No. A23-1354

STATE OF MINNESOTA IN SUPREME COURT

JOAN GROWE, *et al.*,

PETITIONERS,

V.

STEVE SIMON, MINNESOTA SECRETARY OF STATE,

RESPONDENT,

V.

REPUBLICAN PARTY OF MINNESOTA,

RESPONDENT.

BRIEF OF *AMICUS CURIAE* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

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INTEREST OF *AMICUS CURIAE*[1]

Citizens for Responsibility and Ethics in Washington ("CREW") is a nonprofit, nonpartisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW works to ensure that Americans have a government that is ethical, accountable, and open. Since its founding in 2003, CREW has achieved successes holding those who abuse the system to account, compelling the government to be more open and transparent, and driving secret money and influence into the light. In 2022, CREW and co-counsel represented three New Mexico residents in *New Mexico ex rel. White v. Griffin*, the first case to successfully enforce Section 3 of the Fourteenth Amendment ("Section 3") against a government official in more than 150 years. No. D-101-CV-2022-00473, 2022 WL 4295619 (N.M. Dist. Ct. Sep. 6, 2022), *appeal dismissed*, No. S-1-SC-39571 (N.M. Nov. 15, 2022).

CREW and co-counsel currently represent six Republican and unaffiliated Colorado voters in litigation against Colorado Secretary of State Jena Griswold and former President Donald Trump to prevent the Secretary from taking any action to place Trump on Colorado's primary or general election ballot, due to his disqualification from office under Section 3. *See Anderson v. Griswold*, No. 2023-CV-32577 (Dist. Ct. of Denver Colo., filed Sept. 6, 2022). Accordingly, CREW has an interest in this case.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Enacted in the wake of the Civil War and unrepentant secessionists' efforts to return to power, the United States adopted a "measure of self-defense" designed to preserve and protect American democracy against those who broke their oaths to the Constitution. Cong. Globe, 39th Cong., 1st Sess. 2918 (May 31, 1866) (statement of Sen. Willey). Section 3 of the Fourteenth Amendment added a qualification to hold office to those already enumerated in the Constitution: one may not hold state or federal office when they have broken their prior oath to the Constitution by engaging in insurrection against it. Put another way, through its enactment of Section 3, the United States asserted "that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress." *Worthy v. Barrett*, 63 N.C. 199, 204 (1869), *appeal dismissed sub nom. Worthy v. Comm'r*s, 76 U.S. 611 (1869). Reflecting the immediacy and gravity of its need, Section 3 "operates independently of any … criminal proceedings and, indeed, independently of impeachment proceedings and of congressional legislation"; it applies "directly and immediately upon those who betray their oaths to the Constitution." J. Michael Luttig & Laurence H. Tribe, *The Constitution Prohibits Trump From Ever Being President Again*, The Atlantic (Aug. 19, 2023).[2]

Nonetheless, some have incorrectly posited that Section 3's qualifications are, in essence, optional. They contend that, contrary to all other provisions for qualifications for office in the Constitution, the Fourteenth Amendment's bar on insurrectionists is a legal

[2] Available at https://www.theatlantic.com/ideas/archive/2023/08/donald-trump-constitutionally-prohibitedpresidency/675048.

nullity unless Congress chooses to impose it through legislation. That argument flips Section 3 on its head—it shifts the burden of seeking recourse away from insurrectionists, who must seek amnesty from Congress by a two-thirds vote, onto those loyal to the Constitution, who are left unprotected without Congressional authorization. It imagines a hurdle for the Fourteenth Amendment's qualifications that is absent from any other qualification for office in the Constitution and from any other part of the Fourteenth Amendment. It rests on the conflation of a provision's force of law with a provision's creation of a cause of action. The argument, in other words, conflates Section 3's power to be executed against those it governs with the ability for a plaintiff to bring suit where they otherwise have no legal vehicle to put the question to a court.

