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STATE OF MINNESOTA
IN THE SUPREME COURT
A23-1354

JOAN GROWE, *et al.*,

Petitioners,

v.

STEVE SIMON, MINNESOTA SECRETARY OF STATE, *et al.*,

Respondents

BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have frequently appeared before the Supreme Court of the United States and the lower state and federal courts as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g., Biden v. Nebraska,* 143 S. Ct. 2355 (2023). Recently, the ACLJ has been retained to represent state Republican parties in similar cases involving efforts to disqualify Donald Trump from state presidential ballots.[1]

The proper resolution of this case is a matter of utmost concern to the ACLJ and more than 125,000 ACLJ supporters, including more than 2000 from Minnesota. because of their commitment to the proper interpretation of the Constitution and to stability in election law. Amicus offers this brief to address the question whether Section 3 of the Fourteenth Amendment is self-executing.[2]

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[1] *Anderson v. Griswold*, Case No: 2023CV32577 (Colo. Dist. Denver), COLO. JUD. BRANCH, https://www.courts.state.co.us/Courts/District/Case_Details.cfm?Case_ID=5240 (last visited Oct. 18, 2023); *Castro v. Ziriax*, Case No. 5:23-cv-00781-JD (W.D. Okla. 2023) (dismissed); *Castro v. Warner*, Case No. 2:2023-cv-00598 (S.D.W. Va. 2023); *Perry-Bey v. Trump*, Case No. 1:23-cv-01165-LMB-IDD (E.D. Va. 2023).

[2] The Court's September 20, 2023, Scheduling Order requested the parties to brief several issues, including whether Section 3 of the Fourteenth Amendment is self-executing.

ARGUMENT

Petitioners' challenge is premised on Section 3 of the Fourteenth Amendment which provides:

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

U.S. Const. amend. 14, § 3. Petitioners claim that Section 3, in conjunction with Minn. Stat. § 204B.44 (2015),[3] authorizes their Petition.[4] For this to be so, Section 3 of the Fourteenth Amendment must be self-executing, an issue which, as this Court recognized, is central to the disposition of the case.[5] The Fourteenth Amendment itself, however, expressly states in Section 5 (emphasis added) that "*[t]he Congress* shall have power to enforce, by appropriate legislation, the provisions of this article." As discussed

[3] § 204B.44 permits "[a]ny individual" to file a petition directly with this Court asking it to correct "an error . . . in the placement or printing of the name . . . of any candidate . . . on any official ballot, including the placement of a candidate on the official ballot who is not eligible to hold the office for which the candidate has filed," or any wrongful act, omission, or error by the Secretary of State (or any other individual charged with any duty concerning an election), that is "about to occur."

[4] Petr's Br. at 1, 12-18.

[5] Scheduling Order at 3.

below, these two sections are best read to mean that Congress has exclusive authority to enforce, by legislation, the disqualification rule of Section 3.

Petitioners addressed the question by 1) mischaracterizing it, 2) urging this Court to disregard binding federal authority holding that Section 3 is not self-executing, and 3) ignoring recent scholarship establishing that the framers of Section 3 intended Congress to enact enforcement legislation. This Court should reject Petitioners' suggestion that courts are free to interpret and enforce Section 3 any way they like.

I. Section Three of the Fourteenth Amendment Is Not Self-Executing, and Petitioners' Arguments to the Contrary are Either Wrong or Irrelevant.

Petitioners began by mischaracterizing the question this Court asked: whether state courts "need congressional permission to enforce the Constitution."[6] The obvious answer is "no," but Petitioners' question was irrelevant. This case is not about "permission" to enforce the Constitution; it is about correctly interpreting the Constitution, specifically a rarely invoked Constitutional provision, adopted in the aftermath of the Civil War to "put some sort of stigma upon the leaders of *this* rebellion."[7]

[6] Petr's Br. at 13.

[7] Statement of Senator Jacob Howard, Cong. Globe, 39th Congress, 1st Sess. at 2901 (emphasis added), *quoted in* Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment* (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838.

