EXHIBIT 1

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellants,

v

Court of Appeals No. 368628

SECRETARY OF STATE,

Defendant-Appellee,

Court of Claims No. 23-000137-MZ

and

DONALD J. TRUMP,

Intervening Appellee.

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BRIEF OF AMICI CURIAE STATES OF WEST VIRGINIA, INDIANA, AND 17 OTHER STATES IN SUPPORT OF INTERVENING APPELLEE DONALD J. TRUMP

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST

The States of West Virginia, Indiana, Alabama, Alaska, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming submit this amicus brief in support of Intervening Appellee Donald J. Trump.[1]

Appellants ask the Court to block the Forty-Fifth President of the United States from running for President again on a Michigan ballot. They insist President Trump is ineligible for reelection under Section 3 of the Fourteenth Amendment. Under their theory, each State decides whether that's so on its own. But "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important *national* interest." *Anderson v Celebrezze,* 460 US 780, 794–95; 103 S Ct 1564; 75 L Ed 2d 547 (1983) (emphasis added) (footnote omitted). No State is an electoral "island" because "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Id.* at 795. When one State excludes a presidential candidate, his or her votes lose value in other States. And when many States exclude the candidate, his or her votes may have no value at all in other States. The Amici States have a strong interest in protecting their electorates from this sort of dilution. Michigan's "interests in regulating an election cannot trump the national interest in having presidential candidates appear on the ballot in each state." *Libertarian Party of Ohio v Blackwell*, 462 F3d 579, 594 (CA 6, 2006).

[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the Amici States made such a monetary contribution.

INTRODUCTION

Appellants raise a question that demands a single, national answer—whether the Fourteenth Amendment's Insurrection Clause bars former President Donald Trump from seeking a second term. However one views his candidacy, everyone should be able to agree that our country needs a clear, uniform answer. Electoral chaos would ensue if a presidential candidate, whose eligibility is governed by a single set of constitutional requirements, is eligible to appear on some States' ballots but not others. Recognizing as much, the Court of Claims rejected Appellants' attempt to balkanize eligibility for President, holding that it did not have the power under Michigan law to push President Trump off a presidential primary ballot.

But as the Court of Claims further explained, a more fundamental problem plagues Appellants' case: Deciding whether the Insurrection Clause applies to a candidate presents a nonjusticiable "political question for the voters, not the courts." *Donigan v Oakland Cnty Election Comm'n*, 279 Mich App 80, 84; 755 NW2d 209 (2008). At least one other court has already dismissed the very same sort of allegations against President Trump under the political-question doctrine. See *Castro v NH Sec'y of State*, No 23-CV-416-JL, 2023 WL 7110390, at *9 (DNH, October 27, 2023), *aff'd*, 2023 WL 8078010 (CA 1, November 21, 2023). This Court should do the same.

The Fourteenth Amendment entrusts Insurrection Clause questions to Congress—not state officials or state courts. The Amendment vests Congress with "power to enforce" the Insurrection Clause "by appropriate legislation" and power to "remove [the] disability" it imposes. US Const, amend XIV, §§ 3, 5. That "textually

demonstrable constitutional commitment of the issue to a coordinate political department" means that courts have no business second-guessing Congress's decisions to enforce—or not to enforce—the Clause. *Nixon v United States*, 506 US 224, 228; 113 S Ct 732; 122 L Ed 2d 1 (1993) (quoting *Baker v Carr*, 369 US 186, 217; 82 S Ct 691; 7 L Ed 2d 663 (1962)). After all, this Court "cannot serve as political overseers . . . , weighing the costs and benefits of competing political ideas"—or competing political candidates. *Straus v Governor*, 459 Mich 526, 531; 592 NW2d 53 (1999).

Other considerations—including a "lack of judicially discoverable and manageable standards" and an "unusual need for unquestioning adherence" to an issue's resolution—reinforce the conclusion that this case raises a "nonjusticiable" political question. *Nixon*, 506 US at 228; see *Makowski v Governor*, 495 Mich 465, 472; 852 NW2d 61 (2014) (applying similar factors). For example, as the Court of Claims noted, even the decisive term "insurrection" is not consistently defined. And allowing each State and its courts to determine eligibility using malleable standards would create an unworkable patchwork of eligibility requirements for President.

