STATE OF MICHIGAN

IN THE COURT OF APPEALS

ROBERT DAVIS

Plaintiff-Appellants,

v.

WAYNE COUNTY ELECTION COMMISSION,

Defendant-Appellee

_____/

Court of Appeals Nos. 368615; 368628

LC Nos. 23-012484-AW; 23-000137-MZ

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

_____/

BRIEF *AMICI CURIAE* OF THE MICHIGAN REPUBLICAN PARTY AND ADDITIONAL STATE REPUBLICAN PARTIES INCLUDING THE OKLAHOMA REPUBLICAN PARTY, THE COLORADO REPUBLICAN PARTY, THE WEST VIRGINIA REPUBLICAN PARTY, THE WYOMING REPUBLICAN PARTY, THE KANSAS REPUBLICAN PARTY, THE NORTH DAKOTA REPUBLICAN PARTY, THE WISCONSIN REPUBLICAN PARTY, THE NEBRASKA REPUBLICAN PARTY, THE GEORGIA REPUBLICAN PARTY, THE DELAWARE REPUBLICAN PARTY, THE MAINE REPUBLICAN PARTY, THE IDAHO REPUBLICAN PARTY, THE RHODE ISLAND REPUBLICAN PARTY, AND THE OHIO REPUBLICAN PARTY, IN SUPPORT OF AFFIRMING THE LOWER COURT AND APPELLEE

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INTEREST OF THE *AMICI CURIAE*

Amicus, the Michigan Republican State Committee (the "Michigan Republican Party," the "MRP," the "Party"), is an unincorporated nonprofit association and Political Party Committee in the state of Michigan, operating under Michigan law.[1] Its primary purpose, as reflected by its bylaws, is to elect duly nominated Republican candidates to office, promote the principles and objectives of the Republican Party, and perform its functions under Michigan election law. Specifically, its purpose is: "To direct, manage and supervise the affairs and business of the Republican Party in Michigan. This shall include but shall not necessarily be limited to: 1. work for the election of nominees of the Republican Party in Michigan; and 2. work in close cooperation with other Republican state, district and county organizations."[2]

The Michigan Republican Party is joined by numerous other state Republican committees in this filing, including the Colorado Republican Party, the Oklahoma Republican Party, the West Virginia Republican Party, the Kansas Republican Party, the Delaware Republican Party, the North Dakota Republican Party, the Ohio Republican Party, the Wisconsin Republican Party, the Wyoming Republican Party, the Georgia Republican Party, the Nebraska Republican Party, the Maine Republican Party, the Idaho Republican Party, and the Rhode Island Republican Party. The interests of these *amici*, clearly implicated in this action, are to elect Republican candidates and to protect the access of their members, statewide, to as many candidates as possible. Nominating and designating candidates is their core role—regardless of any particular candidate. Most of these

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[1] Under MCR 7.212(H)(3), no counsel for any party authored this brief in whole or in part, and no person or entity aside from *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Michigan Republican State Committee, Bylaws, Art. II (2020), https://uploads-ssl.webflow.com/64e5fc4d534d66779544b105/64e5fc4d534d66779544b155_MRSC-Bylaws.pdf.

amici have faced or are facing similar litigation or related threats to or attacks on their autonomy, processes and rules, over the scope and meaning of the Fourteenth Amendment and its application to contemporary events. All these *amici*'s interests would be injured if a presidential candidate is barred from the ballot in Michigan because that candidate's viability is unquestionably lessened and the votes of these state parties' members are lessened.

INTRODUCTION

As the lower court correctly held, it is the Michigan Republican Party who bears the ultimate discretionary responsibility under Michigan law to determine who shall be the Republican nominees for presidential office according to its own policies and procedures by determining who shall represent the Michigan Republican Party at the National Republican Convention. Ct. Op. at 6-7. Michigan law makes clear that it is the Republican Party that has the ultimate say in presidential primary elections, because it chooses the candidates for electors and then transmits those candidates to the Secretary of State. MCLS § 168.42. "The candidates for electors of president and vice-president who shall be considered elected are those whose names have been certified to the secretary of state by that political party receiving the greatest number of votes." *Id.* Likewise, Michigan law reflects the party's authority by giving to the state chairperson of the party the authority, before a presidential primary is held, to "file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party." MCLS § 168.614a(2).

Michigan law is consonant with federal case law holding that states may not determine or interfere with qualifications for national office. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 810 (1995) ("In light of the Framers' evident concern that States would try to undermine the National Government, they could not have intended States to have the power to set

qualifications."); *Heitmanis v. Austin*, 899 F.2d 521, 529 (6th Cir. 1990) (quoting *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 123-24 (1981) (applying U.S. Supreme Court jurisprudence to Michigan in holding that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution."). That same law supports the lower court's conclusion that this case is nonjusticiable. Because this case presents a nonjusticiable political question, both the lower court and this Court lack jurisdiction.

ARGUMENT

I. THE LOWER COURT CORRECTLY HELD THAT THE DETERMINATION OF WHETHER OR HOW THE DISQUALIFICATION CLAUSE OF THE FOURTEENTH AMENDMENT CAN BE APPLIED IN THIS CASE PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.

The lower court's conclusion that this case presents a nonjusticiable political question was based in part on its assessment that Congress has exclusive authority to enforce the disqualification provision of the Fourteenth Amendment. Ct. Op. at 13. The lower court was correct. The Fourteenth Amendment reserved authority for its enforcement to Congress. Section Three of the Fourteenth Amendment is not self-executing, and it does not authorize state officials or courts to enforce its provisions.

