisions of this article."[68]

Plaintiffs' objections on this score are unavailing. They point out that the Constitution allows states to appoint presidential electors[69]—but that of course is not the same as making legally binding decisions about who is qualified to be President. In fact, the Twentieth Amendment to the Constitution recognizes this, by specifying what should be done if the state-appointed electors choose someone who is ineligible to be President. Plaintiffs also object that the Constitution's assignment of this responsibility is not as "express[]" or "explicit[]" as Plaintiffs would prefer.[70] But Plaintiffs cite no authority suggesting that it must be. As the courts have repeatedly found, the commitment of this question to the electoral and political processes for choosing the President is textually demonstrable from the many provisions of the Constitution that create those processes. *That* is the proper test, and it is readily satisfied here.

2. Conflicting state-court decisions on Presidential candidate qualifications would create practical difficulties and significant potential for chaos.

Another hallmark of non-justiciability is "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[71] That's present here too. Deciding Presidential candidates' qualifications in a patchwork of 51 jurisdiction-specific, ballot-access proceedings would be a confusing and crippling morass. It could very well result in

---

[68] *See also Hansen v Finchem*, 2022 WL 1468157, at *1 (Ariz. May 9, 2022) (Appellee's App'x at 349a); *Ownbey v Morgan*, 256 US 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy.").
[69] ALA at 16-17.
[70] *Id.* at 10-11.
[71] *Baker*, 369 US at 217.

SHRR\6011910.v1

RECEIVED by MSC 12/22/2023 3:50:25 PM

situations where a candidate for President was held qualified in some states but disqualified in others. That would be a recipe for chaos and confusion.

Yet that sort of chaos is the inevitable result of adopting Plaintiffs' position. Courts have recognized this reality. As the California Court of Appeal recently held, it would be

> truly absurd … to require each state's election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each [state official] the power to override a party's selection of a presidential candidate. The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results…. [T]he result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines.[72]

Petitioners' only response is that, if states reach conflicting conclusions about a presidential candidate's eligibility, the U.S. Supreme Court could step into the middle of an ongoing presidential campaign in order to prevent any difficulty.[73] That facially implausible assertion is further undermined by Plaintiffs' own citation to *Bush v. Gore*—which, of course, was the controversial culmination of a lengthy national political crisis of a kind that courts shouldn't be eager to re-enact.

The Constitution cannot be interpreted to tolerate the kind of enormously difficult and chaotic situation that Plaintiffs are courting here. Instead, as the Court of Claims recognized, the potential for chaos resulting from numerous conflicting opinions demonstrates that this case presents a quintessential political question.

3. The United States Senate already decided the specific political question at issue.

---

[72] *Keyes v Bowen*, 189 Cal. App. 4th 647, 660 (Cal. Ct. App. 2010). Although *Keyes* is ambiguous whether it was based on the political-question doctrine or California election law, it's rationale plainly supports a federal constitutional rule.

[73] ALA at 18-19, citing *Bush v Gore*, 531 US 98 (2000).

RECEIVED by MSC 12/22/2023 3:50:25 PM

Finally, a dispute may be rendered non-justiciable by "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" or "an unusual need for unquestioning adherence to a political decision already made."[74] Here, Plaintiffs' requested relief is particularly inappropriate because it asks this Court to override the Senate's decision to acquit President Trump in its impeachment proceedings—yet another hallmark of a political question.

President Trump was impeached by the 117th Congress and acquitted by the Senate.[75] That impeachment proceeding decided the precise question at issue here: whether Section Three of the Fourteenth Amendment disqualifies Donald Trump from being President. The facts cited by Plaintiffs here are the same that were issue in the impeachment: President Trump's alleged involvement in the events of January 6.[76] Indeed, the impeachment trial was held only a few weeks after the crimes and violence of January 6, in the very same Senate chamber that they threatened. And the legal theories are the same, too: the Article of Impeachment specifically cited Section Three of the Fourteenth Amendment.[77] The very first paragraph of the House managers' trial brief made clear that the impeachment trial arose from President Trump's alleged "incitement of insurrection."[78]

The requested remedies are also identical. Because the impeachment proceedings took place after President Trump left office,[79] the only practical effect of a conviction would have been

[74] *Baker*, 369 US at 217.
[75] Plaintiffs' Complaint at §249-251 (Appellants' App'x at 95); See 167 Cong Rec S733.
[76] Compare ALA at xviii and Plaintiffs' Complaint (Appellants' App'x at 43-115), with House Impeachment Managers' Trial Brief at 5-36 (Appellee's App'x at 358a-389a).
[77] See 167 Cong Rec H165 (alleging that President Trump violated Section Three of the Fourteenth Amendment); 167 Cong Rec S129 (confirming that the House of Representatives passed the Articles of Impeachment).
[78] House Impeachment Managers' Trial Brief, pg. 1 (Appellee's App'x at 354a).
[79] The Senate impeachment trial started on February 9, 2021.

RECEIVED by MSC 12/22/2023 3:50:25 PM

disqualifying him from holding future office.[80] Again, the very first paragraph of the House managers' trial brief made clear that this was the trial's sole object of the trial: "[T]he Senate should convict President Trump and disqualify him from future federal officeholding."[81] And the Senate expressly determined that President Trump was "subject to the jurisdiction of a Court of Impeachment for acts committed while President of the United States, notwithstanding the expiration of his term in that office."[82] The Senate then proceeded to a verdict, and President Trump was "adjudge[d]" to be "not guilty as charged," was "acquitted of the charge," and, thus, was not disqualified from holding future office.[83]

No court (including this one) could formally review or reverse the Senate's impeachment verdict. The Constitution gives the Senate the sole "authority to determine whether an individual should be acquitted or convicted," and so judicial review is barred by the political-question doctrine.[84] But although Plaintiffs claim their requested relief wouldn't undo the Senate's verdict, that is exactly the outcome they seek. Just weeks after January 6, the Senate entered judgment refusing to bar President Trump from holding future office. Petitioners now want the Michigan courts to enter exactly the opposite judgment, barring President Trump from holding future office. That cannot be done without "expressing lack of the respect due coordinate branches of government."[85] The trial court recognized that reality. This Court should likewise refrain from

[80] This was widely recognized at the time. *E.g.,* Bertrand, "Legal scholars, including at Federalist Society, say Trump can be convicted," Politico, Jan. 21, 2021, available at https://www.politico.com/news/2021/01/21/legal-scholars-federalist-society-trump-convict-461089.
[81] House Impeachment Managers' Trial Brief, pg. 1 (Appellee's App'x at 354a).
[82] 167 Cong. Rec. S609 (daily ed. Feb. 9, 2021).
[83] 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021).
[84] *Nixon v United States*, 506 US 224, 231 (1993).
[85] *Baker*, 369 US at 217.

RECEIVED by MSC 12/22/2023 3:50:25 PM

RECEIVED by MSC 12/22/2023 3:50:25 PM

reconsidering a political decision already made by the duly elected representatives of the fifty states.

For all these reasons, the Court of Claims correctly dismissed this case as nonjusticiable. So, even if this Court concludes that the Michigan Election Law authorizes the Secretary to determine the qualifications of presidential candidates (it does not), it should still affirm the Court of Claims' political question ruling. Plaintiffs' arguments should be raised in our nationwide and statewide political and legislative debates, not in this (or any other) Court.