In short, Appellants "ask[] the court[] to intrude in an area in which [it] ha[s] no rightful power and no compass." *Wu Tien Li-Shou v United States*, 777 F3d 175, 183 (CA 4, 2015) (cleaned up). And while Appellants purport to take up a noble fight, "[t]here is a fundamental difference between actions taken to get a candidate's name on the ballot and actions taken to prevent it from appearing." *Deleeuw v State Bd of*

Canvassers, 263 Mich App 497, 504; 688 NW2d 847 (2004). The Court should refuse Appellants' ill-advised effort and affirm the decision below.

ARGUMENT

I. The Fourteenth Amendment Expressly Commits Section 3's Enforcement to Congress.

The President occupies a unique place under our Constitution. The President is only one of two "elected officials who represent all the voters in the Nation." *Anderson*, 460 US at 795. So, when States try to impose "more stringent ballot access requirements" or eligibility criteria on candidates for President, that effort "has an impact beyond [a State's] own borders." *Id.* at 795. And the practical impact makes it essential to have a single, national answer as to whether someone is eligible to run for President. It is unworkable for 50 States to decide for themselves whether someone is constitutionally eligible.

The Constitution recognizes the need for national answers. It imposes a single set of eligibility requirements for President, see, e.g., US Const, art II, § 1 (imposing age, citizenship, and residency eligibility requirements), which States may not "modif[y]," *US Term Limits, Inc v Thornton*, 514 US 779, 811; 115 S Ct 1842; 131 L Ed 2d 881 (1995). It also gives Congress—an elected, national body capable of giving a single answer—responsibility for determining whether a President may continue in office. US Const, art I, § 2 (allocating "sole Power of Impeachment" to the House); US Const, art I, § 3 (allocating "sole Power to try all Impeachments" to the Senate); *id.* (limiting "[j]udgment in Cases of Impeachment "to removal from Office[] and disqualification" from further office); US Const, art II, § 4 (providing for "remov[al]

from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors").

So even assuming the Insurrection Clause applies to a candidate for President (to be clear, it doesn't), Congress gets to call the tune. The Fourteenth Amendment provides that "[n]o person shall … hold any office … who, having previously taken an oath … as an officer of the United States … to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same." US Const, amend XIV, § 3. But it then stresses that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." US Const, amend XIV, § 5. And it specifies that only "Congress … by a vote of two-thirds of each House" may "remove [the] disability" imposed by the Insurrection Clause. US Const, amend XIV, § 3. Thus, the Fourteenth Amendment charges Congress with deciding how the Insurrection Clause will be enforced. See *Kerchner v Obama,* 669 F Supp 2d 477, 483 n 5 (DNJ, 2009) (detailing constitutional provisions that show qualifications of a President constitute a non-justiciable political question).

Just months after the Fourteenth Amendment's ratification, for example, Chief Justice Salmon P. Chase (while riding circuit in Virginia) reached that very conclusion. *In re Griffin*, 11 F Cas 7 (CCD Va, 1869). Examining the text, he explained that the Fourteenth Amendment's "fifth section qualifies the third." *Id.* at 26. Section 5 "gives congress absolute control of the whole operation of the amendment," and hence "legislation by congress is necessary to give effect to [Section 3's] prohibition." *Id.*

Practical considerations, Chief Justice Chase explained, "very clearly" underscored the need for legislation. *Griffin*, 11 F Cas at 26. To give effect to Section 3, "it must be ascertained what particular individuals" are subject to a disability. *Id.* But "only . . . congress" may "provide" the "proceedings, evidence, decisions, and enforcements of decisions" required to "ascertain[] what particular individuals are embraced by the definition" and "ensure effective results." *Id.*; cf. *Cawthorn v Amalfi*, 35 F4th 245, 275–82 (CA 4, 2022) (Richardson, J., concurring) (explaining why only Congress may decide whether its own members are disqualified under Section 3 of the Fourteenth Amendment). No wonder, then, that Congress at one point *did* pass (later repealed) enabling legislation; Congress, like Chief Justice Chase, recognized that this portion of "[t]he Constitution provides no means for enforcing itself." Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, Working Paper, at 46 (October 28, 2023), https://bit.ly/3RfwVS8 (quoting Sen. Lyman Trumbull).