Petitioners here do not seek to enforce Section 3 standing alone or through any implied federal private right of action; rather, they bring a cause of action under *Minnesota law* to enforce a qualification for office against an ineligible candidate. *See* Pets.' Br. (Oct. 4, 2023) at 1-3. That candidate is ineligible because Section 3 is "self-executing" in the sense that matters here: it imposes an immediate and enforceable rule of law that limits who may hold office—that "[n]o person shall" serve who has broken their oath.

ARGUMENT

I. Section 3 of the Fourteenth Amendment is enforceable in state courts through state law, without any federal legislation.

A. Under the Supremacy Clause, state courts must enforce Section 3 where state law allows and, historically, state courts have done exactly that.

The Supreme Court has stated "[t[he label 'self-executing' has on occasion been

used to convey different meanings." *Medellín v. Texas*, 552 U.S. 491, 505 n.2 (2008). Relevant here is whether Section 3 is "self-executing" in terms of "operat[ing] of itself without the aid of any legislative provisions": whether the operation of Section 3 alone disqualifies Donald Trump from office by. *Id.* at 505. Opponents here attempt to recast the argument by focusing on the irrelevant claim that Section 3 is not "self-executing" in a different sense: that it does not "provide for a private cause of action." *Id.* at 506 n.3; *see, e.g.*, Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3: A Response to William Baude and Michael Stokes Paulsen*, 28 Tex. Rev. L. & Pol. (forthcoming 2023-24), at 12 (equating "self-executing" to a cause of action under § 1983, *Bivens*, and *Ex Parte Young*).[3] But Petitioners here need not establish that Section 3 provides for a cause of action; *state* law supplies that cause, and there is no further need for *federal* legislation to give Section 3 operation.

The Supreme Court has squarely held that *state law* can provide a cause of action to enforce the Constitution, *regardless* of whether a *federal* cause of action exists. *See, e.g.*, *Health and Hospital Corp. v. Talevski*, 599 U.S. 166, 177 (2023) ("[T]he § 1983 remedy ... is, in all events, *supplementary to any remedy any State might have*." (emphasis added)). States "have great latitude to establish the structure and jurisdiction of their own courts," and federal law "may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

[3] Available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4579135_code345891.pdf?abstractid=4568771&mirid=1&type=2

Howlett v. Rose, 496 U.S. 356, 372–73 (1990). Where state law provides a cause of action, there is no need to appeal to implied causes of action brought directly under the Constitution. *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020) (discussing implied causes of action under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)); *cf. Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (discussing implied causes of action for federal statutes). Here, Minnesota law provides Petitioners a cause of action to prevent the Secretary from granting ballot access to a constitutionally ineligible presidential primary candidate. *See* Pets.' Br. at 1-12.

State courts have an affirmative duty to adjudicate constitutional questions where state law allows, even absent federal legislation. The Constitution's Supremacy Clause provides that "[t]his Constitution … shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*." U.S. Const. art. VI, cl. 2. (emphasis added). The Clause explicitly "'charges state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure.' " *Howlett*, 496 U.S. at 367. Put simply, "the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Id.* at 367. And "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Haywood v. Drown*, 556 U.S. 729, 736 (2009) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

In keeping with these bedrock principles of federalism, state courts have historically enforced Section 3 pursuant to *state* statutes and procedural rules, without separate federal enforcement legislation in effect. *See, e.g.*, *New Mexico ex rel. White v.*

Griffin, No. D-101-CV-2022-00473, at 27, 2022 WL 4295619 (N.M. Dist. Ct. Sep. 6, 2022) (adjudicating Section 3 challenge under state quo warranto law); *Worthy*, 63 N.C. at 202; *In re Tate*, 63 N.C. 308 (1869) (mandamus); *State ex rel. Sandlin*, 21 La. Ann. 631 (1869) (quo warranto); *see also Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Off Admin. Hr'gs May 6, 2022) (adjudicating Section 3 challenge in state administrative proceeding).[4]

Petitioners here invoke a state cause of action to seek relief. They do not attempt, and do not need, to bring a cause of action implied directly from the Fourteenth Amendment. Concerns of whether the Amendment imposes its own cause of action are thus irrelevant. Instead, those asserting that Section 3 is not self-executing must show this constitutional provision lacks independent legal force, which they cannot.