Argument III

Section Three is not self-executing.

A. Section Three requires enforcement mechanisms from Congress, not the States.

Even if the courts had jurisdiction over Plaintiffs' claims, and even if Michigan law allowed the Secretary to review a presidential candidate's qualifications, there are alternative reasons why Plaintiffs' suit is still subject to dismissal. The first reason is that Section Three of the Fourteenth Amendment cannot be enforced in a state-law cause of action, as Plaintiffs attempt to do. For a century and a half after the Fourteenth Amendment's enactment, the consensus has been that Section Three is enforceable only through procedures prescribed by the Constitution or Congress.[86] There is no reason to break from that settled law now.

1. A long and distinguished history holds that Section Three is enforceable only as prescribed by Congress.

There is no question that Congress *can* specify how Section Three must be enforced. Section Five of the Fourteenth Amendment expressly states that "Congress shall have the power

[86] *See, e.g.*, *Rosberg v Johnson*, No. 8:22CV384, 2023 WL 3600895, at *3 (D. Neb. May 23, 2023); *Secor v Oklahoma*, No. 16-CV-85-JED-PJC, 2016 WL 6156316, at *4 (N.D. OK Oct. 21, 2016).

to enforce, by appropriate legislation, the provisions of this article."[87] Indeed, the Supreme Court has regularly reiterated that power to enforce the Fourteenth Amendment lies only in Congress, and Section Five of the Fourteenth Amendment gives Congress the power to determine "whether and what legislation is needed to" enforce the Fourteenth Amendment.[88] More than a century ago, the Court even held that "it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy."[89] Rather, "[i]ts function is negative, not affirmative, and it carries no mandate for particular measures of reform."[90]

It is not surprising, then, that the courts have also held that Section Three must be enforced *only* as prescribed by Congress. Just months after the Fourteenth Amendment was ratified, Chief Justice Salmon P. Chase held that Section Three requires Congressionally prescribed enforcement procedures.[91] *Griffin's Case* involved a petition for habeas corpus by a man convicted of a crime in Virginia state court. The state judge had been appointed by the Virginia government loyal to the Union that had met in West Virginia for most of the Civil War—but, during the war, he had been the Speaker of Virginia's rebel House of Delegates and had supported the Confederate military.[92] The petitioner, Griffin, therefore argued that his conviction was invalid because the judge was disqualified by Section Three.[93]

[87] US Const. amend. XIV, § 5; *see also Hansen v Finchem*, No. CV-22-0099-AP/EL, 2022 WL 1468157, at *1 (Ariz. May 9, 2022) ("Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause.").
[88] *Katzenbach v Morgan*, 384 US 641, 651 (1966); *Ex parte Va.*, 100 US 339, 345 (1879) ("Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.").
[89] *Ownbey*, 256 US at 112.
[90] *Id.*
[91] *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869) (Chase, C.J.).
[92] *Id.* at 22-23.
[93] *Id.*

RECEIVED by MSC 12/22/2023 3:50:25 PM

The appeal of the case was heard by Chief Justice Chase, sitting as Circuit Justice in Richmond, Virginia.[94] The petitioner argued that Section Three "acts *proprio vigore*, and without the aid of additional legislation to carry it into effect," and "[t]hat it is binding upon all courts, both state and national."[95] Chief Justice Chase noted what a serious mismatch this construction would be for the post-War circumstances. He observed that, by the time the Fourteenth Amendment was proposed and adopted, the post-war governments of the southern states—that is, the legitimate governments recognized as loyal to the Union—were made up of "[v]ery many, if not a majority" of individuals who had supported the Confederacy to some degree.[96] If Section Three of the Fourteenth Amendment were self-executing as the petitioner argued, the result would be a chaotic undoing of these governments' actions: "No sentence, no judgment, no decree, no acknowledgment of a deed, no record of a deed, no sheriff's or commissioner's sale—in short no official act—[would be] of the least validity."[97] The Chief Justice explained that he was reluctant to adopt this interpretation.[98]

Instead, Chief Justice Chase held that Section Three "clearly requires legislation in order to give effect to it," because "it must be ascertained what particular individuals are embraced by" Section Three's disability, and "these [procedures] can only be provided for by congress."[99] Therefore, "the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability … to be made operative … by the legislation of congress in the ordinary course."[100]

---

[94] *Id.* at 7.
[95] *Id.* at 12.
[96] *Id.* at 25.
[97] *Id.*
[98] *Id.* at 24.
[99] *Id.* at 26.
[100] *Id.*

SHRR\6011910.v1

RECEIVED by MSC 12/22/2023 3:50:25 PM

There is no record of any widespread outcry or protest about this decision. At least one state supreme court expressly applied *Griffin* to an analogous provision of its state constitution.[101] Multiple newspaper editorials of the time—including in Northern states—expressed approval of the decision; only a few appear to have criticized it.[102] And the U.S. Supreme Court was not called upon to revisit Chief Justice Chase's conclusion, either in that case or in any other.

Both before and after *Griffin*, therefore, Section Three has indeed always been enforced as prescribed by Congress. Even before Chief Justice Chase decided *Griffin*, Congress had expressly authorized—indeed, commanded—six other southern States, as a condition of re-admission to the Union, to enforce Section Three against candidates for state office.[103] Thus, Plaintiffs are badly wrong to argue that Reconstruction state courts "enforce[d] Section 3 without federal legislation."[104] Plaintiffs give examples of this from only two States, North Carolina and Louisiana—both of which were covered by this express Congressional instruction.[105] Indeed, when in 1869 a disqualified official argued to the Louisiana Supreme Court that Section Three "is not self-enforcing [but] requires legislation by Congress," the court saw no need to decide the question but instead noted that, in the act of re-admission, Congress *had* expressly required Louisiana to enforce Section Three.[106]

Shortly after *Griffin*, Congress supplied additional Section Three enforcement legislation that also applied in the rest of the States (including Virginia, where *Griffin* has arisen). The federal

---

[101] *Alabama v Buckley*, 1875 WL 1358, at *13-15 (Ala. Dec. 1, 1875).
[102] *See* Blackman & Tillman, *Sweeping and Forcing the President into Section 3,* 28 Tex. Rev. L. & Ol. (forthcoming 2024), at 126-27 & nn.344-350 (collecting many sources), ssrn.com/abstract=4568771.
[103] 15 Stat. 74 (June 26, 1868) ("[N]o person prohibited from holding office … by section three … shall be deemed eligible to any office in [the readmitted] states.").
[104] ALA at 26-28.
[105] *See* 15 Stat. 73.
[106] *State ex rel. Sandlin v Watkins*, 211 La. Ann. 631, 633-34 (1869).