In requiring that "two-thirds of each House" agree to remove the disability, the Fourteenth Amendment aligns with the standard for Congress to determine a President's legal qualifications under the Twenty-Fifth Amendment. Under that amendment, if the Vice President and certain officers find that the President is unable to perform the duties of his office, "Congress shall decide the issue [of ability] … by two-thirds vote of both Houses." US Const, amend XXV. "[O]therwise, the President shall resume the powers and duties of his office." *Id.* An unable President is one who lacks the ability or the legal qualifications to discharge his office. See

Grinols v Electoral Coll., No 2:12-CV-02997, 2013 WL 2294885, at *6 (ED Cal, May 23, 2013) (stating that "the Twenty–Fifth Amendment provides for removal of the President should he be unfit to serve"), *aff'd*, 622 F App'x 624 (CA 9, 2015). So the Twenty-Fifth Amendment—and by extension the Fourteenth—gives Congress the ultimate power to decide whether an official is legally unqualified to serve.

The voters first will decide whether President Trump is legally qualified to be reelected as President. Even when it comes to lower-level positions in "sleepy little town[s]," the Supreme Court has stressed that "[t]he establishing of qualifications for public office is essentially a political decision." *Schweitzer v Clerk for City of Plymouth*, 381 Mich 485, 493; 164 NW2d 35 (1969). And when an election concerns the presidency, qualifications questions become even more politically charged and weighty. So "[a]rguments concerning qualifications or lack thereof can be laid before the voting public before the election[.]" *Robinson v Bowen*, 567 F Supp 2d 1144, 1147 (ND Cal, 2008). If the voters find former President Trump qualified, and Congress concurs, then the Constitution does not contemplate a time for the judiciary to second-guess that call. Rather, the Constitution gives Congress the sole and final authority to determine whether the President can continue to serve. See *Taitz v. Democrat Party of Miss,* No 3:12-CV-280, 2015 WL 11017373, at *16 (SD Miss, March 31, 2015) ("[T]hese matters are entrusted to the care of the United States Congress, not this court."); *Grinols*, 2013 WL 2294885, at *6 ("Nowhere does the Constitution em power [sic] the Judiciary to … enjoin [a] President-elect from taking office."). Because "[e]lections are a most vital part of government[,] . . . [i]nterference by the courts

where, as here, the proceedings are regular and legal in every respect, should be avoided." *Kilpatrick v Searl*, 366 Mich 335, 340; 115 NW2d 112 (1962).

The Court of Claims was right to reject the notion that the States' general power over presidential *electors* somehow gives them special powers over the qualifications of presidential candidates themselves. Opening Br, p 31–32. Section 3's express reference to presidential electors—and its choice not to refer to Presidents themselves—underscores how the qualifications of those two sets of people are distinct. And Appellants can find no authority that suggests anyone has leeway to act as to the qualifications of purported "insurrectionist" candidates. *Hassan v Colorado*, 495 Fed Appx 947, 948 (CA 10, 2012), for example, does not speak to the political-question doctrine at all. And *Lindsay v Bowen*, 750 F3d 1061, 1065 (CA 9, 2014), says that States may act only when a candidate suffers from a "known ineligibility from the presidential ballot." But the whole point is here is that President Trump does *not* suffer from a *conceded* disability. Unlike an underage candidate of the sort in *Lindsay*, someone would need to discern whether President Trump is, in fact, ineligible. Only Congress is up to that task. And *Elliott v Cruz*, 137 A3d 646, 651 (Pa Commw Ct, 2016), does not address the specific text of the Insurrection Clause because it was grappling with the separate issue of the qualifications listed in Article II, Section 1, Clause 5.