B. The Fourteenth Amendment's text and Supreme Court precedent confirm Section 3 is "self-executing" and can be enforced without federal legislation.

When interpreting the Constitution's text, courts are "guided by the principle that '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 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

[4] Available at https://perma.cc/M93H-LA7X. Moreover, state courts routinely adjudicate other Fourteenth Amendment claims brought under state law, including in the election context. *See, e.g.*, *Bergstrom v. McEwen*, 960 N.W.2d 556, 558 (Minn. 2021) (Due Process and Equal Protection claims in an election contest); *DSCC v. Simon*, 950 N.W.2d 280, 283 (Minn. 2020) (First and Fourteenth Amendment challenge to the constitutionality of state election law).

Section 3 imposes a clear command with independent legal force: "[n]o person *shall*" hold public office if the disqualifying conditions, or disabilities, are met. U.S. Const. amend. XIV, § 3 (emphasis added). Its mandatory language mirrors other self-executing constitutional qualifications. *See, e.g.*, *id.* art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not…"); *id.* art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not…"); *id.* art. II, § 1, cl. 5 ("No Person … shall be eligible to the Office of President … who shall not…"); *id.* amend. XXII ("No person shall be elected to the office of the President more than twice…"). Section 3 also echoes other substantive provisions of the Fourteenth Amendment, *see, e.g.*, *id.* amend. XIV, § 1 ("No State shall …"), *id.* § 4 ("[N]either the United States nor any State shall…"), and provisions of the Constitution's other Reconstruction Amendments, *see id.* amend. XIII, § 1 ("Neither slavery nor involuntary servitude … shall exist…"); *id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged…").

While each of the Reconstruction Amendments include materially identical sections authorizing Congress to enact legislation to enforce the Amendments' substantive provisions, the substantive provisions themselves have remained independently enforceable. *See id.* amend. XIII, § 2; *id*. amend. XIV, § 5; *id.* amend. XV § 2. The Supreme Court has consistently held the substantive provisions of Reconstruction Amendments—including the Fourteenth Amendment—to be "self-executing." *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are *self-executing*." (emphasis added)); *Nw. Austin Mun.*

Util. Dist. No. One v. Holder, 557 U.S. 193, 197 (2009) (the Fifteenth Amendment is "*self-executing*," even though it "also gives Congress the 'power to enforce this article by appropriate legislation'" (emphasis added)) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966)); *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (holding that the Thirteenth Amendment "as well as the Fourteenth, is undoubtedly *self-executing* without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances" (emphasis added)).

Moreover, as a federal appeals court has expressly confirmed, Section 3's authorization of Congress to "remove such disabilit[ies]" by a two-thirds vote "connotes taking away something which has already come into being." *Cawthorn v. Amalfi*, 35 F.4th 245, 260 (4th Cir. 2022) (quoting U.S. Const. amend XIV, § 3). Section 3 itself therefore creates the disability. Indeed, that's exactly how Section 3 was understood to operate during Reconstruction: as early as 1867—before Congress had yet passed any federal statute to enforce Section 3—thousands of ex-Confederates flooded Congress with amnesty requests to "remove" their disabilities. *See* The National Archives, "Preliminary Inventory of the Records of the Select Committee on Reconstruction, 1867-71," compiled by George P. Perros (1960).[5]

Similarly, under the *expressio unius* canon, Section 3's inclusion of an explicit congressional role in *removing* disqualifications, but omission of such role in imposing

[5] Available at https://www.citizensforethics.org/wp-content/uploads/2023/06/Confederate-Amnesty-Petitions-PI_0233_Select-Committee-on-Reconstruction-1867-71.pdf.

them, supports a "sensible inference" that no congressional action is required to activate it. *See N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 302 (2017); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995) (applying canon in construing Article I's Qualifications Clauses).