Continuing in the same vein, Petitioners next argue that the question, whether Section 3 is self-executing, is merely a disguise for the false notion "that state judges may apply the Constitution only if Congress says they can."[8] Petitioners assert "that state courts routinely adjudicate Fourteenth Amendment claims without federal statutory authorization" – specifically, without recourse to the federal statute, 42 U.S.C. § 1983. To support this assertion, Petitioners cite a few of this Court's cases rejecting Fourteenth Amendment equal protection claims against state officials without explicitly stating that the claims were brought under 42 U.S.C. § 1983.[9]

The lack of a specific reference to § 1983 in the court's opinion does not mean that § 1983 was not the vehicle for the claims. For example, in *Jenness v. Fortson*, 403 U.S. 431 (1971), relied upon by this Court in *Beaulieu v. Mack*, 788 N.W.2d 892, 895 (Minn. 2010),[10] the United States Supreme Court rejected the plaintiffs' federal constitutional claims against a state's election nominating requirements without mentioning § 1983. As confirmed by the District Court decision in *Fortson*, § 1983 was nonetheless the vehicle for Jenness's constitutional claims. *See Ga. Socialist Workers Party v. Fortson*, 315 F. Supp. 1035, 1037 (N.D. Ga. 1970) (stating the "action is brought under 42 U.S.C.A. § 1983"). In any event, an error not called to the court's

[8] *See* Petr's Br. at 13-14.
[9] *See* Petr's Br. at 13-14.
[10] Cited by Petitioners, Petr's Br. at 13.

attention – i.e., not invoking § 1983 – is not an implicit endorsement of that practice. Moreover, failure to plead federal constitutional claims under § 1983 is not grounds for automatic dismissal under Fed. R. Civ. P. 12(b)(6). See *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (summary reversal) (holding that plaintiffs who neglect to plead their federal constitutional claims under § 1983 should be given permission to amend their complaint).

Petitioners ignore unanimous federal precedent holding that 42 U.S.C. § 1983 provides the exclusive vehicle for bringing constitutional claims against state officials under the Fourteenth Amendment. *See, e.g.*, *Sweat v. City of Fort Smith*, 265 F.3d 692, 696 (8th Cir. 2001) (noting Eighth Circuit precedent holding that § 1983 is an exclusive remedy for constitutional violations); *Cedar-Riverside Associates, Inc. v. City of Minneapolis*, 606 F.2d 254 (8th Cir. 1979) (stating that Congress intended 42 U.S.C. § 1983 as an exclusive remedy for constitutional violations committed by municipalities and that "no reason exists to imply a direct cause of action (for such violations) under the fourteenth amendment.")[11] Contrary to Petitioners' claim, state courts can only

[11] *See also Foster v. Michigan*, 573 F. App'x. 377, 391 (6th Cir. 2014) ("[W]e have long held that § 1983 provides the exclusive remedy for constitutional violations."); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1273 n.3 (5th Cir. 1994) (providing that § 1983 is the appropriate vehicle for asserting violations of constitutional rights); *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) ("We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983.").

"apply the Constitution"[12] when constitutional claims are brought before them as Congress prescribed. State courts have no free roaming power to hear federal constitutional claims against state and local officials apart from the limits of § 1983.

Petitioners also wrongly assert that the other provisions of the Fourteenth Amendment are self-executing.[13] Not so. Section 5 of the Fourteenth Amendment confers enforcement power on Congress to determine "whether and what legislation is needed to" enforce the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 33 (1991) (Scalia, J., concurring) ("It cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform."). As the Supreme Court recently noted, Congress enacted 42 U.S.C. § 1983 precisely because the Reconstruction Amendments were not self-executing, and because civil rights violations were legion even after the Amendments were adopted. *Health & Hosp. Corp. of Marion Cty. v. Talevski,* 143 S. Ct. 1444, 1453 (2023).

Petitioners' reliance on the *Civil Rights Cases*, 109 U.S. 3, 20 (1883) is misplaced. As the United States Court of Appeals for the Fourth Circuit explained:

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[12] Pet'rs' Br. at 13.
[13] *Id*. at 15.