RECEIVED by MSC 12/22/2023 3:50:25 PM

Enforcement Act of 1870, also known as the Ku Klux Klan Act, contained robust provisions protecting the rights of freed slaves to vote. Also, Section 14 of the Enforcement Act authorized United States Attorneys in their respective districts to seek writs of *quo warranto* in the federal courts to remove from office anyone who was disqualified by Section Three of the Fourteenth Amendment.[107] Section 14 even instructed the federal courts to prioritize these proceedings over "all other cases on the docket."[108] Similarly, Section 15 of the Enforcement Act provided for separate federal criminal prosecution of anyone who *assumed office* in violation of Section Three.[109]

U.S. Attorneys brought numerous Section 14 *quo warranto* petitions and Section 15 criminal prosecutions. Although many of them didn't result in reported opinions, there were as many as 180 such cases just in Tennessee—including against several members of the Tennessee Supreme Court.[110] This continued until, in 1872, Congress passed an Amnesty Act by two-third majorities in both houses, which—as Section Three permits—removed the Section Three disability for most ex-Confederate officials and supporters.[111] Finally, in 1898, Congress lifted all Section Three disqualifications of any kind.[112] And in 1948, Congress repealed the Enforcement Act in its entirety.[113]

---

[107] 16 Stat. Ch. 114, at p.143 (41st Cong., 2d Sess. 1870).
[108] *Id.*
[109] *Id.* pp. 143-44.
[110] Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870,* 49 TENN B.J. 20, at 24-26 (2013); *see also United States v Powell*, 27 F.Cas. 605 (D.N.C. 1871) (Section 15 prosecution).
[111] 17 Stat. 142, Ch. 193, at p.142 (42d Cong. 2d Sess. May 22, 1872).
[112] 49 Stat. 132, Ch. 389, at p.432 (55th Cong. 2d Sess. June 6, 1898).
[113] *See* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 993; Act of June 25, 1948, ch. 645, § 2383, 62 Stat. 683, 808.

RECEIVED by MSC 12/22/2023 3:50:25 PM

After 1898, it doesn't appear that any state or federal court directly considered Section Three until recently.[114] In 1978, the Fourth Circuit noted Chief Justice Chase's holding "that the third section of the Fourteenth Amendment … was not self-executing absent congressional action."[115]

After January 6, 2021, Congress expressly considered—but decided against—reviving federal Section Three enforcement procedures. A bill was introduced in the House of Representatives "[t]o provide a cause of action to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States."[116] Its procedures would have been similar to the old *quo warranto* proceedings: an expedited civil suit by the Attorney General in a three-judge U.S. District Court.[117] But Congress hasn't enacted this proposal.

Since January 6, 2021, the courts of two States have also addressed the question, albeit indirectly. The Supreme Court of Arizona recently said that "the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause," although it eventually ruled on other grounds.[118] And a New Mexico trial court stated

[114] Congress also enforced Section Three disqualifications through the mechanisms created by the Constitution itself for judging the qualifications of Members of Congress. Several times following the enactment of the Fourteenth Amendment, the House or Senate voted on whether a member-elect was or was not disqualified by Section Three. Later, in 1919 and 1920, the House again declined to seat a member-elect who had been convicted of espionage. 6 C. Cannon, Cannon's Precedents of the House of Representatives §§ 56-59, (1935) *available at* https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/html/GPO-HPREC-CANNONS-V6-10.htm.

[115] *Cale v City of Covington, Va.*, 586 F.2d 311, 316 (4th Cir. 1978).

[116] H.R. 1405 (117th Cong. 1st Sess.).

[117] *Id.* §§ 1(b), (d).

[118] *Hansen*, 2022 WL 1468157 at *1.

RECEIVED by MSC 12/22/2023 3:50:25 PM

that state courts may enforce Section Three with respect to local office, although it didn't record that any party had argued to the contrary.[119]

2. *Griffin* is good authority.

Plaintiffs invite this Court to ignore *Griffin* with a smattering of meritless arguments. Their contention that it conflicts with the "plain meaning" of Section Three[120] is insubstantial. Chief Justice Chase didn't question that Section Three barred many officials from holding office; he simply held that Congress must supply procedures for determine who those individuals were.[121] Nothing in Section Three suggests otherwise. To give a rather direct analogy, in light of *Griffin*'s claimed disqualification of a judge, consider Article III of the Constitution's provision that federal judges hold office "during good Behaviour." It certainly doesn't contradict "the plain meaning of Article III" to conclude that the only enforcement mechanism is congressional impeachment proceedings. Thus, similarly to Griffin, a criminal convicted by a federal court cannot seek habeas corpus by alleging that his judge was disqualified by the good-behavior requirement.

Plaintiffs assert that Chief Justice Chase "did not consider *state* court proceedings, and never explained why *state* court could not provide such proceedings [to enforce Section Three]."[122] But to a Circuit Justice sitting in Richmond, Virginia in 1869, the reason would have been crystal clear. As explained above, and as Chief Justice Chase described at length in *Griffin*, the post-war southern state governments contained many—perhaps a ***majority***—of officials who were likely disqualified by Section Three. It would have been extraordinarily problematic to allow those state

---

[119] *New Mexico v Griffin*, 2022 WL 4295619, at *16 (D.Ct. N.M. Sept. 6, 2022) (Appellee's App'x at 477a).
[120] ALA at 28-29.
[121] *Griffin*, 11 F. Cas. at 26.
[122] ALA at 28-29 (quotation marks and citations omitted).

SHRR\6011910.v1

RECEIVED by MSC 12/22/2023 3:50:25 PM

officials to judge each other's qualifications for office under the federal Constitution without Congress' approval.

In any event, over one hundred years of precedent have firmly settled that Chief Justice Chase's carefully crafted opinion in *Griffin* remains the gold standard because it represents the conclusion, "[a]fter the most careful consideration"[123] of the sitting Chief Justice of the United Supreme Court about the meaning of Section Three, rendered a mere ten months after Section Three's enactment, on precisely the issue that Petitioners seek to raise here. Both as a matter of *stare decisis* and as a matter of Section Three's original public meaning, *Griffin* is by far the most important authority for this Court's consideration.

3. Post-Civil-War practice doesn't suggest that Section Three was self-executing.

Plaintiffs also try to avoid *Griffin* by arguing that people in the post-War era treated Section Three as self-executing. They are mistaken. For example, Plaintiffs point to the fact that, even before there was federal enforcement legislation for Section Three, ex-Confederates began seeking, and Congress began enacting, bills that removed the disability for specific people.[124] Plaintiffs ignore the fact, discussed above, that Congress had much earlier commanded several states to enforce Section Three. But their argument has an even more obvious and fundamental weakness: since Congress had just adopted the Fourteenth Amendment, it made perfect sense to assume that Congress would imminently provide for its enforcement. Thus, the relief-bill history proves nothing about whether Section Three is self-executing.

* * *

The year after the Fourteenth Amendment was enacted, Chief Justice Chase held that Section Three was not self-executing, and that Congress needed to enact legislation for it to be

[123] *In re Griffin*, 11 F. Cas. 7, 27 (CCD Va 1869) (Chase, C.J.).
[124] ALA at 26-28.

RECEIVED by MSC 12/22/2023 3:50:25 PM

enforced. Congress promptly did so, and any minor initial confusion quickly gave way to a uniform nationwide practice that prevailed for as long as Section Three was enforced in the post-War era and was not questioned for the following century and a half.

Plaintiffs provide no reason for upending this well-settled law. So even if this Court disagrees with the lower courts' conclusions about the Secretary's state-law authority or the political-question doctrine, this Court should still deny leave to appeal (or affirm) because Section Three cannot be enforced through the state-law cause of action asserted by Plaintiffs.

Argument IV

Plaintiffs' claims are unripe.

By its plain language, Section Three of the Fourteenth Amendment only prohibits an individual who engaged in insurrection from *holding* office, not from appearing on a ballot or being elected.[125] That means enforcement of Section Three's prohibition on holding office isn't ripe before someone is in a position to *hold* office—i.e., they won the general election. Thus, Plaintiffs' challenge to President Trump's constitutional qualifications is fatally premature and unripe.