Further, the Constitution uses different language when it merely empowers Congress to create its own rules, rather than when it imposes a direct legal obligation like Section 3. The Constitution provides that "[t]he Congress shall have Power To lay and collect Taxes," "To borrow Money," or "To regulate Commerce." U.S. Const. Art I, § 8, cl. 1-3. It says "Congress may" set the time for choosing electors, or create inferior officers, or establish inferior courts. *Id.* Art. II, § 1, cl. 4; *id.* § 2, cl. 2; Art III, § 1. These provisions empower Congress and, absent enacting legislation, impose no obligation or burden. *See, e.g.*, *Palmore v. United States*, 411 U.S. 389, 400–01 (1973) ("The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art. III courts[.]"). They do not "operate of [themselves] without the aid of any legislative provisions." *Medellín*, 552 U.S. at 505. Section 3, on the other hand, uses direct, "self-executing" commands.

Like other substantive provisions of the Fourteenth Amendment and other constitutional qualifications, Section 3 "directly adopts a constitutional rule of disqualification from office" that requires no federal legislation to take effect. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev.

1, 18 (forthcoming 2024).[6]

C. Supreme Court precedent makes clear that congressional action cannot be required to activate Section 3.

Boerne further shows that Section 3's detractors get the separation of powers backwards—congressional action cannot be required to activate Section 3 because Congress's remedial authority under Section 5 of the Fourteenth Amendment itself depends on courts' interpretation of the Amendment's substantive scope.

The Supreme Court in *Boerne* addressed the authority of Congress to enact the Religious Freedom Restoration Act, which was enacted in response to the restriction of the First Amendment (as incorporated by the Fourteenth Amendment) in a prior Supreme Court decision. The Court started with the observation that "[a]s broad as the congressional enforcement power is, it is not unlimited." *Boerne*, 521 U.S. at 519 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970)). Congress's power under Section 5 "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment …. Legislation which alters the meaning of the Free Exercise Clause [as incorporated under the Fourteenth Amendment] cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is." *Id.* The *meaning* of any provision that Congress is authorized to enforce, then, must be interpreted by the courts: "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary." *Id.* at 524. Allowing Congress to define the meaning of constitutional provisions would mean that the Constitution is no longer "superior paramount law,

[6] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751.

unchangeable by ordinary means." *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The Court held that legislation under Section 5 must show "proportionality or congruence between the means adopted and the legitimate end to be achieved," with the latter interpreted by courts.[7] *Id.* at 533.

Boerne's rationale applies equally to Section 3. Congress's Section 5 power to legislate for Section 3, like its power to legislate for Section 1, is necessarily limited by the *judiciary's* interpretation of the Constitution. The contours of Congress's enforcement authority must be shaped by the courts through the interpretation of "engage" and "insurrection," among other terms. Otherwise, "it is difficult to conceive of a principle that would limit congressional power" with respect to Section 3. *Boerne* 521 U.S. at 529; *cf. Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) (contrasting the Copyright Clause which "empowers Congress to *define* the scope of the substantive right" and Section 5 which "authorizes Congress to *enforce* commands" of the Fourteenth Amendment) (emphasis added).

In addition to ignoring the Fourteenth Amendment's text and the history of its enforcement, Respondents confuse the provision's *substantive scope* with its *remedy*. *See* Blackman & Tillman, *supra* at 3. Of course a litigant needs a cause of action to get into court and obtain affirmative relief. For example, the Supreme Court in *Bivens s*, 403 U.S.