> It is true that in the *Civil Rights Cases*, the Court referred to the Fourteenth Amendment as self-executing, when discussing the Fifteenth, but it is also true that earlier in the opinion, discussing § 1 of the Fourteenth Amendment, the court stated: "in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation." The *Civil Rights Cases* did not overrule *Ex Parte Virginia*, and any apparent inconsistency between the two just quoted statements in the *Civil Rights Cases* may be resolved, we think, by reference to the protection the Fourteenth Amendment provided of its own force as a shield under the doctrine of judicial review.

Cale v. Covington, 586 F.2d 311, 316-17 (4th Cir. 1978) (rejecting the argument that there is an implied cause of action under the Fourteenth Amendment because the Amendment is self-executing).

Just as Congress enacted 42 U.S.C. § 1983 pursuant to its enforcement power under Section 5, Congress has adopted legislation enforcing Section 3. It has chosen not to create a private right of action. In 1994, Congress adopted 18 U.S.C. § 2383, a criminal provision banning rebellion and insurrection. Donald Trump has never been charged with, much less convicted of, violating § 2383.

In 2021, Congress considered but did not adopt legislation authorizing the U.S. Attorney General to enforce the Disqualification Clause.[14] That Congress has authorized enforcement of Section 3 only by criminal authorities demonstrates an

[14] *See* H.R. 1405, 117th Cong. (February 26, 2021) ("To provide a cause of action to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States, and for other purposes.").

intention that only the government, and not private citizens, can be the party initiating the action. Criminal enforcement also safeguards the due process rights of those accused of insurrection or rebellion.

For at least the past two decades, the Supreme Court has consistently declined to recognize a private cause of action that Congress did not expressly authorize to enforce federal laws. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015); *Comcast Corp. v. Nat'l Assn. of African American-Owned Media*, 140 S. Ct. 1009, 1015 (2020). The Court firmly grounded these holdings on the principle that when Congress has not created a private right of action, implying such a right entrenches upon the separation of legislative and judicial power. *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020). That principle applies with even greater force to a constitutional amendment that expressly reserves enforcement power to Congress.

Whether Section 3 is self-executing is not resolved by irrelevant truisms about state judicial powers. Federal case law and authoritative scholarship on how Section 3 was understood by the framers of the Fourteenth Amendment reinforce that Section 3 is not self-executing.

II. Federal Case Law Establishes that Section 3 Is Not Self-Executing.

Petitioners' suggestion that this Court is free to interpret and enforce Section 3 any way it likes because it has general authority to apply the federal Constitution is neither logical nor legally correct. Federal case law establishes that Section 3 is not self-executing. In the seminal decision of *Griffin's Case*, 11 F. Cas. 7, 22 (C.C.D. Va. 1869), Chief Justice Salmon Chase, sitting as Circuit Justice for Virginia held that only Congress can provide the means of enforcing Section 3. In *Griffin*, Judge Sheffey, a former officer of Confederate Virginia, sentenced Caesar Griffin to two years' imprisonment for assault with intent to kill. Griffin filed a federal action, arguing that the Fourteenth Amendment automatically acted to remove Judge Sheffey from office, "operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at 23.

Chief Justice Chase prefaced his analysis of Section 3 with the observation that "it can hardly be doubted that the main purpose was to inflict upon the leading and most influential characters who had been engaged in the Rebellion, exclusion from office as a punishment for the offense." *Id*. at 26. Chase opined that "it is obviously impossible to do this by a simple declaration . . . . [I]t must be ascertained what particular individuals are embraced by the definition, before any sentence of

exclusion can be made to operate." *Id.* Chase concluded that the Due Process Clause foreclosed the argument that Section 3 automatically disqualifies someone from offense without a trial:

> Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an ex post facto, are inconsistent in their spirit and general purpose with a provision which, at once without trial, deprives a whole class of persons of offices held by them, for cause, however grave.

Id. at 26.

Moreover, Chief Justice Chase held that the provisions of Section 3 can only be enforced by Congress. "To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by congress." *Id.* He concluded that:

> the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislations of congress in its ordinary course. This construction gives certain effect to the undoubted intent of the Amendment to insure the exclusion from office of the designated class of persons, if not relieved from their disabilities, and avoids the manifold evils which must attend the construction insisted upon by the counsel for the petitioner.

Id.; *see also In re Brosnahan*, 18 F. 62, 81 n.73 (C.C.W.D. Mo. 1883) (McCrary, J., concurring) (same).