A. The Fourteenth Amendment in its Entirety Is Not Self-Executing.

The Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Shortly after adoption of the Fourteenth Amendment, the Supreme Court stated that "[i]t is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation.

Some legislation is contemplated to make the amendments fully effective." *Ex parte Virginia.*, 100 U.S. 339, 345 (1879).

Section Five 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) (quoting *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921)) ("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 United States Court of Appeals for the Fourth Circuit explained:

> 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 (4th Cir. 1978) (citation omitted) (rejecting the argument that there is an implied cause of action under the Fourteenth Amendment because the Amendment is self-executing). In other words, the Fourth Circuit explained a critical distinction in constitutional law. Many provisions are self-executing in the sense that they may be relied on as a defense, even if not specifically authorized. The First Amendment may be raised as a defense in some criminal cases even when not explicitly authorized by an individual statute, for example. But what the Court has made clear time and time again is that no constitutional provision is a self-executing sword, creating within itself a cause of action. As fundamental as the First and Second

Amendments are, for example, they still nonetheless may only be enforced as a cause of action under a congressional statute. And this is also true of Section Three of the Fourteenth Amendment.

B. *Griffin's Case* Establishes Conclusively that Section Three of the Fourteenth Amendment 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 Judge for Virginia, held that only Congress can provide the means of enforcing Section Three as a cause of action. There, Judge Sheffey, a former officer of Confederate Virginia, sentenced Caesar Griffin to two years of imprisonment for assault with intent to kill. *Id.* 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. In other words, he argued that the Disqualification Clause was self-executing, and that individuals who served the confederacy were automatically barred from office, even without any congressional authorization of a cause of action or process.

Chief Justice Chase prefaced his analysis of Section Three 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 ruled 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 Three 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. Moreover, Chief Justice Chase held that the provisions of Section Three 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.

State courts and officials have repeatedly followed *Griffin*. *See, e.g.*, *Hansen v. Finchem*, 2022 Ariz. Super. LEXIS 5 (Maricopa Cnty. Super. 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. May 9, 2022); *Rothermel v. Meyerle*, 20 A. 583, 584 (Pa. 1890) (citing *Griffin's Case*, 11 F. Cas. at 26) (citing and ultimately agreeing with trial court's conclusion that "[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 ex rel Att'y Gen. v. Buckley*, 54 Ala. 599, 616 (Ala. 1875); 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 Three 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*).

In fact, even the United States Government officially takes the view that the Fourteenth Amendment is not self-executing, based on *Griffin's Case*. The annotated constitutional commentary available on Congress's website cites *Griffin's Case* for this proposition: "Legislation by Congress providing for removal was necessary to give effect to the prohibition of Section Three, and until removed in pursuance of such legislation persons in office before promulgation of the Fourteenth Amendment continued to exercise their functions lawfully." *Amdt14.S3.1 Overview of Disqualification Clause*, Constitution Annotated, https://constitution.congress.gov/browse/essay/amdt14-S3-1/ALDE_00000848/ (last visited Nov. 6, 2023).

Chief Justice Chase's analysis in *Griffin's Case* is supported by historical evidence. 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 explicitly that both Section Three and other provisions in the Fourteenth Amendment would require enabling legislation from Congress in order to be enforceable. 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." 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. (quoting 2 Reconstruction Amendments, Essential Documents 219 (Kurt Lash ed. 2021)).

Stevens expressed fear that there was "no hope of safety unless in the prescription of proper enabling acts." *Id.*

Because the Fourteenth Amendment is not self-executing, the exclusive method for enforcing its provisions is through the provisions Congress may choose to establish for doing so. Just as a private plaintiff seeking to enforce individual rights under Section One of the Fourteenth Amendment must utilize the mechanism Congress has established, 42 U.S.C. § 1983, *see 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."), the enforcement of Section Three is likewise entrusted to congressional authority.

II. THIS COURT LACKS JURISDICTION AND SHOULD AFFIRM THE LOWER COURT'S DISMISSAL OF PLAINTIFFS-APPELLANTS' REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF.

Because this case presents a nonjusticiable political question, this Court lacks jurisdiction over all other claims presented. The presence of a political question defeats jurisdiction just as effectively as does lack of standing. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("The doctrine[] of . . . political question . . . originate[s] in Article III's 'case' or 'controversy' language, no less than standing does."); *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citation omitted) ("Congress may not confer jurisdiction on Article III federal courts . . . to resolve 'political questions,' because suits of this character are inconsistent with the judicial function under Article III."); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) ("[T]he jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Article III, embodies both the standing and political question doctrines . . . .").

The Court reiterated this principle most recently in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494, 2508 (2019) (explaining that the resolution of political questions falls "outside the

courts' competence and therefore beyond the courts' jurisdiction" and remanding "with instructions to dismiss for lack of jurisdiction."). Accordingly, this Court should also dismiss this case with prejudice.

CONCLUSION

For these reasons, this Court should affirm the lower court's dismissal of the Plaintiffs-Appellants' Request for Declaratory and Injunctive relief.

Respectfully submitted,

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Dated: December 6, 2023

PROOF OF SERVICE

I, Daniel J. Hartman, hereby affirm that on December 8, 2023, I delivered a copy of the *Amicus Curiae* Brief upon counsel of record stated above, via the Court's MiFile system. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

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