The Court of Claims also correctly rejected any attempt to distinguish between those who can remove a constitutional disability and what government body would adjudicate or determine that disability in the first place. *LaBrant v Benson*,

unpublished order of the Court of Claims, issued November 14, 2023 (Docket No. 23-000137-MZ) p 14-15 ("Order"). The Constitution's text does not support this distinction. As Chief Justice Chase recognized, the amendment itself provides for Congress to "enforce, by appropriate legislation, [its] provisions." US Const, amend XIV, § 5; see *Griffin*, 11 F Cas at 26. And as a matter of common sense, it's not obvious why the Framers would jealously guard Congress's right to *remove* a disability while freely empowering a diverse body of local, state, and federal judges across the country to individually decide whether a national official should be deemed disqualified at the front end.

Appellants unsuccessfully try to impugn Chief Justice Chase's reasoning, attacking his political views and saying he "contradict[ed]" himself in another case. Opening Br, p 24–25 (citing *Case of Davis*, 7 F Cas 63, 90, 102 (CCD Va, 1871)). But the passage they cite merely records how Chief Justice Chase was of the view that the "fourteenth amendment" barred "further proceedings" against Jefferson Davis. *Case of Davis*, 7 F Cas 63, 90, 102 (CCD Va, 1871). It does not explain why. Appellants assume that Chief Justice Chase must have agreed with *everything* that Davis's counsel said, including the argument that Section 3 of the Fourteenth Amendment inflicts a self-executing punishment. See *id.* at 90. But Chief Justice Chase never said he did. It's far more plausible to assume that Chief Justice Chase saw no need to take any position on whether Section 3 required implementing legislation because both sides stipulated it was self-executing. See *id.* at 94 (government explaining the only "two questions for the court" were whether the

amendment "inflict[ed] a punishment or penalty, in the sense of the criminal law," and whether any punishment precluded application of the treason statute). And when Chief Justice Chase eventually did take a position, he examined the text and concluded that it unambiguously entrusted enforcement to Congress.[2]

II. As the Court of Claims's Discussion of the Term "Insurrection" Illustrates, Judicially Discernible and Manageable Standards Are Lacking.

Other considerations reinforce that courts are poorly suited to enforce the Insurrection Clause absent congressional action, including a lack of "judicially discoverable and manageable standards." *Baker*, 369 US at 217; see also *Rucho v Common Cause*, 139 S Ct 2484, 2498; 204 L Ed 2d 931 (2019).

A. Section 3's text provides little useful guidance for judges. It applies to persons who "engaged in insurrection or rebellion against the [Constitution]," or who have "given aid or comfort to the enemies thereof." US Const, amend XIV, § 3. Evaluating whether someone has given inappropriate and actionable aid to the enemy or whether an insurrection occurred is the kind of question answered in war and diplomacy. Cf. *Stinson v NY Life Ins*, 167 F2d 233, 236 (CA DC, 1948) (explaining that the existence of a war is a political question). "But [j]udges are not soldiers or diplomats." *Lin v United States*, 539 F Supp 2d 173, 180 (DDC, 2008). In fact, one of

[2] The two Louisiana cases that Appellants cite are even less illuminating. One said it had no need to "consider[]" whether Section 3 requires implementing legislation because Congress had in fact enacted legislation, *State ex rel Sandlin v Watkins*, 21 La Ann 631, 633 (1861); the other involved a state-law question as to whether the Louisiana Governor could eject a justice of the peace absent removal "by impeachment" or "disqualification . . . by the court," *State ex rel Downes v Towne*, 21 La Ann 490, 491–92 (1869).

the very first cases invoking the political-question doctrine involved a purported insurrection—and the Supreme Court refused to argue with Rhode Island's *political* determination that certain parties had "engaged in [an] insurrection." *Luther v Borden*, 48 US 1, 45–46; 12 L Ed 581 (1849).