State courts and officials have followed *Griffin*. *See, e.g., Hansen v. Finchem,* 2022 Ariz. Super. LEXIS 5 (Maricopa Cnty. Sup. Ct. 2022) ("given the current state of the law and in accordance with the United States Constitution, Plaintiffs have no private right of action to assert claims under the Disqualification Clause"), *aff'd on other grounds*, 2022 Ariz. LEXIS 168 (Ariz. S. Ct. May 9, 2022) *Rothermel v. Meyerle*, 136 Pa. 250, 254 (1890) (citing *Griffin's Case*, 11 F. Cas. at 26) ("[I]t has also been held that the fourteenth Amendment, as indeed is shown by the provision made in its fifth section, did not execute itself."); *State v. Buckley*, 54 Ala. 599, 616 (Ala. 1875) (Stone, J.) (same); Mark R. Herring, Va. Attorney General to Lee J. Carter, Delegate, Commonwealth of Virginia Opinion No. 21-003, 2021 Va. AG Lexis 1, 2, n.11 (2021) ("[T]he weight of authority appears to be that Section 3 of the Fourteenth Amendment is not 'self-executing'—put another way, it is possible that Congress may need to pass implementing legislation to make this provision operative.") (citing *Griffin's Case*).

Griffin's Case is the controlling federal case establishing that Section 3 is not self-executing. The Chief Justice's analysis is supported by recent scholarship showing that due process concerns were paramount for those who considered during the Fourteenth Amendment framing and ratification debates whether Section 3 was self-executing.

III. According to Recent Scholarship from a Prominent Fourteenth Amendment Expert, Historical Evidence Supports that Only Congress Can Enforce Section 3.

Fourteenth Amendment Scholar Professor Kurt T. Lash recently focused on the Fourteenth Amendment framing and ratification debates with the goal of determining the "likely public understanding of Section Three." Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment,* at 6 (October 3, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838. He concluded that the public understanding at the time of ratification was that Section 3 was not self-executing. *Id.* at 37-40.

Professor Lash framed his analysis by noting the limited historical purpose of Section 3 and the obvious impact on interpretative questions. Section 3 was

> "intended to put some sort of stigma, some sort of odium upon the leaders of this rebellion, and no other way is left to do it but by some provision of this kind." It was [this] narrow explanation of Section Three that went forth to the ratifying public, and this is the only historically verifiable meaning of the text. The provision applied to the still living rebel leaders of the American Civil War. *The text and history of Section Three demands nothing more.*

Id. at 6 (emphasis added) (quoting Senator Jacob Howard (Michigan), Cong. Globe, 39th Congress, 1st Sess. at 2901)).

Conceding that "the text of Section Three says nothing about the need for enabling legislation," Lash pointed out that "it is paired with Section Five which

expressly grants enforcement power." *Id.* at 4. Below is a summary of the key historical facts leading Lash to conclude that Section Three was not intended to be self-executing:

- Representative Thaddeus Stevens, one of the leading proponents of the Reconstruction Amendments introduced the Joint Committee's draft of Section Three to the House. During the Congressional framing debates, Stevens responded to concerns that Section Three would be unenforceable, stating that both Section Three and other provisions in the Fourteenth Amendment would require enabling legislation.[15]

- Stevens emphasized that "[i]t will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have a right to do."[16]

- Stevens expressed fear that there was "no hope of safety unless in the prescription of proper enabling acts."[17]

- The question whether Section 3 was self-executing also arose during the Pennsylvania ratification debates. Animated by the same due process concerns expressed by Chief Justice Chase in *Griffin*, Representative Thomas Chalfont "explored in detail the necessity and form of congressional enforcement of Section Three." *Id.* at 42. He was concerned that the provision could be read as "self-executing and automatically disqualifying certain persons without the need for any prior deliberation and judgment." *Id.*[18]

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[15] Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment* (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838, at 37.
[16] *Id.*
[17] *Id.* (quoting 2 Reconstruction Amendments, Essential Documents 219 (Kurt Lash ed. 2021).
[18] *Id.* (quoting Hon. Thos. Chalfant, member from Columbia County, in the House, January 30, 1867, on Senate Bill No. 3 [the proposed amendment], *in* The Appendix to the Daily Legislative Record Containing the Debates on the Several Important Bills Before the