Matters might be different if Section Three created a disqualification from office that was permanent and unchangeable. In that situation, a challenger could seek to prove not just that the candidate was ineligible at the time of running for office, but would also be ineligible at the time of attempting to *hold* office. But that is not the situation with Section Three, which expressly provides that any disability may be lifted by a two-thirds vote of each House.[126] Nothing in the Constitution prevents Congress from removing this disability for a person who is already running for office, or who has already been elected. In fact, when Section Three was being enforced in the

[125] US Const. amend. XIV, § 3.
[126] US Const. amend. XIV, § 3.

RECEIVED by MSC 12/22/2023 3:50:25 PM

late 1800s, Congress frequently did exactly that, and courts across the country expressly approved.[127] Thus, even if someone were disqualified under Section Three, he or she could still run for office, be elected, receive a vote from Congress removing the disability, and then take office in the ordinary course. As a result, a Section Three challenge brought in the early stages of an election campaign—when any prospect of the candidate holding office depends on numerous contingences—is not ripe.

The Ninth Circuit's opinion in *Schaefer v. Townsend* illustrates why.[128] There, a California law required congressional candidates to be residents of the state at the time when they were issued their nomination papers—rather than "when elected," as the Constitution specifies.[129] The Ninth Circuit held that this was an unconstitutional attempt by California to change the Constitutionally-prescribed qualification.[130]

The same logic applies to Section Three. As explained, although Section Three (when it applies) bars a person from *holding* office, both the text of the Constitution and historical practice

---

[127] *See generally Smith v Moore*, 90 Ind. 294, 303 (1883) (describing the distinction between restrictions on being *elected* versus *holding* an office and noting, "[u]nder [Section Three] . . . it has been the constant practice of the Congress of the United States since the Rebellion, to admit persons to seats in that body who were ineligible at the date of the election, but whose disabilities had been subsequently removed."); *Privett v Bickford*, 26 Kan. 52, 58 (1881) (analogizing to Section Three and concluding that voters can vote for an ineligible candidate who can only take office once his disability is legally removed); *Sublett v Bedwell*, 47 Miss. 266, 274 (1872) ("The practical interpretation put upon [Section Three] has been, that it is a personal disability to 'hold office,' and if that be removed before the term begins, the election is made good, and the person may take the office.").

[128] *Schaefer v Townsend*, 215 F3d 1031, 1038 (CA 9 2000).

[129] US Const art I, § 2, cl 2.

[130] *Schaefer*, 215 F3d at 1038-1039; *US Term Limits, Inc v Thornton*, 514 US 779, 827 (1995) (States don't "possess the power to supplement the exclusive qualifications set forth in the text of the Constitution."); *Liberty Legal Found v Nat'l Democratic of USA, Inc*, 868 F Supp 2d 734 (WD Tenn 2012) ("Article II of the Constitution…is the exclusive source for the qualifications for the Presidency."); see also *Greene v Secretary of State*, 52 F4th 907 (CA 11, 2022) (Branch, J., concurring) ("[I]n purporting to assess Rep. Greene's eligibility under the rubric of § 3 of the Fourteenth Amendment to the U.S. Constitution, Georgia imposed a substantive qualification on her.").

SHRR\6011910.v1

RECEIVED by MSC 12/22/2023 3:50:25 PM

show that it does *not* prevent a person from running for office or being elected to office—it simply gives Congress the choice, in that event, whether to remove the disability. Plaintiffs, by trying to use Section Three to prevent a candidate from even running for office, are trying to accelerate its enforcement far sooner than the Constitution contemplates. In other words, Plaintiffs are essentially asking this Court to impose an additional qualification for the office of President by extending Section Three to bar not only *holding* office, but also *seeking* or *running* for office. The trial court therefore correctly recognized that Plaintiffs' claim is fatally premature and will remain so until the prospect of President Trump holding office doesn't depend on multiple speculative contingencies. That is yet another reason why this Court should either deny leave to appeal or affirm the result reached by the lower courts.

RECEIVED by MSC 12/22/2023 3:50:25 PM

Argument V

The President is not an "officer of the United States" under Section Three of the Fourteenth Amendment.

A. The Constitutional phrase "Officers of the United States" doesn't include the President.

Section Three of the Fourteenth Amendment applies only to someone who has "previously taken an oath … as an officer of the United States … to support the Constitution." Therefore, Plaintiffs' claim that President Trump is disqualified depends upon him having been an "officer of the United States" within the meaning of Section Three. But reading this phrase in harmony with the rest of the Constitution makes quite clear that, for these purposes, the President is not "an officer of the United States." So, for yet another reason, this Court should deny leave to appeal.

1. Constitutional references to "officers of the United States" uniformly exclude the President.

Section Three lists many elected government figures to whom it applies, such as members of Congress and state legislators. It doesn't similarly name the most prominent elected official in

the entire country—the President. Canons of statutory interpretation counsel that "expression of one thing implies the exclusion of others.[131]" Thus, the Framers' omission of the President in a list of other elected officials indicates that Presidents aren't included. And it's not linguistically likely that the Framers would have specifically named other elected positions, but then referred to the Presidency in a catch-all generic reference to "officers of the United States."

And indeed, the Constitutional text strongly indicates that they did *not* do that. The phrase "Officers of the United States," as used in the original Constitution, *never* refers to elected positions.[132] As the U.S. Supreme Court recently observed in discussing the Constitutional text, "[t]he people do not vote for the 'Officers of the United States.' They instead look to the President."[133] Examining the words of the Constitution confirms this. The phrase "officers of the United States" appears three times in the original Constitution—in three consecutive sections of Article II, dealing with the Executive Branch. Each of these provisions clearly excludes the President.

First, Section 2 of Article II empowers the President to

> appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for.

---

[131] *GCSSWU v Genesee County*, 199 Mich App 717, 721; 502 NW2d 701 (1993).

[132] *See* Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, 15(1) N.Y.U. J.L. & LIBERTY 1 (2021); Blackman and Tillman, *Sweeping and Forcing the President Into Section 3: A Response to William Baude and Michael Stokes Paulsen*, at 13-14 (citing to the Impeachment Clause, the Appointments Clause, and the Commission Clause as textual support). This article is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568771

[133] *Free Enterprise Fund v PCAOB*, 561 US 477, 497-98 (2010). Likewise, in *Seila Law LLC v CFPB*, the Court noted that that "Article II distinguishes between two kinds of officers—principal officers (who must be appointed by the President with the advice and consent of the Senate) and inferior officers (whose appointment Congress may vest in the President, courts, or heads of Departments)." 140 S.Ct. 2183, 2199 n 3 (2020). Importantly, both categories of positions are appointed—not elected.

RECEIVED by MSC 12/22/2023 3:50:25 PM

Presidents, of course, don't appoint themselves or their successors—and the Constitution doesn't "otherwise provide[] for" the President's appointment because it requires the President to be ***elected.*** So this reference to "Officers of the United States" plainly excludes the President.

Second, Section Three of Article II requires that the President "shall Commission all the Officers of the United States." Presidents don't commission themselves or their successors, so they cannot be "Officers of the United States" for the purposes of Article II, Section Three.