The decision below listed some of the impossible questions a court would need to answer to wrestle down the Section 3 question. See Order, p 19. But it's easy to conceive of still more questions to which answers are elusive. Consider Appellants' attempt at crafting their own loose definition of "insurrection." Opening Br, p 7. According to them, any "assemblage" that presents "actual resistance to federal law" through "force or intimidation" with a "public purpose" would qualify. *Id.* But what does it mean to "resist" federal law? The Constitution permits Congress to make laws and charges the President to "take Care that the Laws be faithfully executed." US Const, art II, § 3. Is every criminal group that forcibly opposes the President's enforcement of federal statutes guilty of insurrection? And what if people reasonably disagree as to what the Constitution requires? Are those on the losing side of the argument liable to be charged with insurrection? And how much force and how large a group is required? Appellants say none whatsoever. Opening Br, p 8. Does this mean that a few student protesters blocking a road are at risk of being branded insurrectionists? What about a street gang that fires a few shots at federal law enforcement or rioters who torch federally owned cars or buildings? Appellants offer no real answer to any of these questions or the many others certain to arise under Section 3. And indeed, Appellants struggle to offer any consistent answers even

within their own brief. Compare Opening Br, p. 7 (purporting to define "insurrection"), with Opening Br, p 11-12 (quoting authority requiring resistance that is of "such force that the civil authorities are inadequate" and that necessitates "a considerable military force" to be quelled. *In re Charge to Grand Jury*, 62 F 828, 830 (ND Ill, 1894)).

B. In truth, an "insurrection" is more serious than Appellants' definition supposes.[3] Where the Constitution uses the term "insurrection," that term appears alongside terms like "invasion" and "rebellion." For example, Article I empowers Congress to use the militia to "execute" laws and to "suppress Insurrections and repel Invasions." US Const, art I, § 8. Similarly, Section 3 of the Fourteenth Amendment speaks of "insurrection" and "rebellion" together. US Const, amend XIV, § 3. This terminology suggests that an insurrection is "an effort to overthrow the government" and therefore "more serious than" "mere[] opposition to the enforcement of the laws." Mazzone, *The Commandeerer in Chief*, 83 Notre Dame L Rev 265, 336 n 450 (2007); see Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm & Mary Bill Rts J 153, 167 (2021).

Other early authorities describe insurrections in similar terms. On the spectrum of civil disturbance, Blackstone places "insurrection" closer to a foreign invasion than a riot. Blackstone, Commentaries on the Laws of England, p *82, *420;

[3] At times, even Appellants seem to concede that they must establish that a rebellion occurred. But other than one conclusory footnote in their brief, Opening Br, p 7 n 2, they never really try to show that President's Trump engaged in a "rebellion." And they seem to repeatedly lean on a lower standard of conduct than out-and-out rebellion. *Id.* at 8–9.

cf. *Kneedler v Lane*, 45 Pa 238, 291 (1863) (noting Lord Coke put "invasion, insurrection," and "rebellion" in the same ballpark). Colonial-era laws often treated invasion, insurrection, and rebellion similarly. See Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U Pitt L Rev 99, 107 (1983) (quoting *Laws of New Haven Colony* 24 (1656) (Hartford ed, 1858)); Story, *Commentaries on the Constitution of the United States* § 111 (4th ed, 1873) (noting New York put "rebellion, insurrection, mutiny, and invasion" on a similar plane). And during the Constitutional Convention debates, James Wilson noted that the major reason for the republican-form-of-government clause was to prevent "dangerous commotions, insurrections and rebellions." Madison, *Notes of Debates in the Federal Convention of 1787* 321 (Adrienne Koch ed, Ohio Univ Press, 1966) (1840); accord Story, *supra*, § 490.

Early Congresses took a similar view. Section 1 of the 1792 and 1795 Militia Acts says the President can use the militia to repel a foreign "invasion" or an "insurrection in any state" if the State requests it, while Section 2 says he can use the militia to stop the obstruction of the execution of laws once normal civil processes are overwhelmed. Act of February 28, 1795, ch 36, 1 Stat 424, 10 USC 332; cf. The Insurrection Act of 1807, ch 39, PL 9-2, 2 Stat 443 (differentiating between "suppressing an insurrection" and "causing the laws to be duly executed"). This framing means "insurrection" and merely obstructing the execution of laws are fundamentally different "type[s] of domestic danger." Guerra-Pujol, *Domestic Constitutional Violence*, 41 U Ark Little Rock L Rev. 211, 222 (2019).

