STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellants,

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

v

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

Defendant-Appellee,

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

and

DONALD J. TRUMP,

Intervening Appellee.
_____/

ROBERT DAVIS,

Plaintiff-Appellant,

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

v

WAYNE COUNTY ELECTION COMMISSION,

Defendant-Appellee.
_____/

REPLY BRIEF OF PLAINTIFFS-APPELLANTS LaBRANT ET AL.

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INTRODUCTION

The political question doctrine does not bar Michigan from appointing electors in the manner its legislature directs, and Michigan's candidate eligibility challenge framework includes presidential candidates. Trump's suggested alternative bases for affirmance—not addressed by the Court below—are meritless: Section 3 is self-executing, the president is an "officer of the United States," and the fact-intensive questions of "insurrection" and "engagement" require a record.

ARGUMENT

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

A. States' Plenary Power To Appoint Electors Includes The Power To Appoint Electors Only For Eligible Candidates.

Trump acknowledges that "Article II, Section 1 of the Constitution permits state legislatures to direct how electors for President should be appointed." Trump Br, p 14. Indeed. Article II grants states "far-reaching," *see Chiafalo v Washington*, 591 US ___; 140 S Ct 2316, 2324; 207 L Ed 2d 761 (2020), and "plenary," *see Bush v Gore*, 531 US 98, 104; 121 S Ct 525; 148 L Ed 2d 388 (2000), authority over appointing electors. States may direct that their electors only be appointed for candidates who meet constitutional qualifications. They may implement this direction through state law, such as MCL 600.6419, authorizing courts to adjudicate these questions.

No constitutional provision expressly commits presidential *eligibility adjudication*—as opposed to *counting*—to Congress. Any such unstated congressional power is not exclusive. *See Lindsay v Bowen*, 750 F3d 1061, 1065 (CA 9, 2014) ("[N]othing in the Twentieth Amendment states or implies that Congress has the *exclusive* authority to pass on the eligibility of candidates for president."); *Hassan v Colorado*, 495 F Appx 947, 948 (CA 10, 2012) (state may "exclude from the ballot candidates who are constitutionally prohibited from assuming office"); Muller,

Scrutinizing Federal Election Qualifications, 90 Ind L J 559, 604 (2015) ("[B]ecause the legislature[] may choose the manner by which it selects its electors, it follows that it may restrict the discretion of the election process through an ex ante examination of candidates' qualifications.").

Trump tries to limit *Lindsay* and *Hassan* to cases with undisputed facts. Trump Br, p 14. But the political question doctrine never turns on the existence of factual disputes. If, as Trump claims, all eligibility questions were textually committed to Congress, then states could not exclude *any* candidates as ineligible. Nothing in the Constitution supports Trump's concocted division of labor—states can decide "easier" questions, but Congress must decide "harder" questions. Rather, it assigns states plenary authority to appoint electors and Congress the authority to *count* those electors' votes.

B. Trump Relies On Unpersuasive Decisions Where The Issues Were Not Properly Joined.

Trump relies mainly on unpublished trial court decisions dismissing challenges by pro se plaintiffs who failed to cite relevant authority. *See, e g, Castro v NH Secretary of State*, ___ F Supp 3d ___ (D NH, 2023) (Docket No. 23-cv-416-JL) ("Castro does not present case law that contradicts the authority discussed above—nor has the court found any."), *aff'd on other grounds Castro v Scanlan*, ___ F4th ___ (CA 1, 2023) (Docket No. 23-1902) (confining analysis to standing and noting "the limited nature of the arguments that [Castro] makes about the more generally consequential political question issue"). *None* involved properly filed challenges under well-established state candidacy challenge procedures. Most were filed in *federal* court, where plaintiffs lacked *both* Article III standing *and* statutory causes of action. Even those filed in state

courts did not use procedures developed by state legislatures for candidacy challenges.[1] It is therefore unsurprising that these courts—nearly all dismissing challenges for standing, mootness, or other jurisdictional defects and addressing the political question doctrine (if at all) in dictum—failed to recognize states' plenary power to appoint electors in the manner directed by the legislature when the plaintiffs did not employ the legislature's procedure.