Third, Section 4 of Article II provides requirements for impeachment of "[t]he President, Vice President and all civil Officers of the United States." This also shows that the President is not included in the "Officers of the United States"—otherwise, there would be no need for the separate listing. If Section 4 had appeared in isolation, there might be some question whether the President and Vice President were listed as *examples* of officers of the United States—so that the text might effectively refer to "[t]he President, Vice President and all ***other*** civil Officers of the United States." But Article II's text and history rule out that meaning. As noted above, Section 2 ***does*** refer to "all other Officers of the United States." In the Constitutional Convention, the original draft of Section 4 did refer to the President, Vice President, and "other civil Officers of the U.S."—but the Framers changed it to "all civil Officers."[134] On top of that, immediately preceding Section Four's reference to "The President, Vice President and all civil Officers of the United States" is Section Three's requirement that the President "Commission ***all*** the Officers of the United States" (emphasis added). Since that definitively excludes the President (as just explained), it's extraordinarily unlikely that the Constitution's very next sentence, in Section Four, would use such an ambiguous signal to give similar words a very different meaning.

[134] 2 *Records of the Federal Convention of 1787*, 545, 552, 600 (Farrand ed., 1911).

RECEIVED by MSC 12/22/2023 3:50:25 PM

In short, the Constitution uses the term of art "officer of the United States" to refer to non-elected functionaries who exercise governmental power. Plaintiffs' insistence that the phrase cannot be a term of art because it didn't appear in legal dictionaries falls short because it ignores the broader context in which the Constitution uses the phrase "officer of the United States" and the fact that this specific contextual meaning excludes the President. Thus, because "officer of the United States" is a Constitutional term of art with a specific meaning, Plaintiffs' argument about the plain and ordinary meaning of the terms "office" and "officer" are inapposite.[135] Nor does it matter that the Presidency has be described generally as an "office" (and is in the Constitution).[136] Similarly, Plaintiffs' handwaving about the positions President Trump has taken in cases addressing the federal removal statute is inapposite—the meaning of statutory language is wholly irrelevant to the specific Constitutional meaning of the text of Section Three (especially where the statutes at issue are subject to rules of liberal construction).[137] Such arguments shed little light on whether the more precise phrase "*officers of the United States*" has a more precise meaning in the Constitution. It does—and that meaning doesn't include the President.

2. This meaning of the Constitutional term "officers of the United States" has been recognized throughout U.S. legal history, including in the Civil War era.

Petitioners appear to concede that, during the Founding era, the phrase "Officers of the United States" excluded the President. They argue that, "[b]y the 1860s" the meaning of this phrase had changed and had come to include the President.[138] That is mistaken: the constitutional

---

[135] ALA at 38-44.
[136] *Id.*
[137] See ALA at 40-41; see also *K&D LLC v Trump Old Post Office LLC*, 951 F3d 503, 506 (DC Cir 2020) (holding that courts "must construe the [officer removal statute, 28 USC 1442] liberally in favor of removal").
[138] ALA at 38-44.

RECEIVED by MSC 12/22/2023 3:50:25 PM

meaning of "officers of the United States" as excluding the President has been recognized by a long list of eminent authorities throughout our nation's history.

In the 1830s, Justice Joseph Story's magisterial *Commentaries on the Constitution of the United States* discussed this precise issue. With respect to the Impeachment Clause, Justice Story stated that "the enumeration of the president and vice president, as impeachable officers, was indispensable," because "the clause of the constitution … does not even affect to consider them officers of the United States," and that "they were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States."[139]

Less than twenty years after the adoption of the Fourteenth Amendment, the U.S. Supreme Court observed that there was a "well established definition" of "[w]hat is necessary to constitute a person an officer of the United States:" specifically, that "[u]nless a person in the service of the government … holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."[140] The President, of course, doesn't hold place "by virtue of an appointment by the president" or the head of another department of government.[141] Although *Mouat* was interpreting a federal statute, its reference to the Constitution's Appointments Clause—and its consideration of who qualifies "strictly speaking" as an officer of the United States—makes clear that the Court was referring to the constitutional term of art. Similarly, in the 1870s a Senator stated that "the President is not an officer of the United States," and an influential

[139] Joseph Story *Commentaries on the Constitution of the United States* (Lonang Inst. 2005) § 791.
[140] *United States v Mouat*, 124 US 303, 306 (1888).
[141] See *id.*

RECEIVED by MSC 12/22/2023 3:50:25 PM

treatise stated that "[i]t is obvious that … the President is not regarded as 'an officer of, or under, the United States.'"[142]

This continued in recent times. In 1969, future Chief Justice William Rehnquist authored a memo for the White House Office of Legal Counsel explaining that "[g]enerally, statutes which refer to 'officers' or 'officials' of the United States are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive."[143] In 1974, future Justice Antonin Scalia reiterated in a different OLC memorandum that "when the word 'officer' is used in the Constitution, it invariably refers to someone *other than* the President or Vice President …. This … has led the Department of Justice consistently to interpret the word in other documents as not including the President or Vice President unless otherwise specifically stated."[144] In 2007, citing *Mouat,* the OLC reaffirmed "that an individual not properly appointed under the Appointments Clause cannot technically be an officer of the United States."[145] And in 2010, Chief Justice Roberts stated in an opinion for the Supreme Court that "[t]he people do not vote for the 'Officers of the United States.' They instead look to the President."[146]

So there is no room for reasonable dispute: there is a long tradition of using the words "officers of the United States" as a constitutional term of art, in a strict sense that excludes the President. Thus, it's inapposite for Plaintiffs to point out that various ***non***-constitutional sources

---

[142] *See* Blackman & Tillman, *supra* at 102-03 & nn.298-300 (quoting *Congressional Record Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap*, at 145 (1876), and David A. McKnight, *The Electoral System of the United States* at 346 (1878).)
[143] *Closing of Government Offices in Memory of Former President Eisenhower*, at 3, https://perma.cc/P229-BAKL.
[144] *Applicability of 3 C.F.R. Pt. 100 to the President and Vice President*, at 2, https://perma.cc/GQA4-PJNN.
[145] *Officers of the United States Within the Meaning of the Appointments Clause*, at 116 (Apr. 16, 2007), https://www.justice.gov/file/451191/download#:~:text=The%20Appointments%20Clause%20provides%3A%20%5BThe%20President%5D%20shall%20nominate%2C,of%20Law%2C%20or%20in%20the%20Heads%20of%20Departments.
[146] *Free Enterprise Fund v PCAOB*, 561 US 477, 498 (2010).

RECEIVED by MSC 12/22/2023 3:50:25 PM

refer to the President as an "officer"—or sometimes even an "officer of the United States."[147] The nature of a term of art is that it applies to specific words used in a specific context (here, the U.S. Constitution); similar words used in other contexts may have a different meaning. In most of Petitioners' examples, there is no indication that the speaker or writer intended to use the phrase in the strict Constitution sense.[148] So these examples have no bearing on the specific Constitutional meaning of the words "officer of the United States."

B. Presidents don't take oaths to "support" the Constitution, which is a prerequisite to Section Three disqualification.

If more were needed to show that Section Three doesn't cover the President, it can be found in the other prerequisite to a Section Three disqualification—that the officer of the United States took an "oath…to support the Constitution of the United States." This is an explicit reference to a constitutionally prescribed oath that the President *does not take.*

Section Three specifies that it applies only to people who took "an oath … to support the Constitution of the United States." This is a direct reference to the Oaths Clause of Article VI of the original Constitution, which requires many government officials to "be bound by Oath or Affirmation, to support this Constitution." These are the only two times that the Constitutional text refers to "support[ing]" the Constitution, and both of them do so in connection with an oath. No reasonable reading of Section Three can dismiss this parallel as unintentional.[149]

---

[147] ALA at 41-45.