- For Chalfont, such a reading was alarming: "[O]f course there would have to be some kind of trial prior to a person's disqualification." *Id.* at 43.[19]

- Chalfant assumed that his colleagues would agree that disqualification under Section Three could not occur without a prior adjudication of the person's guilt: "in order to make this section of any effect whatever, the guilt must be established."[20]

- Chalfant proceeded to present several hypothetical scenarios to demonstrate the harm that would result from determinations of guilt without due process.[21]

- Chalfant then considered the only possible solution to the problems: Congressional legislation.[22]

Professor Lash concluded from the foregoing history that Chalfont clearly

> presumed that every ratifier in the room agreed with him that no person could properly be disqualified under Section Three prior to an adjudication by an impartial tribunal. In the hundreds of pages of debate in the Pennsylvania assembly, I have not found a single example of anyone who thought otherwise. Although Pennsylvania went on to ratify the Fourteenth Amendment, no member appears to

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Legislature of 1867 (George Bergner, ed., Harrisburg 1867) (hereinafter "The Appendix")).

[19] *Id.* at 43 (citing The Appendix, supra note 15, at LXXX).

[20] *Id.* (citing The Appendix, supra note 15, at LXXX.

[21] *Id.* (citing The Appendix, supra note 15, at LXXX-XXI).

[22] Chalmont concluded that "someone will answer that under the fifth section of this amendment Congress is authorized to provide, by appropriate legislation, for enforcing this amendment. . . . I can conceive of nothing, unless it be some act authorizing the appointment of a "commission" to prescribe qualifications and investigate claims of all candidates and candidates for office. This would be one way. *Id.* at 44-45 (citing The Appendix, supra note 15, at LXXXI).

> have denied Chalfant's basic assumption that section three required enabling legislation.[23]

Lash provides a more complete historical picture of Chalmont's views than do Professors Baude and Paulsen, upon whom Petitioners rely.[24] It is true that Chalmont read Section 3 not to be self-executing; it is equally true that he believed strongly that Congress must enact enabling legislation to avoid due process concerns.[25] The view that due process principles required congressional enabling legislation was consonant with "Republican commitment to due process" during the reconstruction era, as "reflected in the opening section of the Fourteenth Amendment itself."[26] Professor Lash also concluded that Chief Justice Chase's analysis in *Griffin's Case* was consistent with the historical record.[27]

What is more, Professor Lash's research conclusively established that Section 3 does not apply to the office of the President.[28] His historical analysis was so persuasive that Professor Steven Calabresi of Yale University, who had previously endorsed the position that Section 3 disqualifies Donald Trump from the

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[23] *Id.* at 45.
[24] *See* Pet'r's Br. at 15 (citing William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (revised Sept. 19, 2023).
[25] Lash, *supra*, note 14, at 38.
[26] *Id.* at 49.
[27] *Id.*
[28] *Id.* at 7-35.

Presidency,[29] recanted. Lash's scholarship persuaded him of the very error Petitioners invite this Court to embrace.[30]

Section 3 is not self-executing and therefore does not authorize Petitioners' claims. Any other conclusion raises profound due process problems.

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[29] Steven Calabresi, *Trump is Disqualified from Being on Any Election Ballots*, VOLOKH CONSPIRACY (Aug. 10, 2023, 6:44 PM), https://reason.com/volokh/2023/08/10/trump-is-disqualified-from-being-on-any-election-ballots/.

[30] Steven Calabresi, *Section 3 of the Fourteenth Amendment*, VOLOKH CONSPIRACY (Oct. 12, 2023, 9:59 PM), https://reason.com/volokh/2023/10/12/section-3-of-the-fourteenth-amendment/.

CONCLUSION

Wherefore the ACLJ respectfully requests that this Court dismiss the Petition.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief Amicus Curiae conforms to the requirements of Minn. R. Civ. App. P. P. 132.01, subds.1 and 3, was produced with a proportional 14-point font, is filed in Portable Document Format ("pdf") and contains 3,811 words. This Brief was prepared using Microsoft Word software.

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