[7] After *Boerne*, the Court has consistently reaffirmed this doctrine. *See, e.g.*, *Allen v. Cooper*, 140 S. Ct. 994, 1004 (2020) ("Congress cannot use its 'power to enforce' the Fourteenth Amendment to alter what that Amendment bars … [congressional action] is valid under Section 5 only if it sufficiently connects to conduct *courts* have held Section 1 to proscribe." (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000) (emphasis added)).

at 389, asked whether there is "a cause of action for damages" consequent upon the conduct of a federal agent *even if* such conduct is found to be violative of a constitutional provision as interpreted by courts. Most recently, *Egbert v. Boule*, 142 S. Ct. 1793, 1802-03 (2022), noted that "creating a cause of action is a legislative endeavor" and "Congress is 'far more competent than the Judiciary' to weigh such policy considerations."

But that in no way undermines the judiciary's "power to interpret the Constitution in a case or controversy" once the question of constitutional interpretation is properly before a court. *Boerne*, 521 U.S. at 524. Here, Petitioners challenge Trump's candidate qualifications under a state law cause of action, and the task of interpreting Section 3 of the Fourteenth Amendment is properly before this Court. This Court must therefore "say what the law is." *Id.* at 536 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

D. *In re Griffin* is neither binding nor persuasive.

Section 3's detractors rely on one non-binding case to the contrary: *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869). There, Chief Justice Salmon Chase, while sitting as a circuit judge in post-war Virginia, held that an Act of Congress was required to permit a federal court to grant *habeas corpus* relief to a defendant convicted in a trial presided over by a state judge presumably disqualified under Section 3. 11 F. Cas. at 26. That case, however, arose from a unique historical context with no applicability to the modern day. In 1869, Virginia was an "unreconstructed" territory under federal military control, and it lacked any operative state law that could have enabled enforcement of Section 3. *Id.* at 14. *Griffin* had no occasion to address whether a functional state like Minnesota in 2023 could pass its own legislation providing procedures for enforcing constitutional

qualifications like Section 3. *See Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 170 (2004) ("Questions … neither brought to the attention of the court nor ruled upon … are not to be considered as having been so decided as to constitute precedents.").

Moreover, Chief Justice Chase reversed his position on Section 3 shortly thereafter in the treason prosecution of Former President of the Confederate States of America, Jefferson Davis. In that case, Chief Justice Chase agreed (again as a circuit judge) with Davis that Section 3 "executes itself" and "needs no legislation on the part of [C]ongress to give it effect." *In re Davis*, 7. F. Cas. 63, 90, 102 (C.C.D. Va. 1871).[8]

Neither *Griffin* nor *Davis* are binding precedent here, since Chief Justice Chase was merely "acting as a circuit judge," and Chase's "contradictory holdings, just a few years apart, draw both cases into question and make it hard to trust [his] interpretation." *Cawthorn v. Amalfi*, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring in the judgment); *see also* Baude & Paulsen, *supra* at 35-49.

[8] Similarly, notwithstanding resuscitating the "self-execution" objection, Blackman and Tillman recognize Section 3 has force of law without enabling legislation. *See* Blackman & Tillman, *supra* at 29 ("[T]he Fourteenth Amendment can be raised as a defense, even in the absence of enforcement legislation"). The idea that Section 3 was enacted to serve as a "shield" to *protect* insurrectionists and not a "sword" to disqualify them absent further legislation runs headlong into history.

CONCLUSION

This Court has the power and duty to adjudicate Petitioners' Section 3 claim under state law challenging Donald J. Trump's constitutional eligibility to serve as President and appear on Minnesota's ballots. No federal legislation is needed for this Court to apply the law because the Fourteenth Amendment, including Section 3, is "self-executing."

Dated: October 6, 2023

Respectfully submitted,

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, was produced with a proportional 13-point font, is filed in Portable Document Format ("pdf") and contains 3,604 words.

/s Sara K. Van Norman
Sara K. Van Norman