Trump's cases fall into four categories.

1. Post-election cases seeking to annul election results, claiming non-existent remedies. *See Berg v Obama*, 586 F3d 234 (CA 3, 2009) (seeking post-inauguration relief); *Grinols v Electoral College*, order of the United States District Court for the Eastern District of California, issued May 23, 2013 (Docket No. 12-CV-02997-MCE-DAD) (post-election lawsuit seeking to enjoin Electoral College and Congress), *aff'd on other grounds* 622 F Appx 624 (CA 9, 2015); *Taitz v Democrat Party of Miss*, opinion and order of the United States District Court for the Southern District of Mississippi, issued March 31, 2015 (Docket No. 12-CV-280-HTW-LRA) (seeking to "decertify or annul" election results); *Kerchner v Obama*, 669 F Supp 2d 477, 479 (D NJ, 2009) (seeking order "to remove the President from office"), *aff'd on other grounds* 612 F3d 204 (CA 3, 2010). But *this* action relies on a pre-election candidacy challenge procedure that the legislature enacted to help perform its Article II duty to appoint electors "in such Manner as the Legislature thereof may direct."

2. Cases that did not even discuss or purport to apply the political question doctrine, but instead rejected ballot access challenges on other, inapplicable grounds. *See Robinson v Bowen*, 567 F Supp 2d 1144, 1147 (ND Cal, 2008) (stating that judicial review "should occur only

[1] *See, e g, Strunk v NY State Bd of Elections*, 35 Misc 3d 1208(A); 950 NYS2d 722 (NY Sup Ct, 2012), *aff'd* 126 App Div 3d 777; 5 NYS3d 483 (2015) (plaintiff did not use New York's statutory objection procedure, but instead filed a "lengthy, vitriolic, baseless diatribe against defendants").

after the electoral and Congressional processes" (emphasis added) and citing *Texas v United States*, 523 US 296, 300–302; 118 S Ct 1257; 140 L Ed 2d 406 (1998), which concerns *ripeness*); *Keyes v Bowen*, 189 Cal App 4th 647, 659–661; 117 Cal Rptr 3d 207 (2010) (dismissing on state law grounds).

3. Cases affirmed on unrelated grounds. In cases that even *mentioned* the political question doctrine, appellate courts have carefully affirmed on other grounds *without* addressing trial courts' political question musings. *See Castro*, ___ F4th at ___; slip op at 13 (First Circuit "confine[d] [its] analysis, however, to the issue of standing"; declining to adopt district court's political question analysis and noting "like the Supreme Court, '[o]ur court has been similarly sparing in its reliance on the political question doctrine'") (citation omitted); *Grinols*, 622 F Appx at 625 n 1 ("While the district court based its decision on several alternative holdings, we reach only the issue of mootness."); *Kerchner*, 612 F3d at 209 n 3 (noting that district court decided "as an alternate holding" that political question doctrine applied, but "we need not discuss that issue"); *Berg*, 586 F3d at 242 (affirming dismissal solely on standing).

4. Cases later superseded in their own circuits. The pre-2014 California federal district court decisions Trump cites were superseded by *Lindsay*, which held that resolution of presidential candidates' qualifications is *not* exclusively committed to Congress. *See Lindsay*, 750 F3d at 1065. Notably, the *Grinols* trial court decision preceded *Lindsay*, but after *Lindsay*, the Ninth Circuit affirmed *Grinols* on mootness alone. *See Grinols*, 622 F Appx at 625 n 1.