[148] To give just one example, in *United States ex rel. Stokes v Kendall*, the court was distinguishing the President's limited authority from the King of England's absolute sovereignty—not discussing the technical meaning of words in the Constitution—when it stated that "[t]he president himself … is but an officer of the United States." 26 F. Cas. 702, 753 (C.C.D.D.C. 1837).

[149] As if to confirm the deliberateness of this parallel, the officials covered by Section Three and by Article VI are very similar, if not identical. The Oaths Clause of Article VI applies to "Senators and Representatives …, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States." Section Three applies to anyone who took an oath "as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State." Unless there

RECEIVED by MSC 12/22/2023 3:50:25 PM

The Article VI oath, which Section Three clearly refers to, is taken by practically every state and federal official in the United States ***except for the President***. Article II, Section 1 of the Constitution prescribes, word-for-word, a ***different*** oath for the President—an oath that doesn't refer to "support" for the Constitution, but instead includes a promise to "preserve, protect, and defend the Constitution." The President is inaugurated with that oath, not the Article VI oath.

Plaintiffs claim that there is no meaningful distinction between the Article II and Article VI oaths. Instead, they argue that the Article II oath is simply a specific instantiation of the Article VI oath. In other words, Plaintiffs implicitly suggest that Section Three's reference to an "oath … to support the Constitution" was a generic reference both to Article VI's non-Presidential "Oath … to support this Constitution" *and* to Article II's differently worded Presidential oath. Based on both text and context, that is not plausible. The framers of the Original Constitution used different language in framing the Article II oath (which appears first) than the Article VI oath. And, since the use of different words implies different meanings, the framers' use of different language in the Article II and VI oaths must be regarded as intentional.[150] Further, as explained above, there is a well-established Constitutional tradition of using the words "officers of the United States" to exclude the President. In that context, the drafters of Section Three (1) used that same phrase, and then (2) deliberately copied the language of ***another*** provision of the Constitution that also excludes the President.[151] Thus, contrary to Plaintiffs' argument, the use of different language to

---

are non-elected "officers of the United States" in the Legislative Branch, these two lists include the same people.

[150] *United States Fidelity Ins. & Guaranty Co. v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14, 795 NW2d 101 (2009) (stating that "different words…are generally intended to connote different meanings."); 16 Am. Jur. 2d Constitutional Law § 76 ("It is presumed that if the authors of a state constitution used two different words, they intended two different meanings."); *Reading Law*, p 170 ("A word or phrase is presumed to bear the same meaning through a text; a material various in terms suggests a variation in meaning.").

[151] This was the view of a leading constitutional scholar, writing contemporaneously with the ratification of the Fourteenth Amendment. *See* George Washington Paschal, *The Constitution of*

RECEIVED by MSC 12/22/2023 3:50:25 PM

describe the Article II and Article VI oaths—and the choice by the framers of the Fourteenth Amendment to reference the language of one but not the other—was not inadvertent or the result of oversight. Rather, it was an intentional choice that must be given meaning.

In sum, Plaintiffs' argument that Section Three includes former Presidents is contrary to the text, structure, and history of the Constitution. Indeed, the textual evidence is quite plain: Section Three was drafted to exclude the President. So there is yet another reason to deny leave or affirm the result reached by the lower courts.

C. The Post-Civil-War Era presented no need to address this question.

To counsel's knowledge, the historical record doesn't reflect any discussion about why Section Three was drafted to exclude the President. But there is an obvious potential historical reason: the post-Civil War generation focused on amending the Constitution to address the evils they had experienced firsthand rather than speculative ones. As Plaintiffs concede, the only former President who joined the Confederacy, John Tyler, had died early in the Civil War and, in any event, would have been covered by Section Three as a former member of the House of Representatives who took the Article VI oath.[152] So when the Fourteenth Amendment was proposed and ratified, there was no need to address that possibility. Like the other Civil War Amendments to the Constitution, the Fourteenth Amendment was no abstract academic proposal: it arose from and responded to the specific historical circumstances emerging from the Civil War. In all events, the text of Section Three plainly does exclude the President.

---

the United States Defined and Carefully Annotated xxxviii (W.H. & O.H. Morrison, Law Booksellers 1868) (opining that the Article VI oath and Section 3 apply to "precisely the same class of officers"); *id.* at 250 n.242 (Section 3 is "based upon the higher obligation to obey th[e Article VI] oath"); *id.* at 494 (noting that the "persons included in this [Section 3] disability are the same who had taken an official oath under clause 3 of Article VI").

[152] See ALA at 43.

RECEIVED by MSC 12/22/2023 3:50:25 PM

So, for yet another reason, Plaintiffs attempt to weaponize Section Three against President Trump lacks merit and was properly dismissed by the Court of Claims. This Court should affirm.

Argument VI

President Trump didn't Engage in Insurrection.

A. Section Three's threshold for an insurrection or rebellion wasn't met on January 6th.

Section Three speaks in terms of "insurrection" and "rebellion." Congress confirmed that those terms describe two types of treason—not lesser crimes.[153] After ratification, Congress reinforced that conclusion when debating enforcement of Section Three.[154] The drafters chose words encompassing the main actors in an act of treason, but not indirect supporters.

Section Three appears to have been modeled on two primary sources. One was the original Constitution's Treason Clause, which defines "[t]reason against the United States as "levying War against them, or … adhering to their Enemies, giving them Aid and Comfort."[155] The other was Section 2 of the Second Confiscation Act, which punished anyone who "shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States … or give aid or comfort thereto.[156] These sources illustrate the meaning of Section Three's terms.

During the Civil War, the term "insurrection" in the Confiscation Act was construed narrowly. Courts recognized that the Insurrection Act prohibits only conduct that "amount[s] to treason within the meaning of the constitution,"[157] that "engaging in a rebellion and giving it aid and comfort[] amounts to a *levying of war*," and that insurrection and treason are "substantially the same."[158]

---

[153] See 37 Cong. Globe 2d Session, 2173, 2189-91, 2164-2167 (1862).
[154] 41 Cong. Globe 2d Session, 5445-46 (1870).
[155] US Const, Art. III, Sec. 3, Cl. 1.
[156] 12 Stat. 589, 627 (1862); *see* 18 U.S.C. § 2383.
[157] *United States v Greathouse*, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863).
[158] *Id.* at 25 (Hoffman, J.) (emphasis added).

RECEIVED by MSC 12/22/2023 3:50:25 PM

Dictionaries of the time confirm that "insurrection" meant a "rebellion of citizens or subjects of a country against its government," and "rebellion" as "*taking up arms* traitorously against the government."[159] And, because Section Three was enacted in the aftermath of a horrific civil war in which over 600,000 combatants died, it makes sense that "insurrection" was understood at the time to mean the taking up of arms and waging war upon the United States.