Persons during the Civil War and Reconstruction Era treated "insurrection," "rebellion," and "invasion" as on the same plane, too. See, e.g., *Miller v United States*, 78 US 268, 308; 20 L Ed 135 (1870) (discussing federal laws using these terms seemingly equivalently); *United States v Hammond*, 26 F Cas 99, 101 (CCD La, 1875) (discussing a state law regarding grand jury service). The primary Reconstruction Era legal dictionary—echoing many of the sources above—defined "insurrection" as a "rebellion" "against the government"; and "rebellion" primarily meant "taking up arms traitorously against the government." Bouvier, *Bouvier's Law Dictionary* (6th ed, 1856), *available at* https://bit.ly/3uzlbAP. In the Fourteenth Amendment floor debates, legislators freely swapped terms. Cong Globe, 39th Cong, 1st Sess 2898, 2900 (1866). And a contemporaneous Attorney General opinion interpreting Section 3 of the Fourteenth Amendment saw no meaningful distinction either, constantly equating them and even defining them identically as a "domestic war." The Reconstruction Acts, 12 US Op Att'y Gen 141, 160 (1867).

Indeed, throughout the early 19th century, "rebellion" and "insurrection" were often deemed "synon[y]mous." *State v McDonald*, 4 Port 449, 456 (Ala. 1837); see *Spruill v NC Mut Life Ins Co*, 46 NC 126, 127–28 (1853) (describing insurrection as a "seditious rising against the government . . . ; a rebellion; a revolt"); *Ex parte Milligan*, 71 US 2, 142; 18 L Ed 281 (1866) (Chase, C.J., concurring) (equating "insurrection" and "invasion"); *Davis*, 7 F Cas at 96 (treating "insurrection" and "rebellion" as interchangeable). Insurrections, like rebellions and revolutions, were understood to "come under the general head of *civil wars*." *Martin v Hortin*, 64 Ky

629, 633 (1867) (quoting Halleck, *Elements of International Law and Laws of War* 153 (1866)). They were thought to be a "war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own." US War Dep't, Adjutant-Gen's Off, *General Order No. 100: The Lieber Code, Instructions for the Government of Armies of the United States In The Field* § X art. 151 (1863).

These descriptions are consistent with four of the pre-Civil War insurrections that would have been top of mind for the Fourteenth Amendment's framers: Shay's Rebellion (1786–1787), the Whiskey Rebellion (1794), Fries's Rebellion (1799–1800), and Dorr's Rebellion (1841–1842). These insurrection-rebellions lasted several months; involved extended violence that shut down courts and revenue collection in local areas; targeted particular local officials; involved militarily arrayed participants; and saw either combat or the election of a rival government. See *United States v Mitchell*, 2 US 348, 355 (CCD Pa, 1795); *Case of Fries*, 9 F Cas 924, 933 (CCD Pa, 1800); *Milligan*, 71 US at 129. All were far more serious than Appellants' definition suggests.

C. Although it's clear enough that the Appellants' definition is the wrong one, that's not to say that a court would be equipped to provide the right one. "Evidence from the Founding era is not entirely clear" about when a riot becomes insurrection. Mazzone, *supra*, at 336 n 450; see Simpson, *Treason and Terror: A Toxic Brew*, 23 Roger Williams U L Rev 1, 24 (2018) (saying the "distinction between insurrection and riot" can be "narrow"). The Constitution, though, provides the

solution: it specifies that a politically accountable body should be the one to publicly declare whether an ongoing disturbance of the peace constitutes a war, rebellion, or insurrection precisely because the lines between them are not always clear. Across the board, the Constitution entrusts to Congress the power "[t]o declare War," "call[] forth the Militia to suppress Insurrections and repel Invasions," and of course "enforce" Section 3 of the Fourteenth Amendment "by appropriate legislation." US Const, art I, §§ 8, 12; US Const, amend XIV, § 5.