C. The Issues Were Not Resolved By The Senate Impeachment Trial.

Trump invokes res-judicata-like principles, arguing that the Senate's failure to convict Trump forecloses this matter. But if the Senate impeachment vote has any relevance, it *supports* the conclusion that Trump engaged in insurrection. A bipartisan majority of 57 Senators concluded, as did the House, that Trump incited insurrection, and should be convicted. And 22

Senators expressly based their vote to acquit on their belief—notwithstanding an earlier 56–44 procedural vote on jurisdiction, where those 22 were in the minority—that the Senate lacked jurisdiction over a former official, and either criticized him or stated no view on the merits. *See* Goodman & Asabor, *In Their Own Words: The 43 Republicans' Explanations of1 Their Votes Not to Convict Trump in Impeachment Trial*, JustSecurity (February 15, 2021), https://bit.ly/3uUZA1A. A clear Senate majority, and likely two-thirds, agreed that Trump incited the insurrection.

Finally, more evidence is now available than the Senate had in 2021—partly due to Trump's efforts to obfuscate his involvement.

D. The Possibility Of Conflicting Decisions Deserves No Weight.

Trump asserts this Court should not decide this case because states may decide the issue differently. But Article II grants *each state* the power to appoint electors in the manner directed by *its* legislature.[2]

If the political question doctrine prevented resolution wherever sister courts might disagree, no case could ever be decided. That is why appellate courts exist. If any state decides Trump is disqualified, the U.S. Supreme Court can resolve the issue. The possibility that another court may decide this matter differently does not relieve this Court of its obligation to decide the case before it.

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

II. SECTION 3 DOES NOT REQUIRE ADDITIONAL FEDERAL LEGISLATION.

A. Section 3, Like Section 1 Of The Fourteenth Amendment, Is Self-Executing.

Section 3 uses the same direct prohibitory language as Section 1. *Compare* US Const, Am XIV, § 3 ("*No person shall be . . . or hold . . . .*") *with id* § 1 ("*No State shall make or enforce . . . ; nor shall any State deprive . . . ; nor deny . . . .*").[3] Neither uses mere authorizing language, e.g., that Congress "may" "by Law" act. *Cf, e g,* US Const, art I, § 4 ("Congress may at any time by Law . . . ."); *id* § 8 ("Congress shall have Power . . . .").

Section 1 is self-executing. *See City of Boerne v Flores*, 521 US 507, 522–524; 117 S Ct 2157; 138 L Ed 2d 624 (1997), *superseded on other grounds by statute* ("Section 1 of the new [Fourteenth] Amendment imposed self-executing limits on the States. . . . As enacted, the Fourteenth Amendment confers substantive rights against the States which . . . are self-executing."); *Civil Rights Cases*, 109 US 3, 20; 3 S Ct 18; 27 L Ed 835 (1883) ("[Thirteenth] amendment, *as well as the Fourteenth*, is undoubtedly self-executing without any ancillary legislation . . . ."). If "No *State* shall" in Section 1 is self-executing, then so is "No *person* shall" in Section 3.

Trump's argument from Section 5 proves too much. Section 5 applies to Section 1 to the same extent that it applies to Section 3. If Section 5 rendered Section 3 non-self-executing, it would also render Section 1 non-self-executing.

The U.S. Supreme Court rejected this view. *See City of Boerne*, 521 US at 522–526 (while Section 1 of the Fourteenth Amendment "imposed self-executing limits," Section 5 authorizes Congress to enact additional "remedial and preventive measures"); *Jones v Alfred H Mayer Co*, 392 US 409, 439; 88 S Ct 2186; 20 L Ed 2d 1189 (1968) (in similarly-structured Thirteenth

[3] Emphasis added.

Amendment, congressional legislation clause "empowered Congress to do *much more*" than what Section 1 prohibits).

B. *Griffin's Case* Is Not Authoritative Or Persuasive.

Trump relies extensively on *Griffin's Case*, 11 F Cas 7 (CCD Va, 1869). But when that case's central problem—were official government decisions by ex-Confederate officials all void?—was presented to the full U.S. Supreme Court, the Court unanimously agreed on the answer (no) for an *entirely different reason*: the de facto officer doctrine. *Id* at 27. Seven months later, the Court dismissed an appeal of a case that *did* implement Section 3 without federal legislation. *See Worthy v Comm'rs*, 76 US (9 Wall) 611; 19 L Ed 565 (1869).

Public criticism of *Griffin's Case* tracked this distinction. Even newspapers praising the decision focused on its *outcome*—preventing the release of prisoners—and the de facto officer doctrine, not the interpretation of Section 3 as non-self-executing. *See, e g*, Milwaukee Sentinel (May 17, 1869), p 1, col 1; NY Tribune (May 11, 1869), p 4, col 2.

Trump claims that *Griffin's Case* never discussed *state* enforcement of Section 3 because—unmentioned, but supposedly self-evidently—southern state officials could not judge other southerners' qualifications. Trump Br, pp 25–26. But southern state officials *did* judge other southerners' qualifications under Section 3. *See, e g, Worthy v Barrett*, 63 NC 199 (1869), *app dis Worthy*, 76 US (9 Wall) 611; *Louisiana ex rel Downes v Towne*, 21 La 490 (1869); 1 Hinds, *Precedents of the House of Representatives of the United States*, ch 14 (1907), p 470. Loyal officials adjudicated disqualification then; Michigan can now.

III. SECTION 3 APPLIES TO FORMER PRESIDENTS.

The Constitution refers to the presidency as an "office" over 25 times, and the plain meaning of "officer" is one who holds an office. Pls-Appellants' Opening Br, p 2.[4] Trump claims that "officer of the United States" is a technical "term of art" that excludes the president. Trump Br, p 35. And he dismisses extensive nineteenth-century official references to the president as an "officer of the United States"—by Congress, presidents, the Supreme Court, and the public—as not using the term in "the strict Constitution sense." *Id* at 35. But the "Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v Heller*, 554 US 570, 576; 128 S Ct 2783; 171 L Ed 2d 637 (2008); *see also Whitman v Oxford Nat'l Bank*, 176 US 559, 563; 20 S Ct 477; 44 L Ed 587 (1900). A technical term of art would have been defined in legal dictionaries. *See Carpenter v United States*, 585 US ___; 138 S Ct 2206, 2238; 201 L Ed 2d 507 (2018) (Thomas, J, dissenting) (a constitutional term "was probably not a term of art, as it does not appear in legal dictionaries from the era"). Trump cites none.

Nor does Trump explain why he contradicts his federal court brief filed just six months ago. There, Trump argued that he *is* a former "officer of the United States"; distinguished the Appointments Clause cases upon which he now relies; and noted that *amicus* Professor Tillman's views—which he now espouses—are "idiosyncratic . . . and of limited use." *See* Trump Memo in Opp to Mot to Remand, pp 2–9, available at https://bit.ly/TrumpRemandOpp. The court agreed with Trump that the president *is* an "officer of the United States." *New York v Trump*, ___ F Supp 3d ___ (SD NY, 2023) (remanding on other grounds). This Court should reject Trump's opportunistic turnabout.

[4] Trump does not dispute that the presidency is an "office . . . under the United States."

IV. WHETHER TRUMP "ENGAGED" IN "INSURRECTION" IS FACTUAL AND NOT DECIDED BELOW.

Trump argues that January 6 was not an "insurrection," or that he did not "engage" in it. His arguments rely on casuistry. As just three examples:

- He claims that January 6 was not an insurrection against the U.S. Constitution because someone else might attack a post office. Trump Br, p 40.
- He attempts to limit one court's legal conclusion that "marching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding" constitute "engaging" by inserting an invented limitation to "rebel military commanders." Trump Br, pp 42–43. But Trump made that up. *See Rowan v Greene*, initial decision of the Georgia Office of State Admin Hearings, issued May 6, 2022) (Docket No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot), p 14 (*Rowan I*).
- He labels the Colorado court that recently found his January 6 speech constituted incitement an "outlier." Trump Br, p 46. But a federal court *also* so held in 2022. *See Thompson v Trump*, 590 F Supp 3d 46, 115 (D DC, 2022) (finding Trump's speech constituted incitement), *app pending* Docket No. 22-7031. No court has held otherwise.