Although what happened on January 6 was terrible, it wasn't an insurrection. Rioters entered the Capitol, clashed with law enforcement, invaded restricted areas, damaged property, and interrupted Congress' proceedings. But after a few hours, they left and Congress counted the electoral votes early the next morning. No evidence shows that the rioters made war on the United States or tried to overthrow the government. And, although insurrection is a federal crime, no one—including President Trump—has been charged under 18 U.S.C. § 2383 related to January 6. Instead, the Senate found President Trump *not guilty* of impeachment charges of insurrection.

Plaintiffs' attempts to define "insurrection" so as to include January 6 are overly broad. For example, if "combined resistance to…lawful authority" is an insurrection,[160] thousands of annual American protests, riots, and criminal operations would qualify as insurrections. So would resisting arrest. Similarly, if anything that "prevent[s] a peaceful and orderly presidential transition of power,"[161] is an insurrection, that would include almost any act of violence that is remotely associated with a presidential election or transition. But, while these may be crimes, they aren't insurrection.

---

[159] *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* (Philadelphia, G.W. Childs, 12th ed., rev. and enl. 1868) (emphasis added).
[160] ALA at 13-14.
[161] ALA at 1.

SHRR\6011910.v1

RECEIVED by MSC 12/22/2023 3:50:25 PM

The crimes and violence that happened on January 6 were repugnant to any objective observer. But riots—even political riots that temporarily impede government functions—aren't "insurrections" or "rebellions" in the Constitutional sense.

B. President Trump didn't "engage in" the January 6 riot for purposes of Section Three.

1. Engaging in an Insurrection doesn't include pure speech.

Regardless whether the January 6 riot qualified as an "insurrection" (it didn't), Plaintiffs fail to establish that one can "engage" in insurrection through speech alone—and regardless whether one *could,* there is no indication whatsoever that President Trump *did*.

The framers of the Fourteenth Amendment made a deliberate choice that Section Three should cover only actual "engag[ing] in" insurrection or rebellion, and not pure speech—even if advocating rebellion or insurrection.

The word "engage" connotes active involvement: to "employ or involve oneself; to take part in; to embark on."[162] This means a level of activity, not mere words. And the historical context demonstrates that the framers of the Fourteenth Amendment understood that even strident and explicit antebellum advocacy for a future rebellion didn't run afoul of Section Three. In 1870—just two years after the Fourteenth Amendment was ratified—the House found that a Kentucky legislator who had voted to "resist [any] invasion of the soil of the South at all hazards"[163] before the Civil War began wasn't disqualified under Section Three.[164] The same was true of a former Virginia state legislator who, before the Civil War, had voted to "unite" with "the slaveholding states" and "if necessary, fight" if efforts to reconcile with the Union failed.[165] By contrast, the

[162] *Black's Law Dictionary* (11th ed. 2019).
[163] 41 Cong. Globe, 2d Session, 5443, 5447 (1870).
[164] *Id.* at 5447.
[165] *Hinds' Precedents of the House of Representatives of the United States*, 477-478 (1907).

RECEIVED by MSC 12/22/2023 3:50:25 PM

House *did* disqualify a candidate who was a colonel in the rebel army and a Confederate governor of North Carolina.[166]

In short, the Civil War era Congress knew how cover incitement or other speech in support of insurrection. But it didn't do so in Section Three. So pure speech cannot run afoul of Section Three.

2. President Trump's alleged speech didn't violate Section Three.

Ultimately, however, there is no need for the Court to wade into these details, because this case can be resolved by construing Section Three more generally. The only conduct that Plaintiffs point to by President Trump is (i) unsuccessfully arguing that the announced result of the election was incorrect and should be changed, (ii) giving a speech on January 6 that repeated those arguments and asked the crowd to "peacefully and patriotically make your voices heard," and (iii) watching television reports of the events at the Capitol before repeatedly asking the crowds for "peace" and to "go home."[167] Whatever else Section Three means, "engag[ing] in insurrection" doesn't extend to those statements.

Disputes over election outcomes aren't a new thing. Every election involves a winner and a loser. But it's not in our constitutional tradition to treat unsuccessful candidates who question the results as insurrectionists.

That is the case with President Trump. After President Biden was announced as the winner of the 2020 election, President Trump made a series of public statements, and took a series of public actions, challenging the correctness of that outcome and arguing in favor of various remedial actions. Those arguments weren't successful, and Congress certified now-President Biden as the winner. Although President Trump continued to disagree with that result, he promptly

[166] *Id.* at 481, 486.
[167] Plaintiffs' Complaint at pp 35-37, 42-47 (Appellants' App'x at 80-82, 87-92).

RECEIVED by MSC 12/22/2023 3:50:25 PM

promised—and delivered—an "orderly transition" of power to President Biden.[168]

This by itself cannot implicate Section Three. Whatever else might qualify as "engag[ing] in insurrection," contesting an election outcome certainly doesn't. Plaintiffs-Appellants offer no controlling authority to the contrary. First Amendment principles should inform this Court's interpretation of Section Three. "If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition."[169] "Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[170] Speech on matters of public concern—even controversial or objectionable speech on matters of public concern—is protected by the First Amendment.[171] So President Trump's arguments about the result of the 2020 election doesn't constitution engaging in insurrection.

Nor does the impassioned speech that President Trump gave to a large crowd on January 6, in which he reiterated his arguments that he should be certified the election winner.

Courts have consistently and clearly defined incitement in the First Amendment context—and they set the bar very high. Even "advocacy of the use of force or of law violation" or of "'the duty, necessity, or propriety' of violence" falls short.[172] The "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."[173] "What is required, to forfeit constitutional protection," is speech that (1) "specifically advocates for listeners to take unlawful action" and (2) is likely to produce "*imminent* disorder"—not merely "illegal action at some indefinite future

---

[168] Statement of President Donald Trump, https://x.com/DanScavino/status/1347103015493361664?s=20.
[169] *McCutcheon v Federal Election Commission*, 572 US 185, 191 (2014) (citation omitted).
[170] *Eu v San Francisco City Democratic Cent. Comm*., 489 US 214, 223 (1989).
[171] *See, e.g., Snyder v Phelps*, 562 US 443 (2011).
[172] *Brandenburg v Ohio*, 395 US 444, 447-48 (1969).
[173] *Ashcroft v Free Speech Coalition*, 535 US 234, 253 (2002); *Nwanguma v Trump*, 903 F.3d 604, 610 (6th Cir. 2018).

RECEIVED by MSC 12/22/2023 3:50:25 PM

time.[174] And, as the Court recently underscored in *Counterman v. Colorado*, it requires a showing of "specific intent … equivalent to purpose or knowledge."[175]

It would be strange if "engage[ment] in insurrection" under Section Three somehow involved *less* than "incitement of insurrection" under the First Amendment. But the Court need not definitively decide that issue. Under any sensible understanding of these words, President Trump's January 6 speech was neither "inciting" nor "engaging in" insurrection.

The text of President Trump's January 6 speech shows that he told the crowd to engage in a strident but peaceful protest.[176] For example, after urging the crowd to "walk down to the Capitol" and "demand that Congress do the right thing and only count the electors who have been lawfully slated," President Trump stressed that the crowd marching to the Capitol should "to *peacefully and patriotically* make your voices heard."[177] Those remarks clearly contemplated that Congress would complete its business of voting on the certification of the election results, albeit with a political protest. He never called for violence or criminal activity.