Using legislative and political processes to decide which disturbances rise to the level of war, rebellion, or insurrection would have been familiar to those who adopted the Fourteenth Amendment. As early as 1792, Congress required the President to issue a proclamation before exercising authority to use the militia to "suppress Insurrections and repel Invasions." US Const, art I, § 12. The 1792 Militia Act authorized the President to "call forth" the militia only if he first issued a "*proclamation*, command[ing] [the] insurgents to disperse, and retire peaceably." Act of May 2, 1792, Ch. 28, §§ 1–3, 1 Stat 264 (emphasis added); cf. NY Code of Crim. Proc, ch. 4, § 97 (Weed, Parsons & Co, 1850) (requiring published proclamation that a county is "in a state of insurrection"). The Militia Act of 1795 included the same requirement, Act of Feb. 28, 1795 § 3 (requiring a proclamation "forthwith")—as does federal law today, *see* 10 USC 254 (requiring an immediate presidential "proclamation . . . to disperse and retire peaceably . . . within a limited time").

The Framers of the Fourteenth Amendment knew these processes well. Many proclamations issued throughout the Civil War proclaiming it to be an "insurrection

against the United States." Andrew Johnson, U.S. President, Message Proclaiming End to Insurrection in the United States (Aug. 20, 1866) (collecting examples). In 1861, for example, Congress authorized a proclamation to be issued "when insurgents . . . failed to disperse by the time directed by the President" and the insurgents claimed to be acting under State authority. Act of July 13, 1861, ch 3, § 5, 12 Stat 255. No one therefore had to guess whether the Civil War was an insurrection; an *authoritative, public process* for proclaiming it an insurrection gave the definite answer.

If Congress or the President authoritatively give persons notice that continuing to take part in a serious, widespread disturbance constitutes an insurrection, courts perhaps would have a manageable standard to apply. *See* Lynch, *supra*, at 214–15 (stating that disqualification requires "tak[ing] part in a scheme that causes domestic unrest in opposition to state or federal laws *after* the President issues a Proclamation pursuant to the Insurrection Act" (emphasis added)). (Similarly, if a state official attempted to make a judgment that Section 3 reserves for Congress, courts would have a standard to judge that action as well.) But without a proclamation, courts are ill-equipped to second-guess the judgments of politicians, soldiers, and diplomats about how to label politically charged conflicts.

III. Chaos Would Ensue if 50+ Different Judicial Systems Determined Whether a Candidate Is Constitutionally Eligible for President.

Our country needs an authoritative, consistent, and uniform answer to whether a candidate is constitutionally eligible for President—further demonstrating that this case raises a nonjusticiable political question. Under *Baker*, courts should

consider whether they can "undertak[e] independent resolution without expressing lack of respect due coordinate branches of government," whether there is an unusual need for unquestioning adherence to the political decision in play, and whether judicial action holds the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 US at 217. All those potential pitfalls are present when a state court purports to decide a presidential candidate's constitutional eligibility to run for President.

A special need for a single, national answer as to the eligibility of presidential candidates justifies apportioning responsibility to Congress and the voters alone. Elections for President are "of nationwide importance," and when a single State tinkers with a presidential election, the tinkering "has an impact beyond its own borders." *Anderson*, 460 US at 795, 806. And as courts from coast to coast have recognized, "[i]f a state court were to involve itself in the eligibility of candidates to hold national offices, a determination reserved for the Electoral College and Congress, it may involve itself in national political matters for which it is institutionally ill-suited and may interfere with the constitutional authority of the Electoral College and Congress." *Lamb v Obama*, No S-15155, 2014 WL 1016308, at *2 (Alaska, March 12, 2014); see, e.g., *Strunk v NY State Bd of Elections*, No 6500/11, 2012 WL 1205117, at *12 (NY Sup Ct, April 11, 2012) (same).

If courts can decide a candidate's eligibility for President on a State-by-State-by-State basis, chaos will follow. Cf. *Moore v Harper*, 600 US 1, 36; 143 S Ct 2065; 216 L Ed 2d 729 (2023) (warning against allowing state courts to "arrogate to

themselves" the power to manage federal elections). It is not hard to see how. Suppose plaintiffs in five States sue to enjoin their respective secretaries of state from placing a presidential candidate's name on their primary ballot. Perhaps three succeed in obtaining such an injunction. Litigation takes time, and the earliest primaries will take place in just a few short months. Will early primary voters risk casting their votes for a candidate who might later be disqualified? If they do, what becomes of their votes if courts end up excluding their candidate from later primaries? Perhaps some would have chosen a different candidate had they known their preferred candidate had a reduced chance, or even no chance, at the nomination. For elections to be fair, voters need a single, certain answer as to whether someone is ineligible for President under Section 3 of the Fourteenth Amendment—an answer that only Congress can give. In contrast, "[w]ere the courts of 50 states at liberty to issue injunctions restricting certification of duly-elected presidential electors, the result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines." *Keyes v Bowen*, 117 Cal Rptr 3d 207, 215 (Cal Ct App, 2010); see also *Burroughs v United States*, 290 US 534, 545; 54 S Ct 287; 78 L Ed 484 (1934) (stressing the national interest in presidential elections).

Appellants promise national consistency by noting that candidates can appeal to the U.S. Supreme Court—but that's no real answer. Opening Br, p 39. With many state primaries falling close together, any damage may already have been done by the time a case makes its way all the way to the highest court. Suppose a state court in California excludes a presidential candidate under Section 3 just before the voters

in 15 different States vote on Super Tuesday. Voters faced with the prospect their preferred candidate may not be eligible or able to win the Presidency may be prompted to change how they vote. Yes, U.S. Supreme Court review may still come later. But what of the damage done by the California court's ruling to the electoral processes in the other States? Rerunning all affected primaries would not be practicable.

In asking the courts to selectively enforce a political provision of the Fourteenth Amendment without congressional authorization, Appellants seek to "sacrifice[] the political stability of the system" of the Nation "with profound consequences for the entire citizenry." *Storer v Brown*, 415 US 724, 736; 94 S Ct 1274; 39 L Ed 2d 714 (1974).

Any attempt to determine whether Section 3 applies to former President Trump would "express lack of the respect due" to Congress as a "coordinate branch[] of government." *Baker*, 369 US at 217. Recall that Congress has authority to remove a President from office for "Treason, Bribery, or other high Crimes and Misdemeanors." US Const, art II, § 4. The power to accuse a President of an impeachable offense resides solely in the House of Representatives, *id.*, art I, § 2, cl 5, while the power to remove a President resides solely in the United States Senate, *id.*, art I, § 3, cl 6. Congress vigorously applied these powers to President Trump, as the House impeached him twice. But the Senate acquitted him both times, even when political opponents accused him of fomenting insurrection, much as Appellants do

here. See 166 CONG REC S938 (daily ed, February 5, 2020); 167 CONG REC S733 (daily ed, February 13, 2021).

Congress, then, has rendered its judgment—and it disagrees with Appellants' view that former President Trump engaged in insurrection. Appellants want this Court to try again, but "[f]ailure of political will does not justify unconstitutional remedies." *Gill v Whitford*, 138 S Ct 1916, 1929 (2018). Worse still, Appellants want to forcibly enlist a state officer in their plan, even though state-imposed restrictions on a candidate's qualifications to serve are forbidden. See *Thornton*, 514 US at 783; see also *Greene v Sec'y of State for Ga*, 52 F4th 907, 915 (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."). Rather than tread this dangerous path, this Court should dismiss the case for want of a justiciable question and leave enforcement to Congress.

CONCLUSION

The Court should affirm, as this case raises a nonjusticiable political question.

Respectfully submitted,

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I certify that this amicus brief complies with all requirements of MCR 7.212(B)(1), MCR 7.212(B)(5), and MCR 7.212(H). This brief was prepared using Microsoft Word and uses a proportionally spaced face (Century Schoolbook 14-Point). The total number of words, as measured by the word count of the word-processing system used to prepare the brief, is 5,750.

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I certify that I served a copy of this amicus brief on all counsel of record and parties in pro per via MiFILE.

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