But this Court need not decide these issues without a factual record. Upon reversal, Plaintiffs-Appellants will present extensive evidence on these issues—much in streamlined form through admission of testimony already presented in the Colorado trial, *see* MRE 804(b)(1)—and the court below may enter findings of fact and conclusions of law.

V. MICHIGAN LAW AUTHORIZES VOTERS TO CHALLENGE THE BALLOT ELIGIBILITY OF PRESIDENTIAL PRIMARY CANDIDATES.

Trump claims that because presidential primary candidates need not file an Affidavit of Identity ("AOI"), Michigan voters' right to challenge his eligibility does not extend to him. Trump Br, p 8. He is wrong.

It is only presidential *nominees* who are exempt from filing AOI's:

> The affidavit of identity filing requirement does not apply to a candidate *nominated* for the office of President of the United States . . . .

MCL 168.558(1) (emphasis added). Since Trump is not yet nominated, he must file an AOI to appear on Michigan's presidential primary ballot.

Because Trump is subject to the AOI requirement, all the case law authorizing voters to challenge the eligibility of candidates who file AOI's applies to him. *See, e g, Berry v Garrett*, 316 Mich App 37; 890 NW2d 882 (2016) (*per curiam*); *Moore v Genessee Co*, 337 Mich App 723; 976 NW2d 921 (2021); *Davis v Highland Park City Clerk*, 510 Mich 923; 979 NW2d 202 (2022). So, Michigan voters can challenge his ballot eligibility to appear on the presidential primary ballot.

VI. UNDER MICHIGAN ELECTION LAW, CANDIDATES WHO ARE INELIGIBLE TO HOLD OFFICE CANNOT BE CANDIDATES.

Trump claims that Plaintiffs-Appellants' claims are unripe because Section 3 only bars *holding* office, not candidacy. Trump Br, pp 28–30.

Wrong. Michigan election law prohibits candidates who are ineligible to hold an office from *running for* that office.

In *Berdy v Buffa*, 504 Mich 876; 928 NW2d 204 (2019), the Michigan Supreme Court held that candidates for city council, who were ineligible to hold that office due to term limits, could not be candidates for that office. *See also, e g, Sheffield v Detroit City Clerk*, 337 Mich App 492; 976 NW2d 95 (2021), *rev'd on other grounds* 508 Mich 851; 962 NW2d 157 (2021) (citing *Berdy* for proposition that ineligible candidates cannot be on ballot).

Because Trump is ineligible to hold the presidency, Michigan election law bars him from Michigan's presidential ballots.

Election law elsewhere is similar. In 2022, Georgia adjudicated a Section 3 ballot challenge against candidate Marjorie Taylor Greene. *See Rowan I.* The administrative law judge adjudicated the Section 3 question on the merits. Neither the ALJ, the state courts, *see Rowan v Raffensperger*, order of the Superior Court of Georgia, issued July 25, 2022 (Docket No. 2022-CV-364778), nor the federal court, *see Greene v Raffensperger*, 599 F Supp 3d 1283 (ND Ga, 2022), questioned the state's authority to enforce Section 3 in a candidate eligibility challenge. A Colorado trial court

recently conducted a trial over candidate Trump's disqualification under Section 3. *See Anderson v Griswold*, order of the Colorado District Court, issued November 17, 2023 (Docket No. 2023-CV-32577), *app pending*.

Plaintiffs-Appellants' case is ripe.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated, Plaintiffs-Appellants ask the Court for the relief stated in their opening brief.

Respectfully submitted,

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Date: December 8, 2023

Certificate of Compliance

I certify that this brief complies with the word volume limitation set forth in MCR 7.212(B)(1) and with the format requirements of MCR 7.212(B)(5). I am relying on the word count of the word-processing system used to produce this document. The word count is 3,193.

Respectfully submitted,

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Dated: December 8, 2023

Proof of Service

The undersigned certifies that on December 8, 2023, the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
Elizabeth M. Rhodes