This cannot possibly have been "engagement" in an alleged insurrection. While Plaintiffs argue that President Trump's express instruction to the protesters to be peaceful somehow *implicitly* incited them to insurrection, no legitimate authority suggests that this is covered by Section Three. President Trump's conduct after the riot began is similarly unavailing. President Trump didn't do anything to help the rioters. And, after Congress went into recess, President Trump tweeted that protesters should "support our Capitol Police and Law Enforcement" and "Stay peaceful!"[178] Shortly thereafter, he tweeted again, "asking for everyone at the U.S. Capitol to

---

[174] *Nwanguma*, 903 F.3d at 610 (cleaned up); *Hess v Ind.*, 414 US 105, 108-09 (1973) (emphasis added).
[175] 600 US 66, 81 (2023) (citations omitted).
[176] E.g., https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6.
[177] *Id.* (emphasis added).
[178] @realDonaldTrump, TWITTER, (Jan. 6, 2021, 2:38pm), https://twitter.com/realDonaldTrump/status/1346904110969315332.

RECEIVED by MSC 12/22/2023 3:50:25 PM

remain peaceful" and to "respect the Law and our great men and women in Blue," and calling for "No violence!"[179] The President then recorded a minute-long video in which he told the rioters that "[Y]ou have to go home now. We have to have peace. We have to have law and order, we have to respect our great people in law and order. We don't want anybody hurt" and instructed them to "go home, and go home in peace.[180] Two hours later, Congress re-convened to certify now-President Biden as the winner of the election.

Whatever "engag[ing] in insurrection" means, it doesn't include calling for peace and an end to the riot or telling the rioters to go home. So Plaintiffs fail to establish that any of President Trump's conduct or statements amount to "engag[ing] in insurrection" within the meaning of Section Three. As a result, Plaintiffs' request that this Court remand for the Court of Claims to hold an evidentiary hearing—apparently in between December 25 and the beginning of January when the process of printing and proofing ballots must begin—lacks merit and should be denied.

Argument VII

Plaintiffs lack standing to raise claims for declaratory relief.

Plaintiffs assert claims for declaratory and injunctive relief. There is a final reason why these claims fail: Plaintiffs lack standing to bring them.

Michigan's declaratory judgment rule "incorporates the doctrines of standing, ripeness, and mootness."[181] To have standing, plaintiffs must have suffered "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at

---

[179] @realDonaldTrump, TWITTER (Jan. 6, 2021, 3:13pm), https://twitter.com/realDonaldTrump/status/1346912780700577792.

[180] President Trump Video Statement on Capitol Protesters, https://www.c-span.org/video/?507774-1/president-trump-video-statement-capitol-protesters.
Transcript available at: https://www.presidency.ucsb.edu/documents/videotaped-remarks-during-the-insurrection-the-united-states-capitol.

[181] *UAW v CMU Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012).

RECEIVED by MSC 12/22/2023 3:50:25 PM

large…"[182] Here, Plaintiffs allege that they are voters that plan to vote in the primary and general elections. But that's true of every voter. And, although some Plaintiffs allege that they want a different candidate to win the election, instead of President Trump, that's true of anyone who wanted President Trump removed from the ballot—and in any event, it's an alleged harm *to other candidates*, not to Plaintiffs.

In federal court, the law is settled that individual voters like Plaintiffs lack standing to challenge the qualifications of presidential candidates.[183] That's because "a candidate's ineligibility…does not result in an injury in fact to voters."[184] Plaintiffs offer no reason to think Michigan law is any different.

Plaintiffs also don't have standing under the narrow standing exception allowing ordinary citizens to enforce public rights or duties via an action for mandamus without need to establish a special interest distinct from the public's interest because that exception is limited to *mandamus* claims.[185] But Plaintiffs don't assert a mandamus claim. Rather, they seek only declaratory and injunctive relief. So the standing exception in election cases simply doesn't apply.[186]

Thus, substantive flaws aside, Plaintiffs' claims still fail for lack of standing.

---

[182] *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372; 792 NW2d 686 (2010).
[183] *See, e.g.*, *Hollander v McCain*, 566 F.Supp.2d 63, 71 (D.N.H. 2008), *Berg*, 586 F.3d at 239; *Drake v Obama*, 664 F.3d 774 (9th Cir. 2011); *Kerchner v Obama*, 612 F.3d 204, 207 (3d Cir. 2010); *Drake v Obama*, 664 F.3d 774, 781-782 (9th Cir. 2011); *Sibley v Obama*, 866 F.Supp.2d 17, 20 (D.D.C. 2012).
[184] *Berg*, 586 F.3d at 239.
[185] *Helmkamp v Livonia City Council,* 160 Mich App 442, 445; 408 NW2d 470 (1987); *Protect MI Constitution v Secretary of State*, 297 Mich App 553, 567; 824 NW2d 299 (2012), rev'd on other grounds, 492 Mich 860; 819 NW2d 428 (2012).
[186] Regardless, mandamus is inappropriate here because none of the elements are satisfied. *Deleeuw,* 263 Mich App at 500. For example, Plaintiffs' request for an evidentiary hearing demonstrates that the determination whether President Trump is disqualified under Section Three is *not* ministerial. *Id.*

RECEIVED by MSC 12/22/2023 3:50:25 PM

Conclusion

For the reasons stated above, the lower courts correctly held that Plaintiffs aren't entitled to the relief they seek. This Court should deny leave to appeal.

Date: December 22, 2023

By: */s/ Jonathan B. Koch*
Jonathan B. Koch (P80408)
Brendan P. Karl (P86612)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Intervening Appellee Donald J. Trump
100 Monroe Center NW
Grand Rapids, MI 49503
(616) 774-8000
jkoch@shrr.com
bkarl@shrr.com

Michael Columbo, *admitted pro hac vice.*
Mark P. Meuser, *admitted pro hac vice.*
DHILLON LAW GROUP, INC.
Attorneys for Intervening Appellee Donald J. Trump
177 Post St., Suite 700
San Francisco, CA 94108
(415) 433-1700
mcolumbo@dhillonlaw.com
mmeuser@dhillonlaw.com

Gary L. Lawkowski, *pro hac vice forthcoming.*
DHILLON LAW GROUP, INC.
Attorneys for Intervening Appellee Donald J. Trump
2121 Eisenhower Avenue, Suite 608
Alexandria, VA 22314
(415) 433-1700
glawkowski@dhillonlaw.com

Nicholas J. Nelson, *pro hac vice forthcoming*
CROSS CASTLE PLLC
Attorneys for Intervening Appellee Donald J. Trump
333 Washington Ave. N., Suite 300-9078
Minneapolis, MN 55401
T 612.429.8100
F 612.234.4766
nicholas.nelson@crosscastle.com

RECEIVED by MSC 12/22/2023 3:50:25 PM

INTERVENING APPELLEE DONALD J. TRUMP'S CERTIFICATE OF COMPLIANCE REGARDING WORD COUNT

I certify that this brief was prepared in accordance with MCR 7.305 and MCR 7.212(B)(5) using Microsoft Word and 12-point Times New Roman font and consists of 15,988 words.

Date: December 22, 2023

By: */s/ Jonathan B. Koch*

Jonathan B. Koch (P80408)
Brendan P. Karl (P86612)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Intervening Appellee Donald J. Trump
100 Monroe Center NW
Grand Rapids, MI 49503
(616) 774-8000
jkoch@shrr.com
bkarl@shrr.com

RECEIVED by MSC 12/22/2023 3:50